Innovative Public Governance in Times of Crisis – The European Financial Crises

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Abstract: The European economic and financial crisis emerged from the global financial market crisis (2007–2009) and evolved into the European fiscal crisis (2010–2014). It comprised two crises folded into one. The diverse challenges posed by it resulted in ample legal changes to the regulatory and institutional core of the European economic structure. Certain reforms resulted in long-anticipated shifts of public policy. This chapter will analyse what constitutes Innovative Public Governance (IPG) in the regulation of financial markets and outline its prominent examples: it will discuss how IPG led to shifts in political influence during the crisis and how it changed regulatory and institutional law. It will then show how IPG led to severe legitimacy frictions. It will also demonstrate that IPG in the regulation of financial markets has proved to be a pacemaker of regulatory and institutional development.

I. Innovation as institutional change

In determining what constitutes IPG during the European economic and financial crisis, a distinction needs to be made between 'innovative change' and mere changes of the regulatory law. From a legal perspective, however, the scope of changes is naturally limited to changes in the formal law.[1] A legal analysis can be complemented by governance aspects to include matters of regulatory style, institutionalized influence and participatory legitimacy. Even from such an amended legal perspective 'governance innovation' at the European level cannot sufficiently be captured, since European legal structures might draw from the traditions of Member States and European experience, but seldomly possess a clearcut pattern. Therefore, every change in European law is, to a certain degree, innovative. This analysis will consider the political theory of institutional change before developing a standard for innovative change in financial markets law.

1 A discussion on legal institutions in Pierre Schammo, 'Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism' (2021) 40 Yearbook of European Law 265, 269.

I.1. Theory of Institutional Change

Historical Institutionalism (HI) is a historical and comparative approach to the study of institutional change.[2] It can be applied to both formal and informal rules and analyses why and how institutional changes take place. In recent decades, HI has shifted from detailed evaluations of policy changes to more abstract questions of how these changes occur. Two models of change have been identified: changes can develop endogenously, resulting in modest path-dependent modifications (evolutionary model).[3] Changes can also be restricted to certain events and arise exogenously ('punctuated equilibrium').[4] These 'critical junctures' in institutional development lift the usual political constraints on change.[5] This clear-cut distinction, however, must be understood as an ideal type rather than a conclusive study of reality. Researchers emphasize that change is a matter of degree and its respective models must be interpreted as such.[6] The observations on HI aptly illustrate how changes take place in European financial markets law. They capture both the slow and grinding process of changing financial markets mostly headed by the commission,[7] as well as the rapid and extensive reforms due to the Commission's initiatives with the support of the Member States[8] or during and after an economic or financial crisis.

One branch of HI focusses on the institutional form that such changes take. In their study of gradual institutional change, Mahoney and Thelen conceptualize a 'power-distributional approach to institutions',[9] outlining

2 Sven Steinmo, 'Historical institutionalism' in Donatella Della Porta and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences* (Cambridge UP 2012) ch 7, 118–121.

3 John L Campbell, *Institutional Change and Globalization* (Princeton UP 2004) 172 ff.

4 Kathleen Thelen and Sven Steinmo, 'Historical institutionalism in comparative politics', in Steinmo, Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge UP 2008) 1–32.

5 Giovanni Capoccia and Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341–369.

6 Campbell (n 3) 58; Wolfgang Streeck and Kathleen Thelen, 'Introduction: institutional change in advanced political economies' in Streeck and Thelen (eds), *Beyond Continuity—Institutional Change in Advanced Political Economies* (Oxford UP 2005).

7 See eg the reforms following the General Programs [1962] OJ 32/62 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:P:1962:002:TOC> accessed 17 March 2024.

8 Cf eg reforms following the Commissions white book 'Completing the Internal Market' COM(85) 310 final.

9 Streeck and Thelen (n 6) 4.

four modal types of institutional change: *displacement* (removal of existing rules and introduction of new rules), *layering* (introduction of new rules complementing existing ones), *drift* (changing the impact of existing rules because of shifts in the environment) and *conversion* (changing existing rules because of their strategic redeployment).[10] These models show that abstract observations of the institutional form can be used to characterize IPG and its degree.

I.2. Identifying Institutional Change in Financial Markets Law

Drawing from both theories, a standard for innovative change according to the legal and governance approaches can be configured. When assessing the quality of legal transformations, a legal perspective can relate to the nature and degree of a reform. Innovativeness in this regard means original or 'salient'[11] solutions to issues either highlighted or aggravated by the crisis. However, a governance view on changes incites contemplation on power structures, processes and accountability. For the purpose of this chapter, IPG will be defined as changes in the law, players or practices resulting in a paradigm shift in the financial markets regulatory environment. IPG therefore has at least one of the following characteristics:

- it changes the regulatory approach towards a certain policy area;
- it introduces original legal institutions or techniques;
- it transfers regulatory and supervisory powers;
- it shifts accountability.

The European economic and financial crisis and the ensuing general overhaul of financial markets regulation resulted in a wide variety of IPG. This chapter will focus on the most salient and consequential examples of these changes.

II. Players

The power structure of the regulation of financial markets shifted during the financial crisis. Member States were greatly affected by the crisis and

10 ibid 16.
11 Campbell (n 3) 37 ff.

used the European level as a coordination vehicle thereby changing the impact of existing rules. Although, crisis regulation and the need for persistent coordination resulted in Member States transferring more powers to the European level, European players were cut out of central decision-making powers. While the European Central Bank (ECB) gained more competences, other European institutions took a back seat.

II.1. The European Council and the Member States

At the beginning of the financial markets crisis, European institutions and national governments reacted rather autonomously to the consequences of the U.S. sub-prime mortgage crisis. Early on, three of the biggest Member States, Germany, France and Great Britain, each had to bail out major credit institutions to prevent contagion effects as liquidity shortages brought even the main institutions to their knees. During the course of 2008, it became obvious that increasingly more credit intuitions needed state money to survive. In the highly integrated European banking market, Member States in certain instances had to work together to save cross-border banking groups.[12] In this turmoil, Member States hurried to allay depositors with a state backed guarantee of their savings to prevent bank runs, thereby creating adverse incentives to relocate deposits to Member States with broader guarantees.

After operating as first responders, the Member States entered into the political coordination phase re-including European institutions. The eurozone Member States met with the UK in an emergency summit and agreed on a common bank rescue plan[13] that was later adopted by the European Council (EC).[14] The EC also met to find a common 'language' for the G20

12 See Lucia Quaglia, Robert Eastwood and Peter Holmes, 'The Financial Turmoil and EU Policy Co-operation' (2009) 47 Journal of Common Market Studies Annual Review 63.

13 Euro Area Countries, 'Declaration on a concerted action plan of the euro area countries' (12 October 2008) <https://ec.europa.eu/economy_finance/publications/pages/publication13260_en.pdf> accessed 17 March 2024.

14 Council of the European Union, 'Presidency Conclusions' (16 October 2008) 14368/08 CONCL 4 <https://data.consilium.europa.eu/doc/document/ST-14368-2008-INIT/en/pdf> accessed 17 March 2024.

summit in London.[15] In accordance with the agreement, the G20-member states, France, Germany, Italy and the United Kingdom took the lead and committed to tougher financial regulation, the extension of financial supervision, as well as the reform of the Basel II accords.

The general overhaul of financial regulations started in 2009. Yet, the persistent involvement of Member States indicated a functional change of the EC: it developed from a big-picture institution to a stringent monitoring one, which was not above intervening in quite specific questions of European law. It took a leading role in shaping the European regulatory and supervisory institutions[16] and ensured that Member States had influence over their governance, while leaving the substantive law to the more specialized Economic and Financial Affairs Council (EcoFin) constituting of the ministers of finance and economy of the Member States. The Member States seized control of the EU. Nonetheless, the crisis led to a level of integration that just several years earlier seemed impossible to achieve. The Member States agreed on institutions which operated close to the limits of the newly adopted Treaty of Lisbon. This momentum led to the establishment of the European banking union during the second wave of the supervisory reforms. However, at that time the reservations of some Member States, especially Germany, already indicated a slowly fading momentum.

The fiscal crisis brought about another change to the approach of the eurozone Member States: it utilized international law when setting up the central fiscal mechanisms to prevent failure of the eurozone Member States and save the euro. This design had a number of advantages but was mainly chosen to rule out European influence over the decision on fiscal assistance. Even though this arrangement secured the Commission a spot in the 'troika' (Commission, ECB and IMF) since it could now act as a proxy of the eurozone Member States, it resulted in a considerable weakening of the Commission. At the same time, the crisis led to a power shift inside the group of Member States. Since fiscally strong states such as Germany and France were not dependent on pooled assistance, they could enforce their

15 Council of the European Union, 'Presidency Conclusions Annex I' (29 April 2009) 7880/1/09 REV 1 <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/106809.pdf> accessed 17 March 2024.

16 Especially regarding the decision-making powers of the European Supervisory Authorities, see Council of the European Union, 'Presidency Conclusions' (10 July 2009) 11225/2/09 REV 2 and the Single Supervisory Mechanism, see European Council, 'Presidency Conclusions' (14 December 2012) EUCO 205/12.

demands on the other eurozone Member States. As the biggest contributor to the fiscal mechanisms, Germany gained a very strong position which it leveraged to enforce strict austerity and privatization on fiscally weak eurozone states.[17] Additionally, high level of domestic politicization enhanced bargaining complications between the Member States.[18]

II.2. The European Central Bank

The ECB experienced an unparalleled ascent in power during the financial crisis. In the years 2007–2009, it initiated its own measures to support the financial markets by cutting its base rate to 1.0 % and providing liquidity for a freezing and liquidity hoarding banking sector.[19] Its overwhelming role, however, encountered scepticism from non-eurozone Member States that vetoed the establishment of the European Systemic Risk Board (ESRB) as part of the ECB.[20] While the ECB could still secure an influential role in the ESRB, the board's competences remained quite limited.

However, after the first wave of reforms, the ECB became one of the most influential European institutions. As eurozone states drifted apart during the European debt crisis, Member States leaned heavily on the ECB.[21] Seeking to utilize its expertise, independence and status as a European treaty institution, they installed the ECB as the pivotal authority of the banking union of 2014. At the same time and as part of the 'troika', the ECB served as a watchdog of fiscal discipline, strengthening its reputation as an expert institution. The most consequential change, however, is the ECB's asset and bonds purchase programme. The programme had a huge impact on the financial markets and became one of the most discussed instruments of the debt crisis (see III.3.).

17 Ulrike Liebert, 'TINA' Revisited: Why Alternative Narratives of the Eurozone Crisis Matter', in Pablo Iglesias-Rodriguez, Anna Triandafyllidou and Ruby Gropas (eds), *After the Financial Crisis* (Palgrave Macmillan 2016), 303.

18 Philipp Genschel and Markus Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2017) 56 Journal of Common Market Studies 187.

19 Jean-Claude Trichet, 'State of the Union: The Financial Crisis and the ECB's Response between 2007 and 2009' (2010) 48 Journal of Common Market Studies 7.

20 See High-Level Group of Financial Supervision, 'Report' (Brussels, 25 February 2009) 46, <https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf> accessed 21 March 2024.

21 Genschel and Jachtenfuchs (n 18).

II.3. The Commission and the European Parliament

The Commission took a back seat during the financial crisis. Its agenda-setting powers were undermined by the Member States. National interests shaped the institutional design of the established governance structures, whereas the Commission, as one of the most powerful European players, was excluded from the new structures. This, however, did not make the Commission obsolete in combatting the crisis. On the contrary, it negotiated and monitored the mechanisms of fiscal assistance and expedited the reform of substantive law.[22] Still, the rise of highly federalized institutions, such as regulatory agencies or the SSM reduced the Commission's traditionally strong position. Its role shifted from engineering legal change to executing Member State plans. As a counterstrategy, the Commission emphasized the nature of newly founded institutions as expert committees. Through this commitment to expertise rather than national interest, the Commission and European legislator sought to establish allegiance of the national representatives to the EU.[23]

The role of the European Parliament (EP) did not significantly change during the debt crisis. Although the EP was involved in almost all legislative procedures, it did not gain a dominant role during the crisis.[24] The nature of economic legislation as a field of expert regulation might have contributed to that.[25]

III. Innovation in regulatory and institutional law

Public governance concentrated on regulatory law and can be interpreted as both a struggle for control of the financial markets and of the enforcement practices of the Member States. It focused its efforts on the substantive and institutional law of the European economic and financial system.

22 Michael W Bauer and Stefan Becker, 'Debate: From the front line to the back stage – how the financial crisis has quietly strengthened the European Commission' (2014) 34 Public Money & Management 161.

23 See only Art 41 Regulations (EU) No 1093/2010, 1094/2010, 1095/2010 of the European Parliament and of the Council of 24 November 2010 (ESAs Regulation).

24 Nathalie Brack and Olivier Costa, 'Introduction: the European Parliament at a crossroads' (2018) 24 The Journal of Legislative Studies 1.

25 Edoardo Bressanelli and Nicola Chelotti, 'The European Parliament and economic governance: explaining a case of limited influence' (2018) 24 The Journal of Legislative Studies 72.

These measures were complemented by fiscal mechanisms during the European debt crisis.

III.1. Substantive law: Control through uniformity and knowledge

III.1.1. Building uniformity and gathering information

a. Pre-crisis financial markets regulation was based on seemingly uniform European acts. In stark contrast to this, European markets still displayed a highly diverse regulatory landscape. This has been identified as one of the main reasons of the financial markets crisis: certain Member States had 'gold-plated' their transformation acts[26] and – citing the specific development of their financial markets as a reason[27] – established stricter requirements than the European legislation. Other Member States did not fully enforce European law to protect national depositors and credit institutions.[28] As a first order of business, regulators therefore sought to establish a 'level playing field'.[29] At the heart of this effort lies the idea of a *single rule book* containing all the relevant regulations of each sector. This approach is one of the most consequential instances of IPG in regulatory law.

   Just a few years later, all European financial markets law had been overhauled. Regulatory acts are now designed to form a more tight-knit substantive law in order to ensure uniformity. Provisions are more detailed and finer-grained than before. Simultaneously, in many instances, directives, which are only legally binding with regard to their aim (Article 288(3) TFEU), have been replaced or complemented by regulations that are legally binding in their entirety (Article 288(2) TFEU). This applies

26 Discussing the practice Larisa Dragomir, *European Prudential Banking Regulation and Supervision* (Taylor & Francis 2010) 153 ff.

27 See for a post-crisis instance: 'The post-crisis EU financial regulatory framework: do the pieces fit?, 5th Report of Session 2014–15', UK House of Lords, HL Paper 103 2 February 2015 mn 239 <https://publications.parliament.uk/pa/ld201415/ldselect/ldeucom/103/103.pdf> accessed 17 March 2024.

28 Andrea Enria and Pedro Gustavo Teixeira, 'A new institutional framework for financial regulation and supervision' in Francesco Cannata and Mario Quagliariello (eds), *Basel III and beyond: A Guide to Banking Regulation after the Crisis* (Risk Books 2011) 421 ff.

29 Council of the European Union, 'Presidency Conclusions' (10 July 2009) (n 16) mn 16.

in particular to the capital markets[30] and banking law. At the same time, most of the legal acts are subject to maximum harmonization:[31] the regulators of the Member States are forbidden to deviate from the requirements – even if they intend to gold-plate them. In addition, the use of soft law instruments for crucial details has been replaced by either binding forms of legislation or by guidelines of the European Supervisory Agencies (ESAs)[32] that have a *de facto* binding effect on market participants.[33]

In addition to material requirements, public governance focused intensively on the 'soft' factors of uniform enforcement. From early on, regulators sought to establish a common supervisory culture through the ESAs.[34] The realization that supervisory approaches influence enforcement just as deeply as substantive law led to efforts to strengthen a European understanding of the supervision of financial markets: joint training, reciprocal secondments, secondments to the European agencies and Commission, as well as peer review of supervisory practices were created for further communication and understanding among the markets administrators.[35] The European Central Bank and European System of Central Banks (ECSB) followed closely behind.[36] However, a complete change of administrative cultures was always viewed as a lengthy if not

30 Rüdiger Veil, 'Legislative powers for regulation financial markets', in Veil (ed), *European Capital Markets* (2nd edn, Hart Publishing 2017) § 3 36–52.

31 Thomas Möllers, 'Capital markets law in Europe – Too many rules too quick and complicated?' [2016] Osservatorio Del Diritto Cicile e Commercial 597.

32 European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities Markets Authority (ESMA).

33 Miriam Hartlapp and Emilia Korkea-aho, 'Whatever Law' and Teenage Member States?: The National Reception of EU Soft Law and how to Study it' in Mariolina Eliantonio, Emilia Korkea-aho and Oana Ştefan (eds), *EU Soft Law in the Member States* (Hart Publishing 2021) 68 ff.; Jakob Schemmel, *Europäische Finanzmarktverwaltung* (Mohr Siebeck 2018) 109 ff.

34 See eg Art 29 ESAs Regulation; for a result see European Insurance and Occupational Pensions Authority (EIOPA) 'A Common Supervisory Culture' (2017) <www.eiopa.europa.eu/document/download/9b2d986a-0093-4a99-8e8b-630a256c7114_en?filename=A%20Common%20Supervisory%20Culture%3A%20Booklet> accessed 17 March 2024.

35 For an overview see Ann-Katrin Wolff, *Cooperation Mechanisms Within the Administrative Framework of European Financial Supervision* (Nomos 2019) 109 ff.

36 European Central Bank, 'Guide to banking supervision' (November 2014) <www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf> accessed 17 March 2024.

unmanageable project.[37] Therefore, the focus of regulators shifted during the crisis from supervisory culture to supervisory institutions. The banking union had already complemented common supervisory standards by centralized supervision. This step towards an integrated supervisory approach has had a significant levelling effect on national supervisory practice.[38]

b. A second lesson of the European economic crises is that information is key when containing a financial crisis. Vital knowledge and information about certain institutions and the financial system either did not exist, were incomputable or were unavailable to national authorities during the early stages of the crisis. Additionally, national authorities were hesitant to share fundamental information to protect either the institutions or their own supervisory approach. The European legislator attempted to mend these deficiencies by establishing numerous data sharing obligations between the national authorities and their European counterparts. Secondary law lays down detailed responsibilities for supervisory bodies when dealing with relevant data. Article 35 of the ESAs Regulation[39], for example, grants ESAs the power to request information and regular reports of the competent authorities but also gives national authorities the opportunity to request information from the European authorities. According to its supervisory powers, the ECB is authorized to gather information directly from the institutions supervised and their employees (Article 10 of the SSM Regulation[40]) and can share this information with national authorities for the purpose of supervising institutions (Article 27(2) of the SSM Regulation). Information type and range is further specified by tertiary law and guidelines that specify what information must be shared in certain supervisory contexts to defeat any protectionist

37 Niamh Moloney, 'Supervision in the wake of the financial crisis: achieving effective 'law in action' : a challenge for the EU' in Eddy Wymeersch, Klaus Hopt and Guido Ferrarini (eds), *Financial Regulation* (Oxford UP 2012) mn 4.65 ff; for an overview of national supervisory cultures and their differences: Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn Oxford UP 2014) 1004 ff.

38 Angelika Sporenberg, 'Joint Supervisory Teams: European cooperation within the SSM in practice' (*BaFin*, 17 October 2018 <www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2018/fa_bj_1809_aufsichtsteams_JSTs_en.html> accessed 17 March 2024.

39 Regulations (EU) No 1093/2010, 1094/2010, 1095/2010 of the European Parliament and of the Council of 11/24/2010 (ESAs Regulation).

40 Council Regulation (EU) No 1024/2013 of 15 October 2013 (SSM-Regulation).

reservations.[41] European and national authorities are also legally obliged to ensure data quality.[42]

However, the authorities not only collect information, but also provide new information sources. Periodic stress testing has proved to be one of the most consequential methods of information sourcing. During stress tests, selected characteristics of financial institutions are confronted with deteriorating market scenarios to assess the ability of the institutions to cope with financial and economic shocks. Initially, stress testing was used to address the prevailing uncertainty about the quality of balance sheets of most credit institutions, but it has recently developed into an integral part of the European supervision.[43] One of the most prominent stress tests is the Supervisory Review and Evaluation Process (SREP) through which the ECB, the European Systemic Risk Board and the European Banking Authority (EBA) annually assesses the resilience of 'significant' credit institutions of the eurozone.[44]

III.1.2. Ensuring uniformity by enforcement

A more consistent and informed approach, however, did not constitute a sufficient response to the financial crisis. Further changes in law-making (a.) and enforcement (b.) were designed to further improve the ponderous and inadequate regulatory style of the European financial markets.

a. Law-making had been identified as being too slow and inappropriate for the fast and challenging regulatory environment of the financial markets. Therefore, the European legislator developed 'technical standards' to complement the slow legislative process. Technical standards are based on Articles 290 and 291 TFEU and assume the form of delegated and implementing acts. They can be issued by the Commission if the legislat-

41 See eg Commission delegated regulation (EU) No 524/2014, 12/3/2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the information that competent authorities of home and host Member States supply to one another.

42 See eg Art 4(1) of Decision ECB/2014/29 of 2 July 2014, as amended by Decision ECB/2017/23 of 3 August 2017.

43 Elizabeth McCaul, 'The evolution of stress testing in banking supervision' (Speech, 10 December 2021) <www.bankingsupervision.europa.eu/press/speeches/date/2021/html/ssm.sp211210~333effaef3.en.html> accessed 17 March 2024.

44 Art 4(1)(f) Regulation (EU) No 1024/2013 of the Council of 15 October 2013 (SSM Regulation).

or has included a mandate for technical standards in the secondary law. However, the Commission is *de facto* limited to rubber stamp technical standards drafted by the ESAs.

The authorities (the ESAs) draft the technical standards. These drafts must be adopted by the commission without any changes. Although the Commission can object to draft technical standards, such an objection is only justified 'if [the standards] were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market' (Article 14 of the ESAs Regulation). Even if this threshold is met, the Commission can only amend the draft in close coordination with the respective ESA. The intricate design of the technical standards is due to European constitutional law that prohibits agency law-making and is testament to the intention of the legislators: in utilizing the ESAs, the legislator does not only eliminate the laborious European legislative procedure, but also activates the expertise of the national authorities, since their main governance body – the Board of Supervisors – consists of the 27 heads of the national authorities supervising the relevant financial sectors.

With the founding of the banking union, the ECB was also given even greater legislative powers under the same rationale: the ECB can adopt 'regulations' under the SSM Regulation. The scope of this power is strictly limited 'to the extent necessary to organize or specify the arrangements for the carrying out of the tasks conferred on it by' the SSM Regulation (Article 4(3) of the SSM Regulation). The provisions of the ECB Regulation are directly applicable and legally binding.[45]

In addition to these binding instruments, the post-crisis law allows for a great deal of soft law. The ESA Guidelines constitute the most remarkable example of this trend. Although the ESA Guidelines are not legally binding, they are designed to ensure compliance: non-compliant national authorities must notify the ESA, justify their deviation and their non-compliance can be published (Article 16 of the ESAs Regulation). The regime is also applicable to market participants. Other soft law instruments include the ECB guidelines, ECB recommendations and ESA recommendations.

45 Lena Boucon and Daniela Jaros, 'The Application of National Law by the European Central Bank within the EU Banking Union's Single Supervisory Mechanism: A New Mode of European Integration' (2018) 10 European Journal of Legal Studies 155, 168.

b. In order to ensure compliance with the overhauled law, the legislator paid close attention to enforcement. A Member State potentially stepping out of line was a dominating concern. Such violations are usually subject to the treaty infringement procedures (Articles 258, 259 TFEU). However, the procedures were considered too slow and ineffective to bring about relief during a potential future crisis. Therefore, two alternative enforcement models were put into place for the financial markets: supervising the supervisors and European supervision.
   1. The ESAs are deployed to supervise the national supervisors.[46] Their powers are divided into three subcategories (Article 17 of the ESAs Regulation: Breach of Union Law; Article 18 of the ESA Regulation: Action in emergency situations; Article 19 of the ESAs Regulation: Settlement of disagreements between competent authorities in cross-border situations). The power to avert a breach of EU law is the most important competence of the ESAs. According to Article 17(6) of the ESAs Regulation the authorities can adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law. This power constituted a significant departure from European constitutional law that had been limiting most substantive decisions to European institutions. To allay concerns about its constitutionality the procedure is multi-layered and involves the Commission as a European institution. It resembles a reduced infringement procedure that includes a number of information duties. However, since the procedure is specifically tailored so as to not pose risks to its constitutionality, its application is rather limited. Accordingly, to this day, the procedure has never been used. Only the emergency competences of the ESAs are deemed highly effective, since they do not possess noteworthy requirements except for the statement regarding an emergency situation by the EcoFin (Article 18(2) of the ESAs Regulation). However, the competence to determine the existence of an emergency situation is also limited to a breach of Union law.

46 Only exception to this rule is the direct supervision of Credit Rating Agencies, cf Regulation (EC) No 1060/2009 of the European Parliament and the Council of 16 September 2009 on credit rating agencies. Instructive Gudula Deipenbrock, 'Direct Supervisory Powers of the European Securities and Markets Authority (ESMA) in the Realm of Credit Rating Agencies – Some Critical Observations in a Broader Context' (2018) 29 European Business Law Review 169.

2. In contrast to this rather timid approach, the ECB has been equipped with the power to supervise financial institutions. During the first wave of institutional reforms, the European legislator still shied away from direct European supervision of credit institutions. However, during the fiscal crisis the hazardous link between public finance and failing credit institutions became one of the major problems in stabilizing the economies of the Member States. European supervision also addressed the need of major credit institutions for more consistent supervision in various Member States. The SSM was installed to realize a truly European approach towards banking supervision in the eurozone. It applies to 'significant' credit institutions that either exceed a certain asset value, are of economic importance to a member state or the EU economy as a whole or engage in above-average cross border activities. Additionally, if a credit institution requests direct public financial assistance, the SSM Regulation applies to it. This stern Europeanization of supervision has been complemented with a variety of member state involvement. Ongoing supervision is conducted by Joint Supervisory Teams (JSTs) for every credit institution with ECB staff and staff members of the relevant national authorities of those countries in which the respective institution has established subsidiaries.[47] JSTs organize and exercise day-to-day supervision and coordinate their efforts with the respective national authorities. Decisions of the ECB are drafted by each JST, approved by the ECB Supervisory Board and adopted by the ECB Governing Council under the non-objection procedure (Article 26(8) of the SSM Regulation). Both are composed of ECB representatives and representatives of the national authorities.

   The coordinated supervision is complemented by one of the most extensive instances of IGP: According to Article 4(3) of the SSM Regulation, the ECB, in its supervisory role, applies Union law and, where Union law is composed of Directives, the national legislation transposing those Directives. An application of national law by European

47 Instructive Christos Gortsos, *European Central Banking Law: The Role of the European Central Bank and National Central Banks under European Law* (Palgrave Macmillan 2020) 331 ff.

institutions provides a 'genuine novelty' under European law.[48] The problems that arise from this arrangement have been discussed extensively in the academic literature.[49] The main focus of the discussion is, on the one hand, on how the ECB should proceed in the case of an inadequate transposition of a directive. Most scholars agree that this does not lead to the direct applicability of the directive and even inadequately transposed national law must be applied by the ECB if it cannot be corrected through interpretation.[50] On the other hand, scholars have questioned the democratic legitimacy of the SSM Regulation. The independence of the ECB that also applies to its supervisory mandate has been identified as one of the main legitimacy problems. However, this deficit is compensated by certain institutional arrangements that ensure overall sufficient democratic legitimacy.[51]

III.2. Institutional law: Control through supervision

The institutional law of financial markets regulation and supervision underwent significant change during the financial crisis. National and European players sought to establish more centralized institutions. The efforts aimed to create a regulatory environment in which legislation would be perpetually formed and reconsidered by administrative bodies. The *Lamfalussy*

48 See Andreas Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law' (2014) 21 Maastricht Journal of European and Comparative Law 89, 109.

49 Cf Fabian Amtenbrink, The Application of National Law by the European Central Bank: Challenging European Legal Doctrine?', in European Central Bank (ed) *Building bridges: central banking law in an interconnected world. ECB Legal Conference 2019* (ECB 2019) 136; Boucon and Jaros (n 45) 155; Andrea Biondi and Alessandro Spano, 'The ECB and the Application of National Law in the SSM: New Yet Old…' (2020) 31 European Business Law Review 1023; Enrico Peuker, 'Die Anwendung nationaler Rechtsvorschriften durch Unionsorgane – ein Konstruktionsfehler der europäischen Bankenaufsicht' (2014) 69 JuristenZeitung 764; Gianni Lo Schiavo, 'The ECB and its application of national law in the SSM', in Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 177.

50 Amtenbrink (n 49) 108–109; Alexander Kornezov, 'The application of national law by the ECB – a maze of (un)answered questions' in European Central Bank (ed), *ESCB Legal Conference 2016* (ECB 2016) 279.

51 Cf German Federal Constitutional Court, BVerfGE 151, 202 mn 208–230.

process of 2002 was a first step in this direction.[52] However, the financial crisis had shown that a more integrated institutional system was needed. Over the course of five years the legislator created new agencies (III.2.1) and the banking union (III.2.2). Eurozone states, in an attempt to strengthen the European banking system, also entered into intergovernmental treaties.

III.2.1. European agencies

The ESAs were established in 2011. They are, to this day, the most integrated and powerful regulatory agencies of the European Union. Even though the ESAs Regulations are worded equally, their development has taken quite different routes over the last ten years:[53] the ESMA has become a highly influential regulator and determines the supervisory approach across the financial markets, whereas the EBA had to face the ECB as an influential competitor from an early stage. The EIOPA's influence remains limited to the capital requirements of insurance providers (Solvency II Regulation).

As independent European agencies the ESAs employ staff, have their own budget and are headed by a chair. As hybrid agencies, however, their main governance body (the board of supervisors) consists of Member State representatives. Their federalized structure is a manifestation of the federalized approach to crisis management in the EU. It ensures a strong national influence on the operations of the ESAs, which Member States defended against the review recommendations of the Commission that would have given more independent decision powers to the staff of the ESAs.[54]

III.2.2. The Banking Union

a. As discussed, the SSM Regulation assigned the ECB the task to supervise 'significant' credit institutions in the eurozone as the first pillar of the banking union. By vesting the ECB with microprudential competence, the legislator broke with the tradition of Member State supervision in the

52 Instructive Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (Oxford UP 2011) 273 ff.

53 Kostas Botopoulos, 'The European Supervisory Authorities: role-models or in need of re-modelling?' (2020) 21 ERA Forum 177, 180–182.

54 Pierre Schamo, 'Institutional Change in the Banking Union: The Case of the Single Supervisory Mechanism' (2021) 40 Yearbook of European Law 265, 286 ff.

financial markets – one of the most consequential instances of IPG. As a result, the question was raised as to whether Article 127(6) TFEU could be a sufficient treaty basis for such an arrangement.[55] Additionally, the scope of the ECB's competence is viewed as obstructive to a consistent approach towards European banking supervision.[56] This 'incomplete' banking union is a direct result of the political and economic interests of fiscally strong nations, such as Germany and France. Germany, especially, was pushing for supervisory competence to be limited to 'significant' credit institutions to protect its differentiated banking market. As a compromise, the ECB was granted the final responsibility to assume direct supervision over credit institutions that have requested direct public assistance of the European Stability Mechanism (ESM) or the European Financial Stability Facility (EFSF). The SSM institutionalizes hybrid banking supervision. However, the composition of the Supervisory Board – the main governing body of the SSM (Article 26 of the SSM Regulation) – strengthens the European influence in comparison to the Board of Supervisors of the ESAs.[57] It consists of the eurozone national banking supervisors, four ECB representatives, as well as the Chair and the Vice-Chair as appointed members.

b. The second pillar of the banking union is the Single Resolution Mechanism (SRM). It complements the SSM and was introduced to tackle the issue of struggling credit institutions which are so closely intertwined with the financial system that their failure could destabilize the economy of a member state ('too big to fail'). The objective of the SRM was to break the connection between a fragile banking sector and the finances of the Member States by preventing public bail-outs.[58] To that end, the SRM established the Single Resolution Board (SRB), which mirrors the

55 See eg Takis Tridimas, 'The constitutional dimension of Banking Union', in Stefan Grundmann and Hans-W Micklitz (eds), *The European Banking Union and Constitution* (Hart Publishing 2019) 25–48, 36–38; Alberto de Gregorio Merino, 'The Banking Union in EU law: an EU institutional law perspective', in Gianni Lo Schiavo (ed), *The European Banking Union and the Role of Law* (Edward Elgar Publishing 2019) 29–48.

56 Marius Skuodis, 'Playing the creation of the European banking union: what union for which Member States?' (2018) 40 Journal of European Integration 99; Lucia Quaglia, 'The politics of an 'incomplete' Banking Union and its 'asymmetric' effects' (2019) 41 Journal of European Integration 955.

57 Schamo (n 54) 285–287.

58 For further details see Agnieszka Smoleńska, 'Multilevel cooperation in the EU resolution of cross-border bank groups: lessons from the non-euro area Member

SSM's supervisory board in composition. The SRB adopts a resolution scheme when a credit institution is failing or likely to fail (Article 18 SRM Regulation[59]). EcoFin and the Commission can veto the scheme within 24 hours. A resolution scheme involves the measures the SRB will be deploying to dissolve or rescue the failing credit institution.[60] These measures correspond with the instruments of the BRRD[61] which harmonized resolution tools across the Member States. The SRM is complemented by the Single Resolution Fund (SRF) that is owned by the board. It consists of the contributions of the eurozone credit institutions and has a target of one percent of the amount of covered deposits of all credit institutions (approximately 55 billion euros). The fund cannot be used to absorb losses of a failing institution but is designed to support the resolution measures.

III.3. Fiscal mechanisms: Control through monetary assistance

III.3.1. The EFSF and ESM

In spring 2010, Greece's ability to roll over its debts was tarnished by its high debt positions. A possible Greek default threatened the whole of the eurozone because of its integrated banking market. European credit institutions held a substantial share of the exposure of Greece's government bonds. After two liquidity injections by the eurozone states, the International Monetary Fund (IMF) and the Commission did not calm the markets and the Member States resorted to shock and awe tactics. As inter-banking lending froze, EcoFin announced the European Financial Stability Facility as a part of a 750 billion euro bail-out package. It was structured as an intergovernmental Special Purpose Vehicle (SPV) that should sell bonds backed by guarantees of Member States resulting in an effective capacity

States joining the Single Resolution Mechanism (SRM)' (2022) 23 Journal of Banking Regulation 43–44.

59 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund (SRM-R).

60 See Art 8–12 SRM-R.

61 Directive 2014/59/EU of the European Parliament and of the Council of 5 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (BRRD).

of 440 billion euros.[62] The guarantees were distributed among the Member States according to a contribution key, with Germany taking up over a quarter of that amount. The SPV was created as a corporation under the law of Luxembourg. This structure ensured absolute member state control, allowed for greater efficiency than assigning a relief fund to the European Commission[63] and aimed at averting constitutional frictions with Article 123 and 125 TFEU.[64]

The EFSF, as an intergovernmental instrument, however, still relied on the European institutions for technical and distribution support: loan packages were negotiated by the 'troika' that focused on reducing the debt ratio of applying countries which led to wide-ranging effects on the national economy. The final decision on EFSF deployment were made during the sessions of EcoFin, which changed its function to an international law body when discussing the EFSF: economically strong states acted as *de facto* veto powers. In the two and a half years of its existence, the EFSF has supported three states: Greece, Ireland and Portugal. The debt crisis, however, proved resistant to short-term solutions.

The Member States therefore phased the limited EFSF into a permanent facility: the European Stability Mechanism (ESM).[65] Before this, after consulting the European Parliament and the Commission, the EC changed Article 136 TFEU according to Article 48 of the Treaty on European Union (TEU) to include authorization for the eurozone Member States to establish a stability mechanism.[66] The objective was to eliminate the remaining frictions between the facility and the European treaties. The ESM has an effective capacity of around 780 billion euros and supported Cyprus, Greece, Ireland, Portugal and Spain. Even though the mechanism proved effective in preventing defaults of Member States, it has given rise to criticism over

62 See EFSF Framework Agreement, <www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 17 March 2024.

63 Ledina Gocaj and Sophie Meunier, 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis' (2013) 35 Journal of European Integration 239, 245.

64 See Jean-Victor Louis, 'The No-Bailout Clause and Rescue Packages' (2010) 47 Common Market Law Review 971.

65 ESM-Treaty, T/ESM 2012-HR/en (2 February 2012) <www.esm.europa.eu/system/files/document/2023-10/05-TESM2-HR1.en12.pdf> accessed 17 March 2024.

66 Council Decision 2011/199/EU of 25 March 2011 amending Art 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

its mutualization effects on the finances of the Member States.[67] Therefore, the EFSF and ESM became subject to constitutional contestation before the German Federal Constitutional Court (FCC) which, however, rejected the complaints.[68]

III.3.2. OMT and PSPP

The ECB initiated its second market sovereign bond purchase programmes in parallel with the fiscal efforts of the eurozone Member States. The Outright Monetary Transactions (OMT) programme was introduced in 2010 after a statement of the former ECB president, Mario Draghi, that the bank would do 'whatever it takes' to save the euro. The OMT was aimed at countries that had regained access to private lending after receiving monetary support from the EFSF or ESM. If these conditions were met and the ECB found that the interest rate values of sovereign bonds were 'distressed', the bank would buy government bonds that matured in 1 to 3 years. Even though no bonds of any countries were ever eligible for the programme, the OMT had a calming effect on the bond market by reducing bond yields by up to two percentage points.[69]

As a part of the ECB's efforts to increase money supply and support consumption and investment spending, it initiated the Public Sector Purchase Programme (PSPP) in 2015. This programme is aimed at bonds issued by public authorities (eurozone Member States, European institutions and municipalities). The ECB and National Central Banks buy public bonds according to a purchase key up to a certain percentage and thereby reduce long term interest rates. This has led to a massive change in ownership of public sector bonds and has reduced interest rates to historical lows.[70]

The measures received fierce criticism, especially from Germany. OMT was identified as an economic and not so much as a monetary measure

67 See eg Dirk Meyer, 'Kosten des Europäischen Finanzstabilisierungsmechanismus (EFSM) aus deutscher Sicht' (2011) 231 Jahrbücher für Nationalökonomie und Statistik 288.

68 BVerfGE 129, 124 (EFSF); BVerfGE 132, 195 (ESM).

69 Carlo Altavilla, Domenico Giannone and Michele Lenza, 'The Financial and Macroeconomic Effects of OMT Announcements' (2014) European Central Bank Working Paper Series No 1707 <www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1707.pdf> accessed 17 March 2024.

70 See Harmen Lehment, 'Fiscal implications of the ECB's Public Sector Purchase Programme' (2019) 162 Dans Revue de l'OFCE 89.

and therefore as a breach of the ECB's mandate (Articles 119 and 127 TFEU). The OMT was challenged before the German Federal Constitutional Court, which requested a preliminary ruling of the Court of Justice of the European Union (CJEU).[71] The CJEU, however, declared OMT as constitutionally sound because of the programme's requirements.[72] The German Federal Constitutional Court followed the ruling and did not invoke its identity and *ultra vires* jurisdiction.[73] However, the review of the PSPP took a different route: after the CJEU had again confirmed that the ECB was within its monetary mandate in buying from the bond market,[74] the German Federal Constitutional Court ruled for the first time in its history that both the ECB and CJEU were *ultra vires* in affirming the constitutionality of the ECB's measures, i.e. they had acted outside of their jurisdiction.[75] The Federal Constitutional Court held that the ECB had not publicly outlined the reason for and proportionality of the PSPP and that the CJEU had failed to properly review the action of the ECB. The judgment generated severe tensions between the Germany and the EU and resulted in the initiation of a treaty infringement procedure by the Commission against Germany.

IV. Legitimacy

The IPG of European institutions naturally leads to legitimacy frictions as the powers of the EU are narrowly limited by the European Treaties.

IV.1. Constitutional resilience and evolution

Most of the institutional and competency changes resulted in questions as to whether they are compatible with the European Treaties (ESAs,[76] SSM,[77]

71 BVerfGE 142, 123.
72 Case C-62/14 *Gauweiler and others v Germany* EU:C:2015:400.
73 BVerfGE 142, 123.
74 Case C-493/17 *Weiss and others* EU:C:2018:1000.
75 BVerfGE 154, 17.
76 Pieter van Cleynenbreuge, 'Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies' (2014) 21 Maastricht Journal of European and Comparative Law 64.
77 Niamh Moloney, 'European Banking Union: Assessing its risks and resilience' (2014) 51 Common Market Law Review 1609, 1657 ff.

SRM,[78] ESM[79]). The challenges applied to the constitutional basis of these changes in the Treaties and the respective competences of the newly found institutions.

In the case of the ESAs, this resulted in a seminal decision of the CJEU. The UK had brought an action for annulment before the CJEU against the European Securities and Markets Authority's power to ban short selling.[80] In its decision, the Court updated the Meroni-doctrine[81] that had until then proscribed the delegation of discretionary to non-treaty bodies and seemed to stand at odds with the decision powers of the ESAs. The Court, however, stated that the devolution to a non-treaty institution (such as an agency) was deemed lawful if the power transferred was 'technical' in nature, i.e. limited the institution's discretion by conditions or criteria.[82] Additionally, the court ruled that the ESA's technical standards were compatible with European law: Articles 290 and 291 TFEU do not prevent the European legislator from establishing other rule-making powers if these powers do not undermine the rules governing the delegation of powers laid down in Articles 290 and 291 TFEU. The decision was a constitutional breakthrough and put genuine agency rule-making within reach.

However, the evolution of European Treaty law has encountered suspicion at the national level. The contestation of institutional reforms and the fiscal support mechanism before the German Federal Constitutional Court was a reoccurring theme of the European crisis. The CJEU proved to be unresponsive to the German concern that the reforms were overstretching European competences.

78 Edoardo Chiti and Pedro Gustavo Teixeira, The constitutional implications of the European responses to the financial and public debt crisis (2013) 50 Common Market Law Review 683, 694 ff.

79 See Case C-370/12 *Pringle* EU:C:2012:756.

80 Case C-270/12 *UK and others EU*:C:2014:18.

81 Case 9/56 *Meroni v ECSC* [1958] ECR 133, EU:C:1958:7.

82 For details see Jakob Schemmel, 'Regulating European financial markets between crisis and Brexit' (2020) 28 Journal of Financial Regulation and Compliance 503.

IV.2. Expert governance and national sovereignty

The European approach to the financial and economic crisis resulted in grave concerns about its democratic legitimacy.[83] Of the many questions, this chapter only addresses two:

a. Troika and fiscal programmes: during the fiscal crisis, the strong fiscal nations, as well as ECB and IWF imposed strict fiscal and privatization rules on Member States that were applying for financial assistance.[84] The wide-ranging cuts in the public sector and the sale of state infrastructure to pay off debts that had been amassed over decades contributed to an economic depression that lasted over ten years. As the Greek economic and social systems collapsed, almost a third of Greece's population was living below the poverty line and youth unemployment reached record highs.[85] Whether the economic decisions imposed on Greece were necessary or not, they resulted in a loss of democratic accountability both at the European and the national level: troika as an expert body drafted and executed its Economic Adjustment Programmes and the respective national governments and parliaments had to oblige to retain access to the relief funds.

b. The governance systems established during the crises are hybrid structures that transfer member state influence into European decision-making. This has led to fuzzy legitimacy patterns further confusing democratic accountability and increasing the potential for scapegoating Euro-

83 See only Bruno de Witte, Adrienne Héritier and Alexander Trechsel, *The Euro Crisis and the State of European Democracy* (European University Institute 2012) <https://eur-lex.europa.eu/resource.html?uri=cellar:16305f25-3d95-45ae-9637-9989463c1197.0001.01/DOC_1&format=PDF> accessed 17 March 2024; Ben Crum and Stefano Merlo, 'Democratic legitimacy in the post-crisis EMU' (2020) 42 Journal of European Integration 399; Anna-Lena Högenauer and David Howarth, 'The democratic deficit and European Central Bank crisis monetary policies' (2019) 26 Maastricht Journal of European and Comparative Law 26.

84 For an overview of Greece, Ireland and Portugal see Niamh Hardiman and others, 'The Troika's Variations on a Trio: Why the Loan Programmes Worked so Differently in Greece, Ireland, and Portugal' (2017) UCD Geary Institute for Public Policy Discussion Paper Series, Geary WP2017/11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3060346> accessed 17 March 2024.

85 Ioannis Bournakis and others, 'Introduction' in Bournakis and others (eds), *Political Economy Perspectives on the Greek Crisis* (Palgrave Macmillan 2017).

pean institutions.[86] The European strategy to push for more expert solutions in order to neutralize member state influence does not redress the problem since the democratic legitimacy of such expert decisions is still a problem. Additionally, the CJEU broadened the power of executive decision-making by expert bodies which will further diminish democratic accountability. These problems result in a general impression that considers European governance fraught with democratic unresponsiveness. The German contestation of ECB measures can be read as an expression of these concerns (see III.3.2.).

V. Key findings

IPG was at the heart of combating the European financial and economic crisis. The European approach reveals different aspects of IPG that are closely related to the EU as an intragovernmental organization.

1. Striving for Uniformity. The post-crisis regulatory structure aims at a uniform regulatory environment for market participants. European regulatory law and institutions have been established to serve this purpose. This has led to a long-anticipated push towards a *single rule book* for European financial markets that reduces the regulatory leeway for Member States. ESAs were established to further unify supervision and have been granted quasi-legislative, as well as decision-making powers. Even the most integrated European regulatory agency, however, has been overshadowed by the institutional reforms of the ECB: 'significant' institutions are now supervised by the SSM, i.e. the ECB. The new mechanism has been complemented by the SRM so that banks supervised by ECB would not only operate but also fail on the European level.
2. Federalized authority. The crisis did not strengthen the European executive. Member states made most of the important political decisions using the EC as a deliberation forum, whereas European institutions were marginalized. The strong and persistent involvement arises from the high budgetary importance of the financial markets and fiscal matters. Due to the proximity of these questions to the sovereignty of the Member States, they are, in most cases, dealt with via intergovernmental negotiation.

86 Espen D H Olsen and Guri Rosén, 'The EU's Response to the Financial Crisis' in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2018) 381, 389–390.

In certain cases, this has given politically and fiscally strong Member States, i.e. Germany, *de facto* veto powers over negotiations and hindered a further integrated European solution.

3. Federalized institutions. The federalized power fed into the newly-established institutions. Even though reforms transferred significant regulatory and supervisory power to the European level, they rarely increased the power of established European institutions as such, but rather established new structures and retained the most important decisions for the member state representatives by their federalized governance (ESAs, SSM, SRM). This approach of 'new intergovernmentalism'[87] found its most extreme manifestation in the fiscal mechanisms (EFSF, ESM) that were established outside of the EU as an international law instrument. Even though all member state representatives are required to perform their mandate independently, the federalized structures have led to hybrid institutions that resemble 'mini'-councils. However, it is likely that the new institutions will be depoliticized by distance as the political focus shifts away from financial and fiscal matters. The influence of the Member States has already declined but it can forcefully return when needed through the established governance structure.
4. Incremental change. Although, the changes that were implemented were wide-reaching, they did not result in a completely unified European financial markets law with its own supervisor and regulator. Even IPG mostly assumed the form of 'layering', building on already existing structures and improving mechanisms rather than exchanging them completely. There are two reasons for this: first, Member States were hesitant to share central competences in vital areas. The protection of their own financial markets constituted a strong interest that was only overcome in certain areas. Second, the European Treaties had a limiting effect at least on the institutional changes.
5. Drawing from Historical Institutionalism, it has been observed that EU governance reform is most productive during crises and falls into procrastination, i.e. small, incremental changes, in non-crisis circumstances.[88] Since crisis measures at the European level tend to result in

87 Christopher J Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 Journal of Common Market Studies 703.

88 Olsen and Rosén (n 86) 393; Adam Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Penguin 2019).

legitimacy issues, this effect can lead to institutional reforms suffering from legal or legitimacy shortcomings. However, this does not cause friction at the European level because the CJEU has yet to develop a doctrine to demarcate competence spheres of the EU and its Member States.[89] At national level, however, these developments paint a different picture. The market support programmes of the ECB have drawn severe criticism culminating in a clash between the CJEU and the German Federal Constitutional Court. If this development proves to be an expression of general discontent with European Governance, it will constitute a real challenge to European IPG during crises.

89 Christiaan Timmermans, 'ECJ Doctrines on Competences' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford UP 2014).