

# Member States in the EU Economic Constitution: Rule of Law Challenges and Opportunities

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*The rule of law has become a hotly debated issue at EU level recently. What appears to be missing in those debates, however, is attention to the peculiarities the rule of law presents in the setup of the EU's economic constitutional framework. The founding EU Treaties have put in place such framework permitting Member States' diversified (capitalist) economies to grow ever closer. At the same time, however, that framework has also continuously given rise to specific rule of law challenges. This diagnostic article revisits and summarizes those challenges, arguing that addressing them is more than ever necessary if only to increase the EU's legitimacy in targeting more general rule of law deficiencies in some of its own Member States.*

## 1 INTRODUCTION

The rule of law concept, its contents and the varying interpretations given to it across different EU Member States have become hotly debated issues at the EU level over the past five years. In response to Member States such as Hungary and Poland having taken measures affecting the independence of their judges,<sup>1</sup> the European Commission in July 2019 published a blueprint for action in strengthening the rule of law across all EU Member States.<sup>2</sup> In accordance with that blueprint, better monitoring and enforcement of rule of law values would have to be set up.<sup>3</sup> In addition, the blueprint also proposes to take steps further to promote a rule of law culture among the EU Member States in the first place.<sup>4</sup>

The Commission's clear commitment to promote a rule of law culture across the EU Member States notwithstanding, the 2019 blueprint does not address well-

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<sup>1</sup> Which gave rise to the judgment holding that Poland infringed Art. 19 TEU in CJEU, Case C-619/18, *Commission v. Poland*, EU:C:2019:531.

<sup>2</sup> See Commission Communication of 17 July 2019, COM(2019) 343 final, [https://ec.europa.eu/info/sites/info/files/7\\_en\\_act\\_part1.pdf](https://ec.europa.eu/info/sites/info/files/7_en_act_part1.pdf) (accessed 24 Oct. 2019).

<sup>3</sup> For previous calls to do so, see Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 *Eur. Const. L. Rev.* 512–40 (2015).

<sup>4</sup> Commission Communication, *supra* n. 2, at 5.

known rule of law challenges brought on by the integration of Member States' legal orders within an overlapping EU economic constitutional law framework. On the one hand, that makes sense as the current rule of law blueprint is born out of concern that some Member States have failed to meet certain standards implicitly presumed to be inherent to the rule of law common to the EU and its Member States. From that point of view, it would make little sense to focus attention also on the challenges integrating different legal orders brings about from a rule of law perspective. On the other hand, however, it may feel somewhat strange that the Commission did not seize this opportunity at least to reflect on the peculiarities and challenges EU economic integration has caused from a rule of law perspective. As rule of law discussions currently rank high on the EU's political agenda, we believe that now is a good time to revisit and diagnose those peculiarities and challenges in the context of EU economic integration as well (2) and to call for their embedding in an even wider rule of law reflection than the one currently taking place (3).

## 2 THE EU'S EVOLVING ECONOMIC CONSTITUTION AND ITS RULE OF LAW PECULIARITIES

The founding EU Treaties have put in place an economic constitutional framework permitting Member States' diversified (capitalist) economies to grow ever closer. Containing general prohibitions and a constitutional basis for economic policy guidelines, the Treaties can be said to incorporate the core of a so-called economic constitution.<sup>5</sup> Thanks to the open-ended nature of those foundational EU economic law provisions, the focus and features of that economic constitution have been able to adapt to changing economic circumstances, both at EU and Member State level.<sup>6</sup> As such, the economic constitutional law provisions of the EU Treaties constitute an evolving and dynamic background framework against which Member States organize, structure and manage their (capitalist) economies.<sup>7</sup>

The notion of an economic constitution, originally developed in German ordoliberal economic theory, carries with it distinctive analytical and normative interpretations (1), which have been subject to evolutions and modifications over time within the EU legal order (2). Those different interpretations, it will be

<sup>5</sup> See in that regard, the pioneering (in English at least), Manfred E. Streit & Werner Mussler, *The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'*, 1 Eur. L.J. 5–30 (1995).

<sup>6</sup> Wouter Devroe & Pieter Van Cleynenbreugel, *Observations on Economic Governance and the Search for a European Economic Constitution*, in *Economic and Social Constitutionalism After the Treaty of Lisbon* 110 (Dagmar Schiek, Ulrike Liebert & Hildegard Schneider eds, Cambridge: Cambridge University Press 2011).

<sup>7</sup> Although they also allow for varieties of capitalism to remain in place, see in particular, Jukka Snell, *Varieties of Capitalism and the Limits of European Economic Integration*, 13 Cambridge Y.B. Eur. Legal Stud. 415–34 (2011).

submitted, have also had an impact on how Member States are perceived or considered as key actors in shaping and implementing the EU economic constitution (3). The changing roles of Member States have in turn given rise to peculiar rule of law challenges (4):

## 2.1 THE EU TREATIES AS AN 'ECONOMIC CONSTITUTION'

The notion of an economic constitution refers to the set of fundamental principles, tools and instruments that permit a State or polity to set up, structure and regulate its economy. In the words of Tony Prosser, the notion above all refers to the 'key constitutional principles and institutional arrangements which may be relevant to management of the economy'.<sup>8</sup> In that understanding, an economic constitution is used in an analytical way, allowing lawyers to distinguish different key legal or constitutional provisions as implicating directly the regulation or management of the economy.

Beyond that legal-analytical understanding, however, the notion of an economic constitution also carries a particular normative weight, going back to the German so-called ordoliberal political tradition.<sup>9</sup> Within that framework, the economy needed to be set up and structured in advance according to a certain set of key principles. Rather than leaving economic policy completely to market forces (*laissez-faire* capitalism) or to unfettered discretionary government interventions, ordoliberalism presented itself as a third way forward.<sup>10</sup> As part of that third way, the State would have to determine at the outset, by way of a constitutional decision, what the economy would look like. Key values and principles such as the prohibition of monopolies, the prohibition of restrictions on competition and illegal trade practices had to be established *ex ante*.<sup>11</sup> Both enterprises and public authorities would have to comply with those principles, which could not be modified easily. As a result, both anticompetitive behaviour and discretionary economic governance practices were to be ruled out by this type of constitution.<sup>12</sup> The ordoliberal school of thought has had an influence over debates on German economic policy and has also been influential in shaping the EU's economic integration project in its earliest stages.<sup>13</sup>

<sup>8</sup> Tony Prosser, *The Economic Constitution* 8 (Oxford: Oxford University Press 2014).

<sup>9</sup> On the origins of the German notion of 'Wirtschaftsverfassung', see David Gerber, *Constitutionalising the Economy: German Neo-Liberalism, Competition Law and the 'New' Europe*, 42 Am. J. Comp. L. 25 (1994).

<sup>10</sup> See also Ralf Ptak, *Neoliberalism in Germany. Revisiting the Ordoliberal Foundations of the Social Market Economy*, in *The Road from Mont Pélérin. The Making of Neoliberal Thought* 103 et seq. (Philip Mirowski & Dieter Plehwe eds, Cambridge: Harvard University Press 2009).

<sup>11</sup> Christian Joerges, *What Is Left of the European Economic Constitution? A Melancholic Eulogy*, 30 Eur. L. Rev. 470 (2005).

<sup>12</sup> See Wolf Sauter, *The Economic Constitution of the European Union*, 4 Colum. J. Eur. L. 28 (1998).

<sup>13</sup> Armin Hatje, *The Economic Constitution Within the Internal Market*, in *Principles of European Constitutional Law*, 2nd ed., 589 (Armin von Bogdandy & Jürgen Bast eds, Oxford: Hart 2010).

Given the EU's original setup as a project of economic integration, it should not surprise anyone that the notion of an economic constitution, both as an analytical tool and as a normative conception, has gained ground as an instrument to describe and analyse EU economic policymaking.

As an analytical tool, the Founding Treaties establishing the European Coal and Steel Community and the European Economic Community contained clear prohibitions on certain types of businesses and Member States' behaviour. The insertion of competition law provisions and free movement provisions are seen as the key embodiments of economic constitutional law.<sup>14</sup> Together, those provisions limit, structure and enable Member States' economic policymaking in a supranational legal order, resulting in those provisions being considered the key components of the EU's economic constitution.<sup>15</sup>

As a normative conception, the Treaties contained a set of provisions prohibiting certain types of behaviour or discretionary economic policymaking.<sup>16</sup> Accompanied by a Commission and a Court enforcing those provisions strictly and vigorously against Member States and enterprises, the constitutional framework at the outset looked like a supranational copy of the German ideal-typical ordoliberal economic constitution:

## 2.2 THE EVOLUTIONS OF EU ECONOMIC CONSTITUTIONALISM

The EU's economic constitution was not set in stone, however. Over time, the EU Treaties have indeed undergone significant modifications. From an economic constitution point of view, one can distinguish both analytical and normative modifications and evolutions in this regard. Those modifications and evolutions are inherently interrelated and will be relevant to our discussion on rule of law challenges and opportunities in this realm. Three stages of both analytical and normative economic constitutionalism can be distinguished in that regard.

In the first stage, the Founding Treaties' key provisions sought to rein in discretionary economic policymaking. Prohibitions on free movement restrictions and on anticompetitive behaviour were in place and were to constitute the background against which Member States and businesses had to limit their actions. As such, those provisions could indeed be believed to constitute an economic

<sup>14</sup> Sauter, *supra* n. 12, at 28.

<sup>15</sup> See for background, Robert Kovar, *Le pouvoir réglementaire de la Communauté européenne du charbon et de l'acier* (Paris: LGDJ 1964).

<sup>16</sup> The provisions on State aid limited Member States' spending discretion in particular, see Francesco de Cecco, *State Aid and the European Economic Constitution* 17 (Oxford: Hart 2012).

constitution, steering States and businesses towards a market-focused European environment. The Treaties constituted the background against which economic policies had to be integrated. To that extent, the staged introduction of the common market envisaged the imposition of harmonized rules Member States would have to respect. Even when political negotiations stalled in this regard, the European Commission and the Court of Justice began to play an important role in this respect. Enforcing the key prohibitions listed in the Treaties, those institutions shaped the EU's economic constitution.<sup>17</sup> Accepting a wide general prohibition on restrictions to intra-community trade in both internal market and competition law, those fields were steered in the direction of a market-based approach with which States and (public) enterprises had to conform.<sup>18</sup> The EU's economic Treaty provisions were primarily to be enforced and applied by the Commission and the Court, independent from the constituent Member States of the Union. From a normative perspective, this setup fitted the idea of an ordoliberal economic constitution in which the ground-rules for the economy (market functioning – the role of the State) were established to some extent. At the same time, the EU Treaties did not fully reflect the substantive ideas of ordoliberalism. According to those substantive ideas, monopolies were to be prohibited, which was not the case under EU law. Only abusive types of behaviour indeed fell within the scope of the prohibition of current Article 102 TFEU. Nevertheless, formally speaking, the Treaties closely resembled an ordoliberal economic constitution.<sup>19</sup>

The second stage marks a shift from a formally speaking ordoliberal economic constitution to a more open-ended governance-based constitution. This stage essentially relates to the changes made to the Treaty by the Single European Act in 1986.<sup>20</sup> Per that Act, the Treaties were adapted to the aspirations of the Delors' Commission to complete the internal market. Completing the internal market required a system of mutual recognition and a more intensified harmonization approach to be set up.<sup>21</sup> That approach, as the Commission envisaged in its Internal Market White Paper of 1985, would also tolerate, and to some extent even promote, regulatory competition between Member States' rules, incentivising those States to adapt their rules to attract

<sup>17</sup> Miguel Poiars Maduro, *We the Court. The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* 175 (Oxford: Hart 1998).

<sup>18</sup> See Hermann-Josef Blanke, *The Economic Constitution of the European Union*, in *The European Union After Lisbon – Constitutional Basis, Economic Order and External Action* 371 (Herman-Josef Blanke & Stefano Mangiameli eds, Heidelberg: Springer 2012).

<sup>19</sup> Joaquin Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community* 176 pp (Oxford: Hart 2002).

<sup>20</sup> Pierre Pescatore, *Some Critical Remarks on the 'Single European Act'*, 24 *Common Mkt. L. Rev.* 9–18 (1987).

<sup>21</sup> See also Blanke, *supra* n. 18, at 372.

businesses.<sup>22</sup> As a result, new Treaty bases were introduced, most notably Article 100A (currently Article 114 TFEU). That provision allows for a harmonization policy to be set up and for certain domains to remain more closely within the purview of States' regulatory jurisdictions. Although previously, directives to ensure the functioning of the Common Market could be adopted as well under Article 100 EEC Treaty, this provision was never meant to set up and justify a more discretionary mutual recognition, minimum harmonization and regulatory competition framework. This type of policymaking more closely resembles a so-called governance approach to economic policymaking.<sup>23</sup> Within that approach, political actors have discretion to tailor certain policies to what is deemed necessary. Policymaking is more open and free for those actors to design and determine. The law in that understanding does not necessarily only have a restraining role limiting States' powers, but also plays an enabling role ensuring that certain solutions could be accepted somehow. From that point of view, the EU Treaty constitutionalized to some extent discretionary governance to an extent previously unheard of. From now on, the EU could make political choices and translate those choices in legislative instruments, whereas previously, those choices seemed to have been made clearly already in and by the Treaty itself. From a normative point of view, this presents a key deviation from traditional ordoliberal ideas. Indeed, the EU would seem to open itself towards the kind of discretionary policymaking the ordoliberal school derided.<sup>24</sup>

The third stage is related to the introduction of provisions on economic and monetary Union with the Treaty of Maastricht and the series of events that have unfolded ever since. In that Treaty, the introduction of provisions governing economic policy and the liberty left to the Member States therein are reflective of the discretionary policymaking opportunities already introduced with the Single European Act. The main difference is that, until now, focus was on micro-economic policy and its integration. With the Maastricht Treaty, macro-economic policy is now also becoming a part of the economic constitution.<sup>25</sup> Where that Act allowed the EU to take discretionary measures taking the form of harmonization instruments to promote micro-economic exchanges, the setup of the Economic Union now explicitly confirmed that Member States as well could still have a large amount of discretion in determining and financing their macro-economic policies.<sup>26</sup> Indeed,

<sup>22</sup> Commission's White Paper on the Completion of the Internal Market COM 85(310) 1985, [http://europa.eu/documents/comm/white\\_papers/pdf/com1985\\_0310\\_f\\_en.pdf](http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf) (accessed 24 Oct. 2019).

<sup>23</sup> Devroe & Van Cleynenbreugel, *supra* n. 6, at 115.

<sup>24</sup> See Werner Bonefeld, *European Economic Constitution and the Transformation of Democracy. On Class and the State of Law*, 21 Eur. J. Int'l Rel. 876 (2015).

<sup>25</sup> Tomi Tuominen, *The European Banking Union: A Shift in the Internal Market Paradigm?*, 54 Common Mkt. L. Rev. 1540 (2017).

<sup>26</sup> Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* 181–204 (Cambridge: Cambridge University Press 2011).

the drafting of so-called broad economic policy guidelines as benchmarks did foster discretionary policymaking in how to organize and intervene in markets by public authorities.<sup>27</sup> At the same time, however, the introduction of the Monetary Union and the conferral of decision-making powers to an independent European Central Bank are more reminiscent of the original ordoliberal economic constitution. The rules of the game clearly set out in advance, clear prohibitions on Member States and on the European Central Bank to finance each other's debts and other rules were meant to make sure that the EU did not engage in discretionary economic policymaking.<sup>28</sup> The experience of crisis showed, however, that crisis governance and discretionary solutions to emergencies and other problems are more than ever at the forefront of the political agenda.<sup>29</sup> As a result, whatever ordoliberal aspirations the Monetary Union may have had at its origins, those have been made subordinate to the realities of discretionary politics relying on developing techniques of EU governance.

### 2.3 THE ECONOMIC CONSTITUTION AND EU MEMBER STATES

The shifting roles of law in the EU's economic constitution from a restraining to an enabling factor have also had an impact on the way in which Member States' roles under the EU economic constitution have come to be understood. A shift from a limited State to an experimenting State can be noticed in that regard. It will be submitted that this shift in roles has an impact on the ways in which the rule of law standards Member States have to maintain under the economic constitution are envisaged.

In the traditional ordoliberal-spirited economic constitution, Member States were actors which were depoliticized. They had a role as constituent members of an organization set up in which they determined the rules of the economic game prior to retreating from interfering with the market.<sup>30</sup> In that understanding, Member States are – just like businesses – above all prohibited from keeping in place certain rules that would go against the principles of the economic constitution. That framework could be identified within the realm of the founding European Coal and Steel Community and European Economic Community Treaties as well. Prohibitions imposed on Member States and enforced by either the European Commission and, above all, the Court of Justice have resulted in a view that the EU's framework somehow resembled the ordoliberal economic constitution ideal. Even when the

<sup>27</sup> Art. 121 TFEU, see also Devroe & Cleynenbreugel, *supra* n. 6, at 108.

<sup>28</sup> See Arts 123–127 TFEU.

<sup>29</sup> See for background, Luuk van Middelaar, *Alarums and Excursions. Improvising Politics on the European Stage* 301 p. (Newcastle: Agenda Publishing 2019).

<sup>30</sup> Wernhard Möschel, *Competition as a Basic Element of the Social Market Economy*, 2 Eur. Bus. Org. L. Rev. 713–21 (2001).



Court's interpretations of the economic constitution did not substantively match the ordoliberal vision,<sup>31</sup> from a formal point of view its focus clearly resembled an ordoliberal approach towards governing the economy. Member States in that understanding are above all limited in what they are allowed to do. The economic constitution is presented to them as an exogenous structure, the principles and provisions of which they have to obey.

The shift in focus towards more governance, both at the micro- and macro-economic levels, has also changed the perception of Member States as actors within the EU's economic constitution. To the extent that the European Union demands an ever larger participation of Member States, their role shifts to that of both a subject and an actor within the economic constitutional framework. Two key examples demonstrate this shift: the transformation of State aid law on the one hand and the increasing importance – and discretion – of national administrative authorities in the implementation of EU law on the other hand.

First, the way in which State aid law has been set up and enforced reflects an intensifying role of Member States as key actors of EU governance. Originally conceived of as a general prohibition in Article 107 TFEU,<sup>32</sup> with exceptions to them outlined in the Treaty itself and applied by the Commission without much room for discretion apparently, State aid has over time evolved into a legal framework characterized by Commission communications and other soft law guidance documents. Those documents explain in a certain way the prohibition covered by the Treaty, yet also grant a significant amount of discretion to the Member States in designing and trying to get approved certain aid schemes and other advantages. As Member States in the first place have to self-evaluate whether or not a given measure constitutes an aid subject to Commission notification, it would seem indeed that Member States are given somewhat more discretion to determine their own State aid policy and to put some accents within the vague norms of EU law.<sup>33</sup> Rather than the Commission enforcing in a strict way a prohibition listed in the Treaty in an ordoliberal constitutional sense, EU law now allows for a governance playing field to be put in place, in accordance with which States have more liberty to experiment in the shadow of vague EU law provisions.

Second, on a more institutional level, EU rules require an ever larger investment from Member States in the design and development of national – independent – administrative authorities tasked with overseeing the implementation and application

<sup>31</sup> See also de Cecco, *supra* n. 16, at 17–18.

<sup>32</sup> Art. 107 TFEU does not explicitly prohibit State aid, yet considers it potentially incompatible with the internal market, amounting de facto to a prohibition.

<sup>33</sup> See in that regard, Pieter Van Cleynenbreugel, *Staatssteun: do's en don'ts voor Belgische ondernemingen*, in *Mededingingsrecht: do's en don'ts voor Belgische ondernemingen* 116 (Pieter Van Cleynenbreugel ed., Antwerp: Intersentia 2017).



of EU law. Those authorities have to ensure the respect for EU law provisions, yet also have a certain margin of appreciation and discretion in shaping and developing a State's policy towards EU law. One can think of the data protection supervisory authorities,<sup>34</sup> the authorities overseeing the Member States' budgets in the context of economic governance,<sup>35</sup> market surveillance authorities and other similar bodies all created to ensure the enforcement of EU law. Those authorities are all part of the administrative edifice of the Member States, yet play a crucial role in ensuring the realization of the EU's economic ambitions. As a result, they have been integrated to some extent in the EU framework, giving rise to the so-called EU integrated or composite administration.<sup>36</sup> Within that framework, Member States are actors of EU economic governance under the banner of EU economic constitutional law provisions as well.

As a result, Member States are becoming active players in an ever changing economic landscape. The EU economic constitution tolerates such diversity and encourages Member States to play a more active role in it, in supplement of and next to the European Commission and the Court of Justice, the latter retaining the final authority over EU law. Beyond the law, however, complicated and multi-faceted governance frameworks are in place that complement the law and grant an ever more important governance role to Member States.

#### 2.4 RULE OF LAW PECULIARITIES: FROM ACCESS TO JUSTICE TOWARDS 'GOOD ECONOMIC ADMINISTRATION' PRINCIPLES

The abovementioned shifts in the shape and scope of EU economic constitutional law must be familiar to anyone studying this subject-matter. What remains or remained puzzling in that regard, however, has been the way in which the shifts in the EU economic constitution have also had an impact on the way in which the rule of law has been perceived in the Member States.

Trying to define the rule of law in all its varieties would be overambitious, yet as a concept, it requires some clarification. In its very essence, the rule of law is a principle of political organization, according to which all members of a society (including those in government) are considered equally subject to publicly disclosed

<sup>34</sup> See Art. 51 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] O.J. L119/1.

<sup>35</sup> Art. 5 Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 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, [2013] O.J. L140/11.

<sup>36</sup> See Herwig Hofmann & Alexander Türk, *The Development of Integrated Administration in the EU and Its Consequences*, 13 Eur. L.J. 253–71 (2007); Eberhardt Schmidt-Assman, *Introduction: European Composite Administration and the Role of European Administrative Law*, in *The European Composite Administration* 1–2 (Oswald Jansen & Bettina Schöndorf-Haubold eds, Antwerp: Intersentia 2011).

legal codes and processes.<sup>37</sup> That definition presupposes three elements: (1) the presence of binding legal rules, (2) the acceptance that those rules apply also to public or government bodies and perhaps less clear at first sight, (3) institutions or bodies that oversee their application and enforcement of those rules and that are themselves subject to some kind of oversight. The presence of those three elements constitutes a basis for a rule of law system to be put in place and to function properly. The three elements characteristic of the rule of law are present within the framework of the EU economic constitution as well. First, the EU Treaties impose a variety of prohibitions or rules that structure, limit and enable Member States' economic policies. Second, EU or Member States' institutions have been put in place to enforce those rules and to hold even public actors violating them to account. Third, those institutions and bodies themselves are accountable to other bodies, either at the EU judicial or Member States' political levels. So far, the whole idea of an economic constitution in itself also embeds the idea of the rule of law. From the very start, it was clear that Member States' public authorities also had to abide by the principles of EU law.<sup>38</sup> What is remarkable in the EU's institutional setup, however, is that the scope of binding legal rules has changed and, concomitantly, the need for and powers of institutions and bodies tasked with enforcing or implementing them.

At the origins, the EEC Treaty imposed certain economic policies upon Member States and businesses. In order to ensure that all public authorities and private enterprises abided by those rules, a rule of law based framework was set up, the focus of which lay with the Commission and the Court of Justice. The court, in recognizing its direct effect and primacy doctrines<sup>39</sup> and the Commission, in setting up and maintaining a strong and relatively strict antitrust enforcement system all contributed to shaping the rule of law in the field of economic integration. Member States not only had to accept EU rules being imposed, they also had to allow individuals to enforce those rules against them. The principle of access to justice has been crucial in that regard. Indeed, as a consequence of the Court of Justice's case law, it became commonplace for individuals first to go to Member States' courts or tribunals to invoke the lack of conformity of national law with EU economic constitutional principles. Those Member States courts had to accept and apply EU law and (could or had to) refer a question to the Court of Justice in case of uncertainty regarding the interpretation of EU law.<sup>40</sup> The preliminary reference system foreseen in the Treaties thus became the key institutional guardian of EU economic law. In

<sup>37</sup> At least according to the Oxford English Dictionary, [www.oed.com](http://www.oed.com) (accessed 24 Oct. 2019).

<sup>38</sup> See already, Gerhard Bebr, *Rule of Law Within the European Communities* (Brussels: Institut d'études européennes 1965).

<sup>39</sup> CJEU, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1; CJEU, Case 6/64, *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

<sup>40</sup> See still Art. 267 TFEU outlining that – to EU lawyers – well-known procedure.

addition, the European Commission's competition law practice, in which it had to authorize agreements between undertakings and through which it obliged Member States to notify their planned State aids played a fundamental supplementary role as well. In both instances, the idea of access to justice was operationalized. Individuals were to have access to either national courts or the European Commission to allow the EU economic constitutional provisions to play their role. As those principles were presumed clear from the very outset in the tradition of the ordoliberal economic constitution, access to justice was deemed sufficient for individuals to claim the rights they had under the EU's economic constitutional law provisions.

The transformation towards an economic governance constitution in the 1980s and the room for discretionary policymaking this brought for Member States also required additional rule of law principles to accompany and supplement the access to justice elements deemed necessary earlier. It is at this stage that the development of EU good governance principles really takes shape.<sup>41</sup> Principles of legal certainty and the protection of legitimate expectations,<sup>42</sup> effective judicial protection,<sup>43</sup> good administration<sup>44</sup> and equality<sup>45</sup> have all been either acknowledged or developed throughout the Court of Justice's case law.<sup>46</sup> Interestingly, those principles applied not only to EU institutions when taking policy decisions affecting individuals or Member States, yet also to Member States' authorities and bodies when taking decisions grounded in European Union law.<sup>47</sup> Moreover, national authorities have to disapply national law provisions wherever their application would go against EU law.<sup>48</sup> Throughout the application of EU law in those context, those authorities are nevertheless bound to respect the EU legal order's good administration principles. The emergence of good governance principles has continued in the wake of the establishment of the Economic and Monetary Union and the extension of the EU

<sup>41</sup> Some principles had already come forward in other contexts, both at Member State and European levels, see Devroe & Van Cleynenbreugel, *supra* n. 6, at 107–09.

<sup>42</sup> Jérémy Van Meerbeeck, *The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust*, 41 Eur. L. Rev. 275–88 (2016) and Eleanor Sharpston, *Legitimate Expectations and Economic Reality*, 15 Eur. L. Rev. 103–60 (1990).

<sup>43</sup> Rob Widdershoven & Sacha Prechal, *Redefining the Relationship Between 'Rewe-Effectiveness' and Effective Judicial Protection*, 4 Rev. Eur. Admin. L. 31–50 (2011).

<sup>44</sup> Art. 41 Charter of Fundamental Rights of the European Union, see also Joana Mendes, *Good Administration in EU Law and the European Code of Good Administrative Behaviour*, EU Law Working Paper (2009), [http://orbilu.uni.lu/bitstream/10993/29457/1/Good%20Administration%20EU%20Law\\_2009\\_09.pdf](http://orbilu.uni.lu/bitstream/10993/29457/1/Good%20Administration%20EU%20Law_2009_09.pdf) (accessed 24 Oct. 2019).

<sup>45</sup> See Constanz Semmelman, *The European Union's Economic Constitution Under the Lisbon Treaty: Soul-Searching Among Lawyers Shifts the Focus to Procedure*, 35 Eur. L. Rev. 516–41 (2010).

<sup>46</sup> They have been recognized as general principles of law, see Takis Tridimas, *The General Principles of EU Law* (2nd ed. Oxford: Oxford University Press 2010).

<sup>47</sup> That is, when they act within the scope of EU law; on difficulties relating to the definition of that scope, see Michael Dougan, *Judicial Review of Member State Action Under the General Principles and the Charter: Defining the 'Scope of Union Law'*, 52 Common Mkt. L. Rev. 1201–46 (2015).

<sup>48</sup> Maartje Verhoeven, *The Costanzo Obligation: The Obligations of National Administrative Authorities in the Case of Incompatibility Between National Law and European Law* 369 pp (Antwerp: Intersentia 2011).

economic constitution to macro-economic governance. The establishment of ever more refined monetary and prudential supervisory mechanisms have been accompanied by an explicit respect for the EU rule of law.<sup>49</sup>

The fields of State aid and the creation of EU-demanded national regulatory and supervisory authorities can once again both serve as illustrations of that tendency. First, in the realm of State aid, questions have arisen to what extent the EU law principles of legal certainty and the protection of legitimate expectations have to be applied whenever a public body decides to recover State aid. Some Member States have argued in that context that their national constitutional principles of legal certainty or the protection of legitimate expectations are to be interpreted more widely than the ones recognized at the EU level and applied in the Court of Justice's case law.<sup>50</sup> According to the Court itself, in that context, the EU principles prevail over the national ones, as Member States are acting within the scope of EU law.<sup>51</sup> It is indeed argued that whenever acting within the scope of that law, the EU law principles will result in the non-application of similar national law principles. The EU principles of good administration and the EU rule of law standards they incorporate, thus apply within those domains governed by EU economic law. Second, in relation to EU-mandated national supervisory and regulatory authorities, a similar conclusion can be drawn. To the extent that those bodies apply, implement or enforce EU law provisions, they act within the scope of EU law. When doing so, EU good administration principles characteristic of the EU Rule of law also apply to the operations of those bodies. Although structured and set up as bodies under national law, their EU mandate implies that they have to abide by EU law principles in large parts of their day-to-day operations.<sup>52</sup>

### 3 ADDRESSING RULE OF LAW CHALLENGES WITHIN EXTENDED RULE OF LAW PROMOTION INITIATIVES?

The previous section highlighted the rule of law consequences of the shifts in EU economic constitutionalism. Those shifts and the evolution towards more discretionary EU economic policymaking have given rise to particular economic

<sup>49</sup> See in that regard, Vestert Borger, *Central Bank Independence, Discretion and Judicial Review*, in *EU Executive Discretion and the Limits of Law* 118–31 (Joana Mendes ed., Oxford: Oxford University Press 2019).

<sup>50</sup> See, by way of example, CJEU, Joined Cases C-34603 and 529/03, *Atzeni et al. v. Commission*, EU: C:2006:130, paras 64–66.

<sup>51</sup> Pieter Van Cleynenbreugel, *Recovering Unlawful Advantages in the Context of EU State Aid Tax Ruling Investigations*, 1 *Mkt. & Comp. L. Rev.* 15–48 (2017).

<sup>52</sup> See Pieter Van Cleynenbreugel, *Market Supervision in the European Union. Integrated Administration in Constitutional Context* 209–16 (Leiden: Brill 2014).

constitution-related rule of law challenges that have persisted since the 1980s (1). Although those challenges have been around for a long time, the Commission's recent shift in focus to promoting more or a rule of law culture may present an unprecedented opportunity also to address them. It will be submitted, therefore, that if the European Commission is truly keen on promoting a rule of law culture among the Member States, it should also take the challenges inherent in the EU economic integration framework and EU economic constitutional law into account (2):

### 3.1 PERSISTENT RULE OF LAW CHALLENGES

The gradual development of EU good economic administration principles has put rule of law flesh on the bones of EU economic policy. With the emergence of more discretionary policymaking at the EU level or at Member State level within boundaries set by EU law, it is not surprising that additional good administration principles have also seen the light of day. Those principles, as it was stated in the previous section, apply whenever Member States are acting within the scope of EU law. That simple statement – at least in theory – raises two challenges for the rule of law at Member States' level in the realm of economic policymaking.

First, the scope of EU law remains difficult to determine exactly. Although the EU has been conferred competences in economic policymaking and everything outside the scope of those competences in principle escapes EU law, the distinction is more fluid in practice.<sup>53</sup> That is due to the fact that some competences are shared rather than exclusively conferred on the EU. When that is the case, the EU taking action in a certain domain pre-empts the Member States from keeping their rules in place in that field.<sup>54</sup> Also in the realm of exclusive competences, those parts of competences not transferred to the EU remain with the Member States and would therefore remain subject to those States' rule of law-based principles.

Second, even when the scope of EU law could be defined with some clarity, the risk of double 'rule of law' standards in the field of economic policymaking always looms in the background. EU law and national laws can adhere to a variety of rule of law principles and features. Those features can be completely different in scope or scale or be structured in a slightly different way. Whatever their appearance, it is clear, however, that the risk of double rule of law standards within one Member State and the obligation for national institutions or bodies to apply different good economic administration principles depending on the laws applicable. That is an

<sup>53</sup> Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, in *Principles of European Constitutional Law* 275–308 (2nd ed., A. Von Bogdandy & J. Bast eds, Oxford: Hart 2009).

<sup>54</sup> Robert Schütze, *Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption*, 43 *Common Mkt. L. Rev.* 1023–48 (2006).

inherent consequence of the way in which the EU legal order has been set up, yet it also allows for rule of law variations at Member State level. Such variations may frustrate individuals and enterprises, and may, at the very least, complicate matters more than they should be.

A good example of such frustration can be found in pending cases regarding tax rulings offered by different Member States to multinational corporations. Tax rulings amount to the tax administration taking a binding decision stating it will apply tax rules in a certain (favourable) way vis-à-vis a particular corporation. The European Commission has not hesitated to classify many of those tax ruling practices as selective measures constituting unlawfully granted State aid, incompatible with the EU internal market.<sup>55</sup> In contesting the obligation to repay the advantages granted, corporations have stated that they legitimately expected a tax ruling to be legal. The principle of the protection of legitimate expectations, which appears both at Member States and at EU level, has been interpreted more strictly within the scope of EU law, however. Questions therefore arise what version of that principle is to be applied and interpreted vis-à-vis tax ruling beneficiaries and whether a streamlining of that principle across different governance levels would not be desirable. Although in theory it is clear that, within the purview of EU State aid law, the EU principle of legitimate expectations would apply, a similarly phrased yet differently structured national law principle would apply whenever national economic policymaking falls outside the scope of EU law. The dispute in the tax ruling cases precisely turns around which rules apply to that case. What is clear in any case, however, is that those differences have been in place for a long time and remain in place at this stage.

In light of the foregoing, one could question legitimately why individuals or enterprises are to be subject to two sets of rule of law-inspired good economic administration principles, depending on the applicability of EU law or not, whenever Member States' economic policymaking, even outside the scope of EU law, has to align with the EU's objectives. The EU's economic constitutional law framework, embedded in the rule of law, consistently allows those double standards to remain in place:

### 3.2 THE 2019 BLUEPRINT MOMENTUM AS AN OPPORTUNITY ALSO TO ADDRESS THOSE PERSISTENT CHALLENGES?

The presence of double standards in rule of law-inspired principles accompanying EU economic policymaking has been well-known and may be tolerated from a legal

<sup>55</sup> See Van Cleynenbreugel, *supra* n. 51, at 16–17.

point of view. Given that the EU has only conferred competences and powers, policymaking falling outside the scope of those competences and powers in principle remains governed by Member States' rule of law principles. At the same time, however, it can be questioned whether the EU institutions could indeed still tolerate the continuous existence of those rule of law peculiarities when it also demands an increased rule of law-focused scrutiny from its own Member States. If the Commission is serious – which it is – about creating a common rule of law culture across all Member States, it would make sense simultaneously to acknowledge and address certain challenges rule of law inspired principles have led to in the EU legal order itself, in addition to just focusing exclusively on rule of law deficiencies at Member State level. So far, that aspect is insufficiently present in rule of law blueprint discussions. As the previous section showed, some rule of law-based features of the economic constitution could nevertheless be improved.

To do so, acknowledging the imperfections in the EU economic constitutional law framework – the original reason for which the EU was created – from a rule of law perspective would be a useful step forward. Doing so, it is submitted, may in the longer term even increase the Commission's legitimacy in questioning Member States' rule of law practices and shortcomings. When it would itself be engaged in a critical reflection on its own rule of law practices, it would indeed have more moral authority than it currently has to directly warn and reprimand Member States that have deficient or potentially failing rule of law systems. We can therefore only hope that the new Commission will use the rule of law momentum in place also to seize this opportunity to address the particular EU-specific rule of law challenges as well.

#### 4 CONCLUSION

Debates on the scope and contents of the rule of law concept have recently re-entered the spotlight, mostly as a consequence of some Member States receding on their own rule of law standards. In response to those developments, the Commission adopted a blueprint proposing to promote a rule of law more streamlined culture across all EU Member States. In that blueprint, however, the Commission only focused on rule of law issues at Member State level, deciding not to take into consideration rule of law challenges materializing as a result of the interaction between EU and national (economic) laws.

The purpose of this article was to summarize and diagnose precisely the latter rule of law challenges. Revisiting the notion of economic constitution and the way in which it has transformed over time within the EU legal order, this article zoomed in on the role Member States have had to play in guaranteeing the EU's rule of law in economic policymaking. Identifying some well-known shortcomings in that regard,



the article subsequently invited the European Commission to broaden its rule of law culture promotion approach also to include EU-Member State rule of law challenges. It was submitted that building upon the momentum of the 2019 blueprint to do so could contribute to a more legitimised criticizing of Member States' own rule of law deficiencies.