10 A Two-Way Street

Flexible and Rigid Legitimation across Actors and Policies in the EU

Julien Bois and Jose Piquer

Faced with a legitimacy-threatening predicament, actors are forced to choose from a limited range of responses. In European Union (EU) politics, actors may interpret the *acquis communautaire* in a rigid, literal manner ('rigidity'). Alternatively, they may choose to be more flexible, accommodating the demands expressed by constituencies seeking change ('flexibility'). While actors opting for a rigid approach tend to stress the importance of the *status quo*, a more flexible approach leads to a redefinition of the rules and a new (re)interpretation. One might think that the choice between rigidity and flexibility depends on the political and legal priorities associated with the predicament; in particular, one might expect judicial actors to respond differently from executive actors, as well as to respond differently in different policy fields. However, choices also vary in how far they contribute to reinforcing (or stabilising) EU integration (Estella 2018).

We conceive of legitimation as an iterative process between at least two sets of actors. We take (re)legitimation to succeed where actors' discourses make some attempt to justify their claims in terms of European integration, and when, in turn, these claims gain consent from relevant constituencies. Our key argument is that very similar legitimation patterns occur across policy fields and across both judicial and political 'arenas'.

We develop this argument by investigating four cases across two policy fields, economic governance and labour migration, involving two types of actors – national and European – from allegedly different 'arenas', judicial and political. The four cases summarised in Table 10.1 are: Prime Minister David Cameron's attempt to renegotiate free movement of persons prior to the 2016 referendum on Britain's EU membership; the *Dano* ruling, which limited 'social tourism' in the EU; Spain's request of a financial bailout in June 2012; and the *Pringle* ruling, which confirmed the compatibility of the European Stability Mechanism (ESM) with EU law.

Table 10.1 Cases: Policy Fields and Type of Actors

	Executive Actors	*Judicial Actors*
Labour Migration	Cameron's renegotiation (2016)	*Dano* ruling (2014)
Economic Governance	Spain's financial bailout (2012)	*Pringle* ruling (2012)

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All these cases of attempted (re)legitimation were at a moment of crisis when the EU was caught in a politico-legal predicament. We are interested in understanding how the EU adapted to circumstances. The comparison across cases tells us something distinct from assessing the cases independently; namely, that even if we investigate different actors (executive and judicial), we end up with legitimation constraints that are common to them. A crucial insight of the chapter is that a common legitimation logic operates across the political and legal arenas in times of crisis.

The chapter is organised as follows: first, we justify our decision to analyse the EU's political and judicial arenas within a single social-scientific framework. We believe that the legal–political dichotomy needs better conceptual clarification, particularly in the EU context. Then we outline our framework through the metaphor of a 'two-way street'. This framework captures an iterative process between national actors demanding solutions from EU institutions (going up the street) and European actors responding to these requests (going down the street). In our four cases, the legitimation street runs from national capitals to Brussels and Luxembourg, and back again. The image conveys the notion of a reciprocal, give-and-take exchange between national and European actors. We use the framework to discuss the four cases: two of them are characterised as 'flexible' re-legitimation – the Spanish bailout and *Pringle*. The other two displayed 'rigidities' in re-legitimation dynamics – Cameron's renegotiation and *Dano*. We conclude the chapter by suggesting further applications of our approach, while acknowledging its limits.

Recoupling the 'Legal' and the 'Political'

In EU studies, law and politics seem two distinct realms of analyses. On the one hand, legal scholars have consolidated the stand-alone discipline of EU law, detailing the regimes and effects of the EU's legal order and placing the Court of Justice of the European Union (CJEU) at the centre of the analysis. Legal scholars have analysed European and national norms and assessed their legal basis, as well as the application to the facts at hand and the reasoning behind legislation and judicial adjudication (Beck 2013; Conway 2014). On the other, political scientists and sociologists have focused more on the actors themselves, studying the power dynamics while trying to grasp the broader implications for democratic politics in the EU.

There are good reasons to study legal and political questions separately. Asking relevant research questions and providing specific answers require different expertise. Legal scholars are better equipped to understand complex legal procedures. Most legal scholars, however, are insufficiently acquainted with social sciences methodologies, and less familiar with relevant theories in political science and sociology. Hence, scholars of different disciplines often struggle to understand each other even when addressing similar objects (Joerges 1996; Kamphof and Wessel, 2018).

For sure, the 'political' and 'legal' arenas are relatively autonomous from each other. The CJEU and its relationship with national courts is brokered by the EU legal community with little external interference. By contrast, political actors like national governments have steered European integration rather independently; first, under a permissive consensus carved out of indifferent national electorates (Lindberg and Scheingold 1970), and lately in the face of a constraining dissensus defined by more skeptical publics, greater politicisation and contestation over European issues (Hooghe and Marks 2009; Bremer et al. 2020).

Yet, we believe there are good reasons to integrate both arenas in the same enquiry. Studying issues that are tackled simultaneously by political and judicial actors can help us grasp the real dynamics of change in the EU. It can also show how the EU relies on contributions from various actors to justify its authority. In the EU, political and judicial actors operate within a politico-legal order that is anything but typical. The unique EU legal order binds national and European institutions alike, creating similar constraints for different actors. The principles of 'primacy' and 'direct effect' of European law, along with the steady but uninterrupted expansion of judicial competences over an increasing number of policies, have transformed the whole institutional frameworks for how law and politics interact at European and national levels of governance. Politics is increasingly shaped by courts' decisions, while legal decisions are also influenced by the politics of the time. At the European level, Stone Sweet (2000) notes that 'the ECJ [now CJEU] fashioned a judicially enforceable constitution out of international treaty law – a unique achievement that is shown to have fundamentally transformed the European polity (…) in a multitude of ways' (2000: 153).[1] At both levels, parliamentarians legislate more like constitutional judges and judges increasingly take into account the will of legislators in adjudicating constitutional disputes, while carving out wide-ranging powers of judicial review for themselves (ibid.: 49).

In contrast to most national constitutions, European treaties are quite extensive (Scharpf 2017). Because of the principle of conferral enshrined in Article 5(2) of Treaty on the European Union (TEU), whereby the EU can only operate in areas to which it is expressly delegated (Grimm 2017), the Treaty on the Functioning of the European Union (TFEU) contains comprehensive provisions on EU policies, which are developed by EU secondary legislation. Therefore, political and judicial actors are similarly constrained by primary and secondary legislation in deciding, interpreting or adjudicating cases over EU affairs. All this is apparent in an Economic and Monetary Union (EMU) anchored in the principles of legal constitutionalism: 'a political doctrine that assumes that a legitimate political regime must rest on a set of legal rules that constrain the actions of politically responsive decision-makers' (Bellamy and Weale 2015: 259).

The sheer centrality of EU law in the Union's decision-making creates impasses in times of crisis. Political actors have to satisfy demands that are difficult to reconcile with prevailing laws, while judicial actors also find themselves adjudicating 'political time-bombs'. The euro crisis illustrates

these predicaments. When politicians were unable or unwilling to address the institutional shortcomings of the euro area, national and European courts emerged as decisive actors in the crisis, wilfully or not (Estella 2018; Tuori and Tuori 2014; Fabbrini 2014). In sum, recoupling the legal and the political is often necessary if analysts want to understand their object of study.

Re-Legitimating the EU: Traps in the 'Two-Way Street'

Legitimation Traps

The legitimacy of a political system rests on willing submission to power-holders (Beetham 2013). This submission must be viewed as 'justified' by subordinates (Weber 1978). In the absence of a crisis, this relationship is difficult to assess empirically because the bonds between subordinates and power-holders are rarely questioned. During a crisis, however, subordinates may challenge the claims of power-holders to political authority.

Political crises are 'fluid' situations (Dobry 1986) where previously established institutional arrangements cease to function smoothly.[2] Crises lead some social groups to demand change – in our imagery, going up the legitimation street – and require power-holders to respond – going down the street. Analysing the exchange between those who demand change, and those who are expected to act upon these demands, is key to grasping the dynamics of re-legitimation.

We rely on the framework developed by Fritz Scharpf (1988; 2006) to understand the institutional conditions of EU policymaking and their consequences. Scharpf identifies three distinct modes of European governance for *political* and *non-political* policy choices: the 'intergovernmental' (or 'bargaining') mode; the 'joint-decision' (or 'Community method') mode and the 'supranational-hierarchical' mode.

EU Treaties are extensive and difficult to amend. The demanding requirements for policy change (unanimity or qualified majority) coupled with the prevalence of 'bargaining'[3] between governments creates a 'joint-decision trap' (Scharpf 1988; 2006): a prescient concept Scharpf developed to explain how sub-optimal policy outcomes are structurally determined in institutional arrangements that require joint-decisions.[4] With that notion, Scharpf aimed to explain a paradox of European integration: frustration without disintegration and resilience without progress (Scharpf 1988: 242).

In times of crisis, some actors demand changes to the *status quo*. But these actors find it difficult to reach optimal solutions via solidaristic 'problem-solving' either because of high thresholds required by unanimity and qualified majority voting, or because they lack *common* interests, values or norms (Scharpf 1988: 261). In the absence of 'solidarity' or 'commonality', actors settle for sub-optimal policy outcomes that fail to unblock blockages or represent lowest-common denominator compromises (2006: 848).

Ongoing joint decisions systems have an advantage, though. Since exit from the system is precluded or very costly, actors face strong pressures to reach an agreement. Non-agreement would imply, otherwise, the self-defeating continuation of past policies in the face of a changing policy environment (Scharpf 1988: 258, 265). As long as members keep deciding jointly, they keep muddling through and engaging in flexible, if sub-optimal, policymaking. Actors count on new chances for negotiating in an iterative game. But, once a player starts negotiating as if in a single-shot game, the incentive structure changes. We discuss implications of this below for how the British Prime Minister David Cameron tried to renegotiate freedom of movement prior to the 2016 referendum.

In contrast to national executives negotiating in the Council, the CJEU operates under a 'supranational-hierarchical' mode.[5] In this mode, the CJEU is not caught in a joint-decision trap because its judges decide by simple majority. In addition, judicial policymaking functions are largely exercised without the involvement of politically accountable actors. Judicial decisions are well protected against political correction because the Court makes decisions that cannot be (easily) reversed by politicians: 'If decisions are based on an interpretation of treaty provisions, they could be corrected only through amendments that must be ratified by national parliaments or referendums in all Member States' (Scharpf 2006: 851–852).

Scharpf later revised his original framework. In a 2006 article, he noted the role of judicial decision-making in sustaining policymaking effectiveness by avoiding the 'join-decision trap' (2006: 854).[6] In other words, judicial decision-making emerges as an alternative route to reach binding decisions at the EU level, becoming a kind of escape route for 'trapped' political actors.

While acknowledging that political and judicial actors operate within two different governing modes, we claim that both actors adopt similar strategies in the face of a legitimation predicament: actors tend to be flexible while trying to accommodate policy change, if that accommodation advances EU integration (Rasmussen 1986; Weiler 1991; Burley and Mattli 1993; Alter 2001; Conway 2014; Pollack 2018). However, actors will be more rigid if integration is under threat.

A flexible approach leads to a new understanding of the rules, underpinning a different *status quo.* In contrast, a rigid interpretation of the rules limits the set of possible responses. It is necessarily less 'creative' in negotiating and interpreting EU law and less likely to satisfy 'challengers' who demand change. Hence it is less likely to be a satisfactory response to the original legitimation predicament. In turn, a re-legitimation failure may raise, under crisis circumstances, the prospects of disintegration. We argue the EU is better placed to meet demands that imply deeper integration than accommodate demands that may facilitate disintegration.[7]

The key challenge is to define, precisely, what 'integration' means for EU institutions whose prerogatives are contested. Historically, the EU has adapted in various ways in the face of contestation: 'integration by subterfuge'

(Héritier 1997), 'experimentalist' governance (Sabel and Zeitlin 2012), 'exploratory' governance (Dawson et al. 2016), '*de novo*' bodies (Bickerton et al. 2015), 'interstitial' institutions (Bátora 2020), or 'differentiated integration' (Leuffen et al. 2013) all conceptualise paths by which EU governance typically adapts to changing policy environments and to contestation. Some of these paths are available within the existing legal framework. Others require solutions outside it. Political and judicial actors support (and legitimise) projects of cooperation between member states and EU institutions even where those projects are not directly available within the prevailing legal framework. Moreover, these 'off-track' paths are not exclusively intergovernmental. They can involve supranational institutions like the European Commission and the ECB. For example, new transnational projects in European economic governance such as the European Stability Mechanism (ESM) do not belong to the EU *per se*. They are institutional innovations that could not be adopted *within* the *status quo* because of requirements for unanimity, the need of ratification by national referendums[8] or just because the innovations disregard other obligations in the TFEU.[9] However, these parallel projects do constitute some form of EU integration. This, crucially, is the commonality we identify across various forms of flexible institutional adaptation.

A key challenge is to convince various publics of the legitimacy of these projects.[10] For example, when approving a financial rescue for a member state, national political actors are expected to seek (direct or indirect) consent from citizens and convince them of the legitimacy (*justifiability*) of the policy choice. The CJEU speaks to a different and narrower public, however. Its judges are first and foremost EU legal specialists, they are not elected via the ballot box and their core function is to interpret the law, so the Court must convince its audience of the soundness of its judicial decisions.

Political and judicial actors deploy different legitimating discourses to their publics: political actors use a political language that seeks to gain the consent of a majority of citizens, while judicial actors adopt the language of legal interpretation in order to satisfy legal experts. Yet, these discourses display similar patterns of flexibility or rigidity. Both actors deploy discourses that justify either a flexible (extensive), or a rigid (narrower) interpretation of existing rules. While the *specificity* of political and judicial discourses is different, the *core* 'flexibility-rigidity' dialectic is always present.

A 'Two-Way Street'

We use the 'two-way street' metaphor to summarise our arguments about re-legitimation practices in the EU. The image evokes a reciprocal exchange between actors that is not a 'one-way' process. The street runs from national capitals to Brussels and Luxembourg, and back again. The image of the 'two-way street' also makes the otherwise abstract idea of legitimation practices more precise by emphasising those practices are not 'stand-alone' discourses or actions. Just like those seeking change must 'go

up the legitimation street' to express their demands (via elections, protests), power-holders are also expected to 'go down the street' to respond to these demands (in the form of a new settlement, legal changes). How this interactive process unfolds, and the exact parameters of this exchange, remains case specific, however. The image does not in itself convey information about substantive solutions to a legitimation predicament. It simply offers a general heuristic for thinking about these questions.

Legitimation in Times of Crisis: Four Cases

We develop our argument across four cases. As explained earlier, two of the cases involve exchanges between national and European political actors; the other two deal with exchanges between national and European courts. Two cases are of changes in the economic governance in the euro area. Two deal with matters of labour migration within the EU (Table 10.1). We first examine two cases where actors adopted 'flexible' legitimation strategies before turning to two cases of 'rigid' legitimation.

'Flexible' Legitimation Case 1. Spain's Financial Rescue: 'A loan with very good conditions.'

In late 2008, Spain slid into recession after a decade of expansion and the bursting of a 'bubble' in real estate and credit markets. By the end of 2011, almost one in four Spanish workers were out of work, while the government's public deficit hit an all-time high of 11 per cent of GDP (Banco de España 2017: 81). Amidst economic, financial and social turmoil, the Spanish crisis reached a new peak in mid-2012 when foreign creditors took fright and Spanish banks were cut off from new financing on the wholesale market.

On 9 June 2012, the Eurogroup recognised the severity of the crisis and urged the Spanish government to make a formal request. On 25 June, the Spanish government requested EU assistance for the restructuring and recapitalisation of the banking sector. Following an 'independent' country assessment, on 20 July the Eurogroup approved an assistance package of up to €100 billion. Three days later, the rescue was endorsed by a Council Decision. In less than a month, Spain's request went through all the necessary approvals.

The agreement was signed with the European Financial Stability Facility (EFSF) until the European Stability Mechanism (ESM) became fully operational. The assistance to the financial sector came with bank-specific and sector conditionality. Loans were given to the Spanish state, which transferred them in an indirect recapitalisation[11] to banks via the Fund for Ordered Bank Restructuring (FROB). The rescue, however, meant that Spain's fiscal position deteriorated, since the state remained legally responsible for repaying the loans.[12]

Establishing the ESM was a legal minefield. The same month that Spain requested the rescue, the German Constitutional Court heard a case that challenged the legal basis of the ESM Treaty. There were also pending cases

in Estonia and Strasbourg, and the CJEU simultaneously heard the *Pringle* case (see p.00). Notwithstanding these legal challenges, the Spanish government and EU institutions moved apace. Spain and European authorities signed a Memorandum of Understanding[13] with the participation of the International Monetary Fund (IMF). When the ESM took over the programme in November 2012, it designed a new cashless system to speed Spain's access to the funds (ESM 2019: 226–228).

For Spain's centre-right government, a targeted programme was politically less controversial than a sovereign bailout with full conditionality. Only days before requesting financial assistance, Spain's Prime Minister Mariano Rajoy had explicitly ruled out rescuing the Spanish banks.[14] Once the assistance was approved, the Finance Minister, Luis De Guindos, claimed it was 'nothing like a rescue but a loan that was given to Spain with better-than-market conditions'.[15] Rajoy then insisted that it was a credit that would be repaid by the banks.[16] The word 'rescue' was avoided in every public statement.

In his statement to the Congress of Deputies, Rajoy blamed the previous Socialist government for not solving the banking crisis, while he equated the decision to seek external assistance with what other European countries and the US had done in 2008 – as if rescuing national banks with national public funds was equivalent to asking the EU for these funds. The best solution, Rajoy told the Chamber, is 'to ask for a very cheap credit (…) because right now Spain cannot ask the market for €100 billions'.[17] Spain's programme reflected the fragile EU consensus on bailouts at the time: conditional and with no mutualisation, targeted and limited (18 months). It also incorporated 'bail-in', the formula agreed by Angela Merkel and Nicolas Sarkozy in Deauville, which requires bank creditors to meet the costs of bank recapitalisation before any form of public contribution is made.

The European Commission has since praised the Spanish rescue as 'highly successful' with a 'simple, smart and ambitious' design, 'strong ownership, effective administration and widespread public support' and full compliance with the Memorandum of Understanding (MoU).[18] Likewise, the ESM has acclaimed the effectiveness of the programme in every official document published.[19] Rajoy later admitted that the success of the programme was decisive for assuring the irreversibility of the euro. De Guindos also recognised that the financial rescue avoided a total bailout of the country (Noceda 2017: 244).[20] For De Guindos, rescue-related reforms in banking resolution constituted the 'germ of banking union' (ibid.: 246). This was an exceptional programme – the first of its kind for the fourth largest euro area member. It was also one in which EU actors showed great flexibility: The CJEU found ways to put the ESM on a sound legal basis; the ESM came up with creative solutions to finance assistance to Spain, and the European Commission tried to meet demands of stakeholders by, for example, imposing limited policy conditionality.

The decision to approve the financial rescue without imposing macroeconomic conditionality set the Spanish programme apart from the rescue packages in Greece, Portugal and Ireland. During the Eurogroup negotiations,

the Dutch and Finnish representatives had pressed for more stringent policy conditionality in the Spanish programme. But the Spanish finance minister, Luis De Guindos, refused. De Guindos argued that dictating Spain's economic policy from outside was like asking for a sovereign rescue without getting the money. If the Eurogroup insisted on demanding conditionality, Spain would request a full programme for €500 billion. Then, De Guindos added (2016: loc.1348), the Eurogroup should prepare €700 billion more to rescue Italy, which was likely to come next. Eventually, only financial sector conditionality was demanded in exchange for approving the Spanish programme.[21]

Meanwhile, by refusing to subject the agreement to further parliamentary or popular approval, Rajoy embraced the elite-driven, emergency politics of muddling through the euro crisis (White 2015). The legitimation approach of the Spanish government aligned with that of other key actors in the EU. It contrasted with the political strategy of Greek prime ministers, Yorgos Papandreou and Alexis Tsipras, who put the bailouts to a popular vote in 2011 and 2015.

In the Spanish case, successful re-legitimation was also a matter of timing. It was the crisis in Spain, Adam Tooze (2019: 432) notes, which forced comprehensive eurozone reform back onto the agenda. Spain's rescue came at the most critical moment for the survival of the euro: in the interregnum between the old-new (EFSM) and the new-new regime (ESM) for assisting member states; right before Mario Draghi's commitment to *whatever it takes* (July 2012) and at the time the European Council asked President Herman Van Rompuy to draw up a roadmap for a genuine Economic and Monetary Union (EMU) (28–29 June 2012).[22]

Amidst a sense of urgency, European integration gained momentum. The solution to the banking crisis in Spain fitted the vision of EU leaders at the time.[23] As a template for banking recapitalisation, it was a compromise most EU member states were willing to accept. By making apparent the failures of the old regime, the Spanish programme created a new model for banking rescues (Tooze 2019: 436). National and EU actors converged on public support for deeper European integration of banking.[24] Overall, Spain's 'flexible' rescue accelerated a new project of integration through banking union. Spain's rescue aligned with European integration in ways Cameron's demand to restrict free movement of people never did. To keep the euro afloat, the rescue of Spanish banks was a price worth paying. Spain's banking crisis is over. Banking union, albeit incomplete, is a landmark in European economic integration. As a close observer of what happened in 2014 put it: 'banking and credit is seen in the same way as coal and steel in the 1950s: the necessary foundation for successful economic development' (Dullien, 2014: 2).

'Flexible' Legitimation Case 2. The **Pringle** *Case: 'Safeguarding the Euro area as a whole'*

The legitimation predicament generated by the sovereign debt crisis also affected the judicial arena. When Ireland ratified the treaties establishing the

Fiscal compact and the ESM, an independent Member of Parliament, Thomas Pringle, issued an injunction to the Irish Supreme Court. Pringle claimed that the ratification of these instruments contravened both the Irish constitution and the TFEU. While the Irish court rejected any incompatibility between the ESM and the Irish constitution, it referred the case to the CJEU in July 2012, to examine the compatibility of the ESM treaty with the EU treaties.

Upon Germany's request, and with a common feeling of urgency (de Witte and Beukers 2013), member states had agreed to use the simplified procedure for revising the treaties (Art. 48(6) TEU) to insert a new paragraph to Art. 136 TFEU. This indicated the adoption of a permanent bailout fund outside the EU legal framework but compatible with it: a compatibility that was only recognised *a posteriori* (since the fund already existed).

This provision raised several doubts, and Thomas Pringle's lawyers expressed them to the CJEU. The simplified revision procedure can only create amendments to the third part of the TFEU, not to other provisions of the treaties.[25] The treaties already provided for a mechanism of 'temporary' financial rescue (Art. 122 TFEU), while otherwise prohibiting bailouts in principle (Art. 125 TFEU). Finally, the ESM had entered into force before the regulation indicating the inclusion of Art. 136(3) was published, casting doubts on the legality of the whole procedure. The situation was legally tricky.

The Court was in uncharted waters. For the first time judges had to interpret Art. 125 TFEU. Economic governance cases were scarce, and the few precedents – on the Stability and Growth Pact in the mid-2000s – showed member states were willing to disregard conclusions of the Court (Heipertz and Verdun 2010). Moreover, most preliminary references ask for clarification of unclear treaty provisions. By contrast, the language of Art. 125 TFEU is unusually clear and prescriptive.[26] Bailouts between member states are in principle forbidden. Yet the Court was being asked by member states to endorse the opposite.

This is where the Court showed some flexibility in its reasoning. Rather than opting for a literal interpretation of the no-bailout (which according to the judges would be misleading), it referred (for the first time ever) to the preparatory works of the Maastricht Treaty (Kuijper 2018). The Court found in those works that the purpose of Art. 125 was to ensure that member states conduct a sound budgetary policy. Financial rescues would not be completely rejected by the new arrangements for economic governance (as recognised in Art. 122 TFEU). These rescues may even be necessary if the overarching principle of 'safeguarding the euro area as a whole'[27] was in jeopardy. A permanent bailout mechanism would have been contrary to the treaties, but since member states concluded the ESM outside the EU's legal framework, they were not contravening EU law (Hinarejos 2015). The Court had reasons to adjudicate the case differently, however. Its reference to the preparatory works of Maastricht is dubious at best (de Witte and Beukers 2013); member states are supposed to respect their EU commitments even when acting

outside of the EU framework, as they are bound by the duty of sincere cooperation in Art. 4(3) TEU; the introduction of Art. 136(3) TFEU may have legal effects beyond part three of the TFEU and the simplified revision may have been declared null and void.

The Court had been flexible in adopting this decision, despite legal shortcomings surrounding the case. While a few legal scholars firmly rejected the reasoning and the outcome of the case (Beck 2013: 447–452; Everson and Joerges 2017), most of the European legal arena endorsed this 'pragmatic' judgement (de Witte and Beukers 2013; Craig 2014). The Court promoted a version of integration to which the vast majority of its specialised audience assented.

For many legal scholars, this decision came as no surprise (de Witte and Beukers 2013: 806). Few expected the Court to declare the ESM incompatible with the treaties. Nonetheless, judges are still bound by Art. 19 TEU which states that the Court must ensure that 'the law is observed'. Satisfying a European legal arena of national judiciaries and legal scholars (Vauchez 2015) is not enough if political actors and citizens are to perceive a decision as justified. Legal scholars do not necessarily oppose a pro-integration stance (they are sometimes vocal when judges do not to follow that path). Yet they do expect a certain kind of legal reasoning from the Court. In *Pringle*, judges did what they could to justify *ex post* the legality of an instrument. In the absence of precedent and faced by seemingly contradicting treaty provisions, the Court adopted a previously unseen line (Beck 2013; Kuijper 2018) that raised a few doubts about its alignment with traditional techniques of legal reasoning (Ibid.: 447–452; Schepel 2017).

When they established the ESM outside the EU legal framework, national governments – assisted by the legal services of EU institutions – used an innovative yet hasty type of legal engineering to reconcile socio-economic urgency with legal authorisation. But they had not anticipated that relatively marginal national players would use a preliminary reference to put the CJEU in a precarious position and endanger financial rescues across the Eurozone. The tension between facts and norms is always a source of legitimation predicaments for courts (Habermas 1996). The CJEU, in *Pringle*, had to convince its attentive public that it preserved the substance of norms despite the urgency of facts.

'Rigid' Legitimation. Case 1. Cameron's Renegotiation: The Limits of Fundamental Reform

It is possible to see David Cameron's renegotiation as a Conservative party affair that mutated into a question of British national interest before failing to convince enough European governments of a need for greater change. The renegotiation exemplifies – perhaps better than any other contemporary instance – the limits of fundamental reform of European integration. In his letter to Donald Tusk before the renegotiation, Cameron demanded an end to

free movement of people for new members until their economies have converged, as well as a 'crack down on the abuse of free movement'. Cameron justified his demands as needed to reduce 'the draw that our welfare system exerts across Europe' and as necessary to 'restore a sense of fairness to our immigration system' (Cameron 2015a).

The strategic dilemma for member states boiled down to keeping the Union's existing arrangements but risking a Brexit, or agreeing to a fundamental reform without any certainty that would keep the UK as a member. However, by seeking changes to free movement Cameron chose an issue on which he was unlikely to negotiate significant concessions from the rest of the Union (Hay 2019: 10; cf. Mortera-Martinez 2014; Cameron 2019: 632).

Cameron and his advisors knew 'there was no deal on earth that would have enabled us to stay in the EU and not sign up to the "four freedoms"' (Cameron 2019: 634). And yet, Cameron set targets to limit net migration to the 'ten of thousands', whilst proclaiming he would not 'take no for an answer' (Cameron 2014a). Cameron raised expectations that would be difficult to meet (Shipman 2016: 14). But he gradually watered down his demands. He had first thought of imposing quotas on EU migrants, but later considered requiring a job offer for EU citizens to move to Britain (Cameron 2014b). By the time of the renegotiation, he settled for imposing limits to welfare benefits (Cameron 2015a). Altogether, the pattern was one of tempering the stringency of demands, rather than further stretching the limits of reform.[28]

Cameron wanted to restore the original understanding of free movement of *workers*, as envisaged in Maastricht. But throughout the negotiation, the gap between the minimum Cameron believed he needed to achieve and what the other leaders deemed plausible was large. Measures that could discriminate between British and other EU citizens were particularly difficult for other members to accept.[29] There was increasing misunderstanding between key players. German Chancellor Angela Merkel, on whom a successful renegotiation largely depended, never saw the migration question on Cameron's terms. As she put it to him:

> 'You have low unemployment, a booming economy, you're growing faster than most of Europe, there is no social crisis. And you are pulling in highly qualified labour, cheaply. Explain to me what the problem is'.
>
> (Cameron 2019: 640)

Many EU governments saw Cameron as failing to appeal to a common interest, and advancing an agenda based on national interests alone (Möller and Oliver 2014; European Council on Foreign Relations 2015).

> 'We are doing all of these things to protect our economic and national interest. And that is the prism through which I approach our membership of the European Union (…) I know some of our European partners may find that disappointing about Britain. But that is who we are.'
>
> (Cameron 2015b)

Cameron's justification for a new EU settlement pivoted on regaining control. He claimed that Britain should not have to choose between effective migration control and membership of the EU: 'I want both and I'm determined to get both. The British people want me to get both and that's what I'm going to dedicate myself to doing' (ibid.). However reluctantly, the European Council and the Commission accommodated some demands on citizens' access to welfare. The final deal envisaged an agreement on unemployment benefits, a four-year 'emergency brake' on non-contributory in-work benefits and linking the export of child benefits to the cost of living in the residence country.[30] After nine months of negotiation, Cameron went back to Westminster to defend a deal.

The agreement gave the UK a special status. This meant, Cameron told the Commons, 'that Britain can have the best of both worlds' (Hansard, 2016b: col.24). The deal broke new ground – Cameron argued — with the European Council agreeing to reverse a European Court of Justice decision (Scharpf 2015). But, anticipating the backlash on immigration and welfare, he warned, 'No country outside the EU has agreed full access to the single market without paying into the EU and accepting free movement' (Hansard 2016b: col.23).[31]

That the four freedoms are interlinked has become, as Catherine Barnard (2017: 203) puts it, sacrosanct in EU parlance. This became a major obstacle to finding 'an imaginative solution to address the concerns of the people (…) who do not feel they have benefited from the EU project' (ibid.: 207). Despite historical, organisational, legal and economic reasons why the freedoms are less connected than would first appear,[32] the possibility of rethinking their 'indivisibility' was never fully explored.

The EU's approach to reform of free movement shaped British political discourse ahead of the referendum. The EU's rigid approach raised the chances of immigration becoming a decisive issue. 'Taking back control' of within-EU migration would be a central message of the Leave Campaign (Shipman 2016; Goodwin and Milazzo 2017). That does not prove that the EU's inflexibility caused the referendum result. However, it lent support to the view that reform of freedom of movement was impossible within the EU, so – Brexiters claimed — we better leave. Subsequent statements of EU leaders reinforced this perception.[33]

Hence, the EU's renegotiation strategy on freedom of movement provoked an accusation of inflexibility. This accusation laid the ground for a de-legitimation strategy that was championed by national political actors and influential media outlets. This strategy resonated among enough voters to raise the prospects of an 'out' victory. The appeal of Cameron's deal among the electorate did not improve when net migration figures hit 330,000 a few days before the official vote – a number that was more than three times above the government target.

Cameron's vision for the EU was one in which members could head to different destinations.[34] But there was, it seems, no political appetite in the EU for such a future. Critics in European capitals judged the settlement to be another step towards political fragmentation ('Europe à la carte'; Europe of

concentric circles).[35] Many leaders thought Cameron got enough, even too many concessions. Instead, critics in Britain accused Cameron of asking for too little and getting even less. Even after the agreement, the centres of gravity around which national and European actors' discourses revolved were too far apart to be bridged.

Finally, renegotiating Britain's EU membership before an 'in or out' referendum was a game-changer. Crucial here was the rigidity of EU positions on freedom of movement reforms. By moving the negotiation closer to a 'single-shot' decision, Cameron changed the legitimation dynamics. Unanimity was still required to approve any renegotiation, but the exit option was no longer foreclosed (Scharpf 1988: 257). Hence, the typical incentive structure in EU bargaining under an 'ongoing joint-decision system' was altered. The fact that Cameron did not rule out campaigning against the deal on several occasions did not play well among key EU actors who were already faced with justifying to their own publics accommodations to Cameron. Not all European leaders saw the referendum in the same way though. Some saw it as 'a ruse to get more out of the renegotiation' assuming that Britain would not leave over migration (Cameron 2019: 640–641). Northern Europeans like the Danish and Dutch, however, were more aligned with Cameron's views and perceived greater risks. Still, the possibility of an exit (via a referendum) inserted a new parameter into negotiations.

The actors negotiating Cameron's deal were aware this could be the last time they were negotiating with the UK as a member. Britain could leave the EU after the referendum but freedom of movement would remain a core tenet of European integration, nonetheless. We argue that the threat of exit increased the costs of flexibility for the EU. As a result, the Council adopted a more rigid position than it might have adopted without a referendum in sight. Faced with a real prospect of disintegration, the EU stiffened to preserve its core. European leaders thought this approach would salvage EU integration, since future negotiations would also have to respect the core that was being challenged (freedom of movement). In hindsight, the greatest strategic miscalculation of Germany – embodied in Merkel's position – may have been to consider a more flexible compromise on freedom of movement as unlikely to prevent Brexit (Gostyńska-Jakubowska 2015: 12; Thompson 2017: 445). Flexibility could have tipped the balance in the referendum, but things turned out differently.

Cameron's deal was a failure on his own terms. It failed the crucial test of convincing a majority of British voters – specifically, those demanding greater reform – to remain in the EU (Cameron 2019: 648). What Cameron retrospectively thinks could have made the biggest difference in the referendum (an immigration cap or a limit on numbers) was never on offer.[36] Most importantly, the outcome of the referendum would still have been contingent on factors independent of the specifics of any deal (Hay 2019: 5–6). There is no guarantee that Britain would have remained a member if European leaders had adopted a more flexible approach during the negotiation. However, by

not pushing the limits of fundamental reform further, neither the EU nor British voters were put to the test. Brexit is finally happening, but what we think we know about its consequences for the future of European integration remains stubbornly uncertain.

'Rigid' Legitimation. Case 2. The Dano *Case: The End of Social Tourism in the EU*

Freedom of movement did not only cause turmoil in the political arena. Political battles often turn into judicial struggles. Freedom of movement was – despite Cameron's attempts at more tightening – already circumscribed. The limits to this freedom were still to be defined by the CJEU, forced to adjudicate cases with high salience and potentially conflicting interpretations within the *acquis*. The Court has had to strike a balance between inclusive Treaty provisions and restrictive secondary legislation. It was in a context of intense criticism of the liberty of circulation that the CJEU adjudicated the *Dano* ruling.[37]

Elisabeta and Florin Dano were economically inactive Romanian citizens who lived in Germany. They hoped to receive social welfare benefits as EU citizens but were turned down by a Job Centre in Leipzig. Claiming a violation of their rights under EU law, they sought a judicial remedy before the *Sozialgericht* of Leipzig. The latter sought an interpretation of the directive regulating the right of residence of intra-EU migrants in other member states[38] and sent the case to Luxembourg.

Unlike economic governance, the legal regime of EU citizenship has become greatly extended since Maastricht. Many legal instruments ranging from secondary law to several CJEU decisions provide a substantial *acquis*. The CJEU had been bold in interpreting cases, widely interpreting citizenship rights in favour of individuals (against the positions of many member states). Probably the most famous is the Zambrano case when the Court extended EU citizenship rights to a non-EU citizen who did not invoke any element of cross-border mobility between two member states (a condition previously deemed essential to invoking EU citizenship rights).[39]

It therefore came as a shock when the CJEU denied the Danos their claim and set limits to social tourism. The vast majority of the Court's audience expected judges to 'sympathise' with the Danos, and adopt another citizen-friendly decision in favour of disempowered individuals (Davies 2018; O'Brien 2017; Carter and Jesse 2018 for an opposite view). On the other hand, the German government was firm in standing by the application of the directive regulating the right of residence which states that EU citizens planning to move to another member state for more than three months but staying for less than five years must possess sufficient resources of their own. The Court recalled the importance of citizenship rights for every citizen of the Union irrespective of their nationality (*Dano*, §58), the prohibition of discrimination on grounds of nationality (§59): the grounding jurisprudential principles that

paved the way for the citizenship regime (Schmidt 2018). However, it stuck to the *acquis*, i.e. Directive 2004/38, and thus adopted a decision confirming a limit to the right of residence.

Some authors argued that the Court's decision could hardly have been different because of the concise text of the directive (Carter and Jesse 2018). However, many in the Court's attentive legal audience expressed their indignation at the 'swift dismantling' of the EU's citizenship regime (O'Brien 2017) and its extension of integration through citizenship rights.

Many experts challenged the new definition of citizenship given by the Court in 2014. Earlier, judges had retained an inclusive definition focused on solidarity and detached from the exercise of economic activity.[40] They previously referred not only to EU secondary law but directly to the treaties themselves, namely Art. 18 and 21 TFEU, to develop a unified humanistic vision of EU citizenship transcending a circumscribed definition based on economic rights. The principles developed in seminal cases such as *Grzelczyk* [41] and *Baumbast* [42] tied citizenship to the principle of non-discrimination to ensure non-economically active citizens a certain level of subsistence in any member state. The *Dano* ruling, however, broke with that trend radically. The CJEU not only changed its reasoning (from a general interpretation of treaty provisions to a strict application of derived legislation). It also reversed the principle that EU citizenship goes beyond the possession of sufficient means of subsistence in other member states.

As it often occurs with groundbreaking and contested decisions, critics expected the Court to temper its stance in further cases. This had happened with Zambrano. Judges used other decisions[43] and extra-judicial means like academic publications and conferences (Lenaerts 2013, 2015) to insist on the particularity of the facts in Zambrano – two EU citizens would not be able to exercise their citizenship rights if their father was deported to Colombia – thus limiting the reach of this decision.

However, case law after *Dano* only confirmed limits brought to social tourism in the EU.[44] 'Integration' (in the sense of conferring rights on people or social groups left out of the scope of legislative instruments) was no longer a leading frame legitimating European citizenship (Minderhoud and Mantu 2017). Judges had previously used certain techniques to develop citizens' rights not explicitly covered by treaty provisions. The Court used to tie EU citizenship to fundamental rights (Yong 2019). It granted protection to citizens in need of enhanced protection such as inactive mothers or students (Cichowski 2007; Thym 2017). This exercise of gap-filling in the legal system extended the Court's adjudication to situations not necessarily foreseen by the *pouvoir constituant* while answering some concerns about justice deficits (Nicola 2015: 349–366).

The *Dano* case surprised many, as weak parties here (including a child) could not benefit from the help of the wealthiest state in the EU. Grounding the final ruling on a directive gives the case a certain soundness, but it nonetheless led many commentators to wonder about the shift in the Court's case

law (Thym 2017: 17–169). For some analysts, the ruling suggests judges took into account concerns of the German government in the case, as well as the plea from the UK to limit freedom of movement (Emerson 2014). Yet, judges have a certain leeway. In *Dano*, they preferred a rigid literal interpretation of a directive, reducing the perceived ambit of EU law. They opted for a restrictive understanding of integration in this policy domain.

Further cases dealing with intra-EU migration of citizens (and even for third-country national [TCN] family members) did not necessarily pick the restrictive path advocated by EU member states. The CJEU recognised the right of same-sex spouses to see their union recognised (and thus granted the right to reside in a member state as a TCN spouse of an EU citizen) by the authorities of a member state that does not recognize same-sex marriages.[45] Since the legislator did not provide a definition of the term 'spouse', CJEU judges opted for a flexible interpretation based directly on the TFEU (here Art. 21[1]) to interpret EU law in favour of a 'mutual recognition' of marriage across member states, even if the text of Directive 2004/38 remained vague and could thus have been interpreted as giving member states the right to define 'spouse' for themselves. Judges did not adopt the same stance in 2014 in the *Dano* case. Despite the doubts expressed by the German judges that the restrictive provisions laid down in Directive 2004/38 could infringe citizenship rights in the treaties,[46] judges elected to stick to the rigid definition provided by the directive, allowing it to limit social tourism.

In the end, the result appeared bittersweet for everyone. The choice of a restrictive legitimation strategy did not help the Court regain support for the contested right of residence in another EU member state. The EU legal arena, which despite some dissenting voices remains firmly pro-integration, was mostly disappointed with a decision that set a brake on more Europe (Davies 2018). Yet, the UK government – which some believe was the real target of the CJEU's decision (Emerson 2014) – was not much moved by a decision that still reaffirms the importance of citizenship for the principle of circulation.

Conclusion: Flexibility by Choice

We have argued that the EU legal order creates constraints common to executive and judicial actors. The chapter compares four crisis experiences in the fields of economic governance and labour migration. The comparison shows that actors within EU institutions choose to be flexible if and when institutional change and discursive justifications align. This 'flexibility by choice' has helped sustain European integration in times of crisis.

The analysis also shows that, at critical junctures, EU positions might be more discretionary than rule-bound. This finding suggests that the institutional constraints under which actors operate in European Union politics might be less insurmountable than one might suspect. Reinterpretation of long-standing rules is thus accepted by political and judicial actors alike, even amidst serious legal and political challenges.[47] Enough discretion exists for

actors to engage in flexible institutional adaptation, even when European rules point *prima facie* to a narrow set of policy responses.

Our comparative analysis also shows that EU institutions are willing to adapt flexibly, if and when 'flexible adaptation' buttresses European integration. Critical decisions about Spain's financial bailout and the judicial resolution of the *Pringle* case consolidated the newly formed ESM, while the Spanish rescue accelerated banking union. In both cases, actors faced political and legal barriers to their preferred responses. On the one hand, the treaties established specific prohibitions for EU institutions[48] and member states.[49] On the other, national and European actors believed that the survival of the euro was at stake and that the financial rescue did not contravene these prohibitions. Overall, a crisis situation coupled with the prospects of advancing integration led these actors to accept and legitimize a new *status quo*: both projects of integration (the ESM and banking union) have endured.

By contrast, EU institutions adopt more rigid interpretations of the rules where flexible adaptation might halt or reverse integration. Freedom of movement is a crucial example. Faced with Cameron's requests to reform freedom of movement as a condition for continuing UK's membership, the European Council and the Commission only accepted minor changes. The spectre of an 'in-or-out' referendum opened up the possibility of exit (Brexit). Conviction that the EU would still have to operate on the basis of freedom of movement of persons, regardless of the outcome of the 2016 referendum, pushed EU actors towards a more rigid position. Similarly, with the *Dano* decision, the CJEU favoured a narrow reading of the *acquis*, even though legal pundits expected a decision grounded in the general principles of EU law that would enhance freedom of movement. Judges appeased national concerns at a cost of *ex post* criticism.

The comparison of re-legitimation dynamics across two policy fields raises an important question: Is 'flexibility by choice' policy-specific? Does the balance between flexibility and rigidity depend on, and vary with, the policy field where adaptation is needed?[50] Are established policy fields with a long-standing *acquis* like freedom of movement (which originates in the Treaty of Rome's 'four freedoms' and has been expanded since Maastricht) less prone to 'flexible adaptation' than newer policy fields like economic governance where the EU creates rules as it goes along, especially with crisis measures? That is what our analysis seems to indicate. Yet, future research needs to study more cases within the same policy field, and to expand the range of policies considered. As well as testing differences in flexibility between older and newer policy fields, further research may reveal different forms of flexibility to those identified here.

In comparing the two cases where executive actors (governments) were central, a crucial issue for political legitimation stands out: the question of democratic 'consent'. Since the 1990s, the EU has struggled with questions of popular consent in member states, particularly where that has involved national referenda. Ever since the Danish rejection of the Maastricht Treaty

in 1992 and the French (May 2005) and Dutch (June 2005) rejections of the Constitutional Treaty, all the way to the failed ratification of the Lisbon Treaty in Ireland (2008) and the rejection of the EU bailout conditions in the Greek referendum (2015), the political risks of using national referenda as legitimating devices for EU decisions have been apparent.

The reaction of national and EU leaders to David Cameron's strategy of renegotiating before an 'in-or-out referendum' can be understood in light of this past. For EU actors, the prospect of a referendum in the UK increased the costs of being flexible. As negotiations moved closer to a 'single-shot' decision, EU and national leaders became increasingly cautious about what to offer since any deal would need to be ratified later by the most Eurosceptic electorate in the Union. Arguably, the prospect of a referendum seems to have made fundamental reform even more challenging to achieve for Cameron.

The contrast between the case of the UK's renegotiation and how the Spanish government managed democratic consent is obvious. In 2012, the Spanish government refused to subject the EU-assisted financial rescue to any form of popular or parliamentary vote.[51] Here, parallels between the several bailouts during the euro crisis are also insightful. The Greek bailouts proved more challenging to negotiate than the Portuguese, Spanish and Irish programmes. There are several plausible explanations for why the Greek bailouts were particularly difficult to approve. But a crucial factor was that, in contrast to the Greek rescues, the other three programmes were never put to a popular vote.[52] So, understanding how executive actors seek democratic consent for EU decisions is critical to anticipate how the EU, as a collective body, may choose between flexible and rigid re-legitimation. In our cases, the 'Spanish' approach decreased the costs of being flexible for EU actors. The Spanish rescue was negotiated on a purely intergovernmental basis with no popular 'vetoes' in sight. Hence, the Eurogroup, the European Council and the Commission were able to internalise the costs of flexibility in ways that EU leaders never could with Cameron's approach to renegotiation. The Spanish approach seemed better aligned with the EU's preferred mode of re-legitimation than Cameron's approach.

Finally, the analysis of the UK's renegotiation of EU membership illustrates a more structural feature of the EU as a polity; namely, its refusal to reform fundamental tenets of European integration in response to long-term political dynamics in a single member state. The reasons underlying this systemic behaviour are straightforward: If the EU were to routinely change its core on the basis of national political dynamics, it would be hard to sustain long-term commitments. To endure, the EU must accept limits to how far it is willing to adapt to *particularistic* demands for change. Maybe that is the story of Brexit?

Notes

1 Stone Sweet (2000: 153) defines the ECJ/CJEU as the most powerful and influential supranational court in world history, an assessment still widely shared (Alter 2014).

2 These institutional arrangements refer to formal institutions as well as informal practices or routines (March and Olsen 1995).
3 As a 'decision style', the 'bargaining' mode is characterised by appeals to the individual self-interests of all (necessary) participants and by resort to incentives (Scharpf 1988: 259).
4 'In ongoing joint-decision systems, from which exit is precluded or very costly, non-agreement implies the self-defeating continuation of past policies in the face of a changing policy environment. Thus, pressures to reach agreement will be great. (…). The price to be paid is not simply a prevalence of distributive conflicts complicating all substantive decisions, but a systematic tendency towards sub-optimal substantive solutions' (Scharpf 1988: 265).
5 This mode of governance was ignored in Scharpf's original contribution (1988) but included in his revised framework in 2006. The 'supranational-hierarchical' complemented the other two modes by analysing the conditions and consequences of non-political European policymaking.
6 In practice, the power of the CJEU to interpret European law had become a power to legislate that is sanctioned by respect for the rule of law in the political cultures of Member States and the cooperation of national judiciaries.
7 This insight can be supported by comparative federalism. If we compare the EU to institutions of federal nation-states – an approach adopted by Scharpf's original article (1988) – it seems that federal institutions and constitutions are relatively effective in accommodating (political and legal) demands that could facilitate greater integration. By contrast, federal arrangements are poorly equipped to cope with (secessionist) demands that increase risks of disintegration (e.g. the inclusion of a constitutional clause recognising the right to self-determination).
8 For example, in the case of the Treaty on Stability, Coordination and Governance.
9 For example, the ESM redistributes wealth across borders. It may thus violate article 125 of TFEU, also known as the 'no-bailout clause'.
10 A legitimation predicament may also arise if EU institutions simultaneously adopt different solutions in order to satisfy different publics. See, in a different context, Habermas (1975).
11 This was before the new ESM's instrument of direct bank recapitalisation was established.
12 The financial rescue increased Spain's public deficit to 10.5% of GDP in 2012, taking its public debt to 86% of GDP (Banco de España 2017: 152).
13 'Memorandum of Understanding between the European Commission and Spain', 20 July 2012. Available at: https://ec.europa.eu/economy_finance/eu_borrower/mou/spain-mou_en.pdf
14 'No va a haber ningún rescate de la banca española'. 28 May 2012, *RTVE.*http://www.rtve.es/noticias/20120528/rajoy-asegura-no-va-haber-ningun-rescate-europeo-bancos-espanoles/532011.shtml
15 De Guindos: 'Esto no tiene nada que ver con un rescate, es apoyo financiero', 9 June 2012, *RTVE.*http://www.rtve.es/noticias/20120609/espana-pide-rescate-para-banca-eurogrupo-concede-hasta-100000-millones/534201.shtml
16 Rajoy, sobre el rescate financiero: 'Se trata de un crédito que va a pagar la banca', 14 June 2012, *RTVE*. http://www.rtve.es/noticias/20120614/rajoy-sobre-rescate-banca-debemos-celebrar-socios-europeos-no-esten-ayudando/535121.shtml
17 Spanish Congress (2012) Extraordinary Plenary Session, no. 46, X Legislature, 11 July 2012—No.47, p.43.
18 European Commission (2014) 'The Spanish financial-sector programme over 2012–13: Key features and achievements'. https://ec.europa.eu/info/sites/info/files/ecfin_technical_briefing_spain20140121_en.pdf
19 ESM (n.d.), 'Spain: a fast and effective programme' https://www.esm.europa.eu/assistance/spain

20 De Guindos went from declaring that 'the rescue will have no cost for the Spanish taxpayers' (https://cadenaser.com/ser/2017/09/08/economia/1504866416_588757.html) to saying that 'I trust that we will recover as much as possible and that Bankia is worth a lot of money'. (http://www.rtve.es/noticias/20170616/banco-espana-da-perdidos-60613-millones-dinero-publico-inyectado-banca-entre-2009-2015/1565726.shtml).

21 From this moment the policy recommendations of the European Commission and the Council became the official policy of the Spanish government. The government avoided including macroeconomic conditionality in the formal, legally enforceable Memorandum of Understanding. But the political reality was that it accepted conditionality.

22 The European Council conclusions 'welcomed the statement of the Euro Area Summit of 29 June 2012 and the use of the existing EFSF/ESM instruments that will be implemented according to existing guidelines which detail the relevant procedures' (i.e. Spain's rescue). http://data.consilium.europa.eu/doc/document/ST-76-2012-INIT/en/pdf

23 Rolf Strauch, ESM Chief Economist, revealingly remarked: 'In contrast to earlier step-by-step, or piecemeal methods, the Spanish government and its European partners applied a more comprehensive approach. *It is perhaps not a coincidence that this was the same period (June–July 2012) when Mario Draghi gave his famous "whatever it takes" speech, and the idea of banking union was launched by the Euro Summit. This was a time of broad and sweeping crisis management actions*' (italics mine), 10 July 2017, 'The Spanish Financial Sector Assistance Programme: 7 years later, speech by Rolf Strauch': https://www.esm.europa.eu/speeches-and-presentations/spanish-financial-sector-assistance-programme-7-years-later-speech-rolf

24 The European Council saw banking union as the first and essential step towards completing EMU, while several analysts presented it as a step to fiscal and then political union (Dullien 2014: 2).

25 Otherwise member states would be required to use constitutionally defined ratification procedures, including (super)majorities in national Parliaments or referenda (obligatory in Ireland).

26 The article says that: 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.'

27 C-370/12, *Pringle*, at 136: 'the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.'

28 What British officials labelled a red line before the renegotiation (a four-year exclusion for in-work benefits) became just another option in the face of strong EU opposition. Also, proposals to change social housing entitlements never reached the stage of preliminary negotiations.

29 A study from the Centre for European Reform (CER) in the run-up to the renegotiation found that 'all EU countries, perhaps with the exception of Ireland and Finland, will oppose' (Gostyńska-Jakubowska, 2015). See the interactive map by CER on Member States positions regarding Cameron's proposals: https://www.cer.eu/publications/archive/policy-brief/2015/camerons-eu-reforms-will-europe-buy-them#

30 European Council Meeting Conclusions, February 18 and 19, 2016, available at: https://www.consilium.europa.eu/media/21787/0216-euco-conclusions.pdf. See also Commission declarations annexed to the conclusions.

31 Cameron later remarked how difficult it was to 'negotiate with an organisation that holds up things like the single market and free movement of people as tablets of stone' (BBC Series: 'The Cameron Years': Episode 1. A Huge Fight on My Hands, September 19, 2019. https://www.bbc.co.uk/programmes/m0008kk6).
32 See Barnard's (2017: 203–206) excellent discussion of the *divisibility* of the four freedoms.
33 See, e.g., remarks of former French President, Nicolas Sarkozy: 'I think the Europeans made a mistake by not giving more to Britain' (BBC Series: 'The Cameron Years', *cit*, note 33.
34 While explaining the deal in the Commons, Cameron said: 'People used to talk about a multi-speed Europe; now we have a clear agreement that different countries are not only travelling at different speeds but ultimately heading to different destinations. I would argue that is a fundamental change in the way this organisation works' (Hansard 2016b, col.23).
35 Romano Prodi, the former President of the Commission, observed that 'the real consequence of the summit is extraordinarily important: Brussels has officially enshrined a multi-speed Europe' (*Financial Times*: 'Fears raised over damage to EU project from UK concessions', February 21, 2016. Available at: https://www.ft.com/content/4567a68e-d8a9-11e5-98fd-06d75973fe09). But as a collective body, the European Council had noted before that 'the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further'. Council Cconclusions, June 2014: https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf
36 Here the divide between euro-ins and euro-outs was relevant since 'concessions that were necessary to manage euro-zone state relations were not required when demanded by a non-euro-zone state' (Thompson, 2017: 441).
37 C-333/13, *Elisabeta and Florin Dano v Jobcenter Leipzig*, 11 November 2014.
38 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
39 Case C-34/09, G*erardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, 8 March 2011.
40 G. Barbone, 'Dano and Alimanovic – the end of a social European Union', *KSLR EU Law Blog*, 22 January 2016, available at: https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#_ftnref12 (Accessed: 05.05.2020).
41 Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECLI-458.
42 Case C-413/99 *Baumbast v SoS for the Home Department* [2002].
43 C-434/09, *McCarthy*, 5 May 2011.
44 Case C-67/14, *Alimanovic*, 15 September 2015.
45 The Romanian judges sought an interpretation of the definition of spouse as contained in Directive 2004/38 EC (same legal base used in *Dano*). But CJEU judges stated that: 'Nonetheless, as the Court has repeatedly held, even if, formally, the referring court has limited its questions to the interpretation of the provisions of Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions' (C-673/16, Coman, 5 June 2018). Judges thus called upon the treaties directly (Art. 21(1) TFEU) to grant Mr Coman's American spouse the right to reside in Romania. Judges circumvented an isolated application of the directive to appeal to a treaty provision

that historically allowed the Court to adopt an expansive definition of citizenship, something it chose not to do in *Dano*.

46 See §43 in *Dano*.

47 This also applies to other policy domains. On capital controls, see, Wolff, G. (2013). 'Capital controls will put the euro at risk', *Bruegel*, 26 March (available online at: https://bruegel.org/2013/03/capital-controls-will-put-the-euro-at-risk/), and Wolff, G. (2015). 'Economic and legal observations on capital control', *Bruegel*, 28 June (https://bruegel.org/2015/06/economic-and-legal-observations-on-capital-controls/). On State aid rules and banking rescues, European Court of Auditors (2019), 'Control of State aid to banks', March 2019. Available online at: https://www.eca.europa.eu/lists/ecadocuments/ap19_05/ap_state_aid_en.pdf

48 Art. 123 TFEU on the prohibition of monetary financing.

49 Art. 125 TFEU on the prohibition of bailouts between member states.

50 We thank Chris Bickerton for this insight.

51 In contrast to what the German government did in the Bundestag to authorise the Spanish rescue.

52 In 2011, Greek Prime Minister, George Papandreou, first called and then cancelled a referendum on acceptance of conditions for an EU–IMF bailout. In 2015, the Tsipras government did hold a referendum. The 2012 referendum in Ireland was about the Fiscal Compact, not on the terms of the Irish EU/IMF bailout.

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