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The Court of Justice of the EU, conflicts of sovereignty and the EMU crisis.

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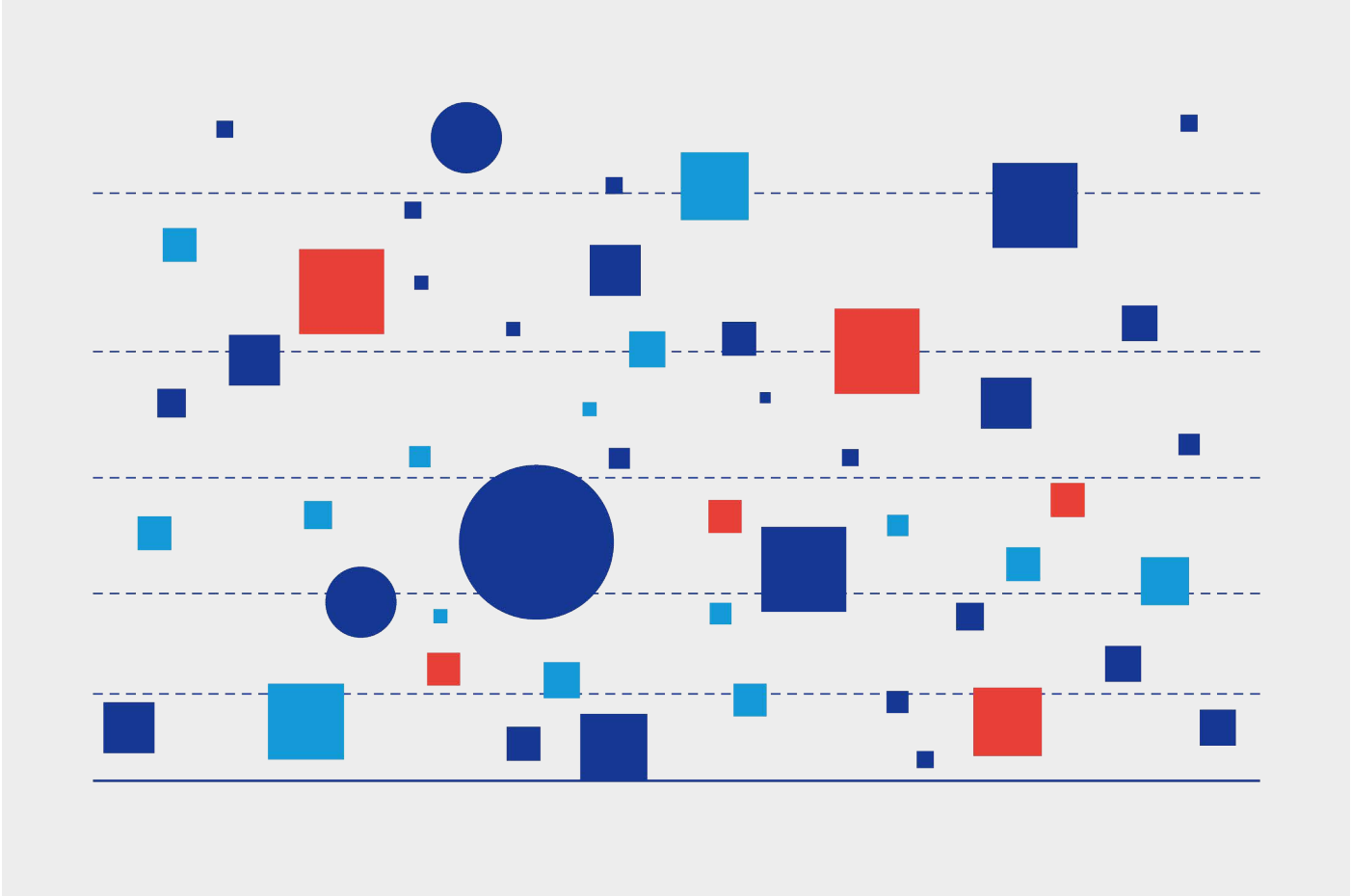

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The Court of Justice of the EU, conflicts of sovereignty and the EMU crisis

The aim of this article is to analyse the position of the Court of justice of the EU with regard to the conflicts of sovereignty that emerged in the context during and in the aftermath of the EMU crisis. We start from the special issue's underlying assumption according to which the rule of law - sovereignty nexus continues to shape EU action. The economic and financial crisis increased legal integration and therefore led to more rule of law. This context opened the possibility for plaintiffs to call upon the CJEU. The aim of this article is to analyse the Court rulings on this matter since the beginning of the economic and financial crisis in 2008: does the Court defend supranational sovereignty or does it take national sovereignty concerns into account? To what extent do the Court's rulings reflect parliamentary and popular sovereignty? Based on a conceptual framework combining a legal and a political science approach, the aim is to analyse which type of sovereignty the Court defends and when.

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Introduction

“"J'accuse la Cour de Justice" – said [former French Prime Minister Michel Debré] as late as 1979 – "de mégalomanie maladive", by which, of course, he meant insufficient deference to the sovereign rights and interests of France.”

Judge G.F. Mancini, 1989

Conflicts of sovereignty are at the origin of regional integration: how much sovereignty do Member states agree to delegate to the supranational level? Dealt with in the European context by notions of “shared” (Wallace 1999) or “pooled” sovereignty (Peterson 1997), principal-agent approaches (Pollack XY), or constructivist frames on usages of sovereignty (Adler-Nissen 2014), these studies share the understanding that sovereignty is not indivisible – parts of sovereignty can be transferred to other levels of governance (Wind 2001).

Supranational institutions are at the heart of this debate. How much sovereignty is transferred from the domestic – be it state, popular or parliamentary - level to those supranational organisations? And once competences are transferred, how do supranational organisations react to this transfer? Do they search for extending the competences they have received? Do they keep in the margin of manoeuvre they have been assigned?

The aim of this article is to analyse these questions in concentrating on one specific supranational institution: the Court of Justice of the EU (CJEU) and its position with regard to four sovereignties identified by the special issue’s coordinators: national, supranational, popular and parliamentary in the context of its rulings pertaining to the Economic and Monetary Union since the beginning of the economic and financial crisis

in 2008.

Despite being led by intergovernmental procedures (Bickerton et al 2015; Fabbrini 2015; Puetter 2015), the economic and financial crisis increased legal integration and therefore led to more rule of law (Amtenbrink 2014; Terpan 2015; Saurugger & Terpan 2016). A number of plaintiffs have used these legal frameworks in order to receive judicial answers to questions, which did not seem to be politically solved. We therefore observe a strengthening of the Court in the EU's macro-economic governance system (Tuori and Tuori 2014; Saurugger 2016; Ruffert 2017). Does this strengthening lead to a defence of supranational sovereignty in its rulings or does the Court equally take parliamentary, popular and national sovereignty into account?

To understand which specific sovereignty the Court defends in its EMU rulings since 2008 is a crucial one for two reasons: one academic, the other social. Academically and, more generally theoretically, these questions have been at the heart of a number of more general studies since the beginning of the 1990s, analysing to what extent the Court of Justice's rulings have allowed the Court to oppose national sovereignty. Scholars have analysed why the CJEU succeeded in broadening its powers, thereby facilitating European integration and the creation of a European market (Garrett 1992; Garrett 1992, 1995; Garrett, Kelemen & Schulz 1998; Garrett & Tsebelis 2001; Kelemen 2001; Stone Sweet & Brunel 1998, 2012; Stone Sweet & McCown 2004; Maher, Billiet & Hodson 2009; Kelemen 2012). While some scholars show that the Court remains independent from member state preferences, and thus consider the Court to be a member state *trustee*, possessing a broader margin of manoeuvre than that of a tightly controlled agent (Stone Sweet & Brunel 1998, 2012; Stone Sweet & McCown 2004), others argue that the court is significantly influenced by member states (Carruba et al.

2008, 2012). The Court's position with regard to parliamentary or popular sovereignty, however, have been less systematically analysed.

The social relevance of this question is linked to the role of citizens in the EMU crisis. The system of law governing the EMU has been questioned since the start of the Eurozone crisis in 2009 for three reasons (Fontan & Saurugger, forthcoming). First, the political answer to the crisis has weakened the responsiveness of the political system to citizens' demands (Streeck & Schäffer 2013; Hall, 2012). Second, the answer to the crisis has aggravated the tensions between creditor and debtor countries within the EMU (Dyson 2014). Third, in order to overcome the crisis, EMU policymakers have created new institutions and strengthened existing rules, reinforced the CJEU's and the Commission's competencies, while the ECB has largely expanded its role within the EMU governance. Consequently, the extension of EMU governance has opened new venues for legal challenges.

In other words, the Eurozone crisis opened the opportunity for the judicialization of EMU politics, which is "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008, p.1). The political answer of the Eurozone crisis is part of these so-called "mega-politics" (ibid.) as it tackles fundamental issues such as the degree of solidarity among EMU countries or the relationship between Europe's economic and social constitutions, which affect basic core normative values such as democracy, transparency and social rights (Tuori & Tuori, 2014). Since the crisis, litigants have thus asked courts at the national and the supranational levels to deal with core normative issues that were left unspecified or unsolved during the EMU creation.

The legal literature on this question has mainly concentrated on normatively commenting the CJEU's decisions with regard to Gauweiler and Pringle (Daniele et al. 2017; German Law Journal special issues 16(6) 2015; 15 (2) 2014), arguing, on the one hand that CJUE decisions are increasingly binding EU economies into a common supranational legal order in a lawful manner (Ruffert 2017), or that the EU's answer to the crisis generated many democratic problems and deconstructed the formerly existing legal apparatus (Höpner & Schäfer 2012, Chalmers et al. 2016; Contiades 2013; Adams, Fabbrini & Larouche 2014; Fabbrini 2014; Amtenbrick 2014; Dawson et al. 2015; Hinarejos 2015; Beukers, De Witte & Kilpatrick 2017).

The aim of this article is to analyse in this context of increasing judicialisation which of the four sovereignties the Court defended and to draw broader conclusions with regard to the positions of Courts in crisis situations.

The article will be divided as follows: a second section will present the analytical and methodological framework used to study the Court's rulings, the third section will analyse the Courts rulings and determine which of the sovereignties is defended in its rulings.

Studying the Court's EMU Rulings

Analysing the CJEU's positions towards different aspects of sovereignty is a broad endeavour, not only because the four different sovereignties analysed in the special issue are situated at different levels and call for different research methods, but also because defining sovereignty is a complex question.

What is sovereignty?

This article starts from the idea that while it is indeed impossible to analyse European integration without taking state sovereignty into account, it is also impossible to understand this sovereignty without taking into account the usage that actors make of this sovereignty (see also Aalberts 2012; Adler Nissen 2014; Adler Nissen and Gammeltoft Hansen 2008). In other words, it is necessary to study sovereignty not as abstract term but in action. Sovereignty is actively used in the EU's multilevel governance system where power is unequally distributed between policy-making levels. Political developments since the beginning of the European integration process, but in particular over the last twenty years – such as the debates surrounding immigration policies, the functioning of Economic and Monetary Union, the successive Treaty reforms, and the more and more politicised debates in the EU, make it necessary to analyse sovereignty anew. Sovereignty is, without doubt a social construct, but a social construct, which confers a position of authority. Sovereignty becomes an institutional fact to understand the structure of power in European integration (Walker 2003).

Definitions

We share the broad definitions presented in the introduction of this special issue according to which national sovereignty is understood as the autonomy of the Westphalian Nation-State to rule on a territory delimited by borders. Supranational sovereignty is acquired by the EU in a fragmentary or differentiated manner in a number of scattered internal and external policy fields. Parliamentary sovereignty is understood as the autonomy of parliaments (at the regional, national and European levels) to take part in the decision making process and control the executive in the name of the

principles of election and representation, and finally, popular sovereignty refers to the body politic, which confers legitimacy to decision makers in a democratic system.

In the context of the CJEU's rulings on EMU, this article uses however more specific indicators as a starting point to define the type of sovereignty contested by the Court. We consider that national sovereignty is contested when the Court's rulings go against or strongly oppose the preferences of individual Member states. This understanding of national sovereignty might appear surprising as the collective body representing Member states – the Council - might be considered from a political standpoint also as an organisation representing national sovereignty. Two reasons guide our argument against: First in the field of EMU, all contested issues have been decided by the Councils (European Council and Council of the EU) representing national interests; yet, their collective decision makes the position supranational. Second, and linked to this first argument, new intergovernmentalism suggests that the Councils have increasingly become the central place of supranational decision-making and bargaining in the last fifteen years, and their decision-making process as well as their decisions increasingly reflect national sovereignty (Puetter 2014). Thus, supranational sovereignty is contested if the Court's decision opposes the positions of all EU institutions in charge of adopting decisions (European Council, Council of the European Union, European Commission, European Parliament, European Central Bank as well as agencies such as the European Banking Authority). Popular sovereignty is contested if the Court ruling goes against the preferences expressed by individuals or groups of individuals belonging to the civil society or an individual political party. Finally, we consider parliamentary sovereignty to be contested by a CJEU ruling when the Court opposes the preferences of

a national parliament acting as an entity and not as individual parliamentary parties or party members.

Methods

These indicators might seem overly simplistic insofar as they do not systematically take the general political context at the time of the Court proceedings into account, i.e. political contestation at the domestic level or parliamentary debates. We will as much as possible include contextual elements in our study. However, three limits exist. First, not all rulings are salient: a majority of them are not taken up by the media and are confined to debates within EU institutions. Second, even if the judges in the CJEU are aware of the political context in which they issue their rulings, our dataset does not allow us to determine to which extent they took political issues into account, as their individual position is kept secret. Third, even when other actors than the litigants intervene during the proceedings, we do not know much about it, as neither *amicus briefs* nor *Reports for the hearing* are any longer available (Naurin et al 2013). *Amicus briefs* refer to observations to the Court submitted by actors who are not party to the case. *Reports for the hearing* existed until 1994. They were prepared by the Judge-Rapporteur when the procedure in the case included a hearing of oral argument, which normally has been the case. About three weeks before the hearing at the Court, the Report for the Hearing was sent out to the parties and other participants in the proceedings. For preliminary ruling cases, these reports comprised a description of the legal and factual background to the case, a note of the questions referred by the national court and the answers proposed in the written observations lodged by the parties before the national court, as well as any interested party in the meaning of article 23 of the Statute of the Court of Justice such as the member states and the Commission.

For these reasons, our analysis of the Court's rulings will be mostly based on the positions of the parties to the dispute. In order to obtain background information, we have however taken into account *the Opinions of the Advocate-Generals*, which are available on the website of the CJEU. These latter documents not only contain the positions of the AG and the final decision by the CJEU, but also relevant background information and legal analysis of the cases.

In order to constitute our database, we searched for all cases coded by the *curia* website under the heading 'Economic and monetary policy'. A first search led to 146 cases both pending and closed. From 1.1. 2008 to 1.5. 2018 (start of the economic and financial crisis to today), we found 133 cases before the General Court and the Court of Justice, of which 32 cases were pending or closed before the Court of Justice. Amongst those cases 20 were closed. We choose to limit the analysis to the Court of Justice, and hence exclude the General Court (former Court of 1st instance). This decision was taken because it is the Court, which rules the most disputed and salient cases (in terms of issues at stakes and debates over legal interpretations). For the same reason, we then choose to select only those cases where a proper judgement had been rendered, putting aside orders of the CJEU. This led to a database of 9 judgments of the Court of justice, a sample size which allows us a thorough study of the cases (Table 1).

We decided to discard other possible selection criteria, like the formation of judgment, the existence of an Opinion by an Advocate-general, the type of action or the precise subject matter of the ruling. The first two criteria are a sign of the importance that the Judges give to as specific case. Yet, for us, the fact that the cases have already reached the stage of the Court of justice shows enough that they raised important issues of European law.

The selection criteria referring to the type of action or the precise subject of the ruling was discarded because it is crucial for us to have all types of proceedings as it allows us to grasp the diversity of the potential applicants. Indeed, access to the Court varies according to the type of action, which pleaded for including indirect actions (preliminary references made by a domestic court seeking an interpretation of EU law to decide on a case at domestic level) as well as direct actions like annulment and actions for damages. In many cases, private litigants have the obligation to bring cases before the General Court, instead of the Court of justice, which could make our choice to keep only Court's judgments problematic. But the fact that the Court of justice is the appeal court of the General Court helps solve this problem.

We felt no need to make another selection of the judgments based on the precise subject matter they deal with. As long as they all have a direct link with the Economic and monetary policy, they were included in our dataset.

Based on these selection criteria, our dataset consist of nine rulings: financial market supervision and the role of supervisory authorities (UK v. Parliament & Council C-270/12, SV Capital OÜ v. EBA C-577/15), financial stability mechanisms (Pringle C-370/12) and their application in the member states (Ledra Advertising Ltd v. Commission and ECB C-8 to 10/15, Gerard Dowling v. Minister of finance C-41/15, Konstantinos Mallis v. Commission and ECB C-105 to 109/15), monetary policy (Gauweiler C-62/14), budgetary and debt surveillance (Spain v. Council C-521/15, Alexios Anagnostakis v. Commission C-589/15P).

One case, a reference for a preliminary ruling in case C-201/14, has been excluded. The CURIA database coded the case as 'Economic and monetary policy' because some of the questions asked by the referring Court was about article 124 TFEU, which deals with economic governance. Yet, the Court answered that it is quite obvious that the

interpretation of Article 124 TFEU requested bears no relation to the object of the dispute in the main proceedings, which concerns the protection of personal data.

We analysed these cases in two steps. First we identified the applicants and the defendants, referring to our understanding of the four different sovereignties. In a second step we analysed the Court's rulings in order to determine which sovereignty conflicts occurred, and how they were (legally) resolved by the Court of justice

Table 1 – Cases on economic and monetary matters brought before the Court of justice since 2008

Case Number	**Date of judgment**	**Name of the judgment**	**Type of judgment**
C-270/12	31.05.2012	UK v. European Parliament and Council	Annulment
C-370/12	27.11.2012	Pringle	Preliminary ruling (Irish Supreme Court)
C-62/14	16.06.2015	Gauweiler	Preliminary ruling (Bundesverfassungsgericht)
C-8/15 P to C-10/15 P	20.09.16	Ledra Advertising & others v. Commission and ECB	Actions for damages / appeal of General Court order
C-41/15	08.11.2016	Gerard Dowling & others v. Minister for finance (Ireland)	Preliminary ruling (High Court Ireland)
C-105/15 P to C-109/15 P	20.09.16	Konstantinos Mallis & others v. Commission and ECB	Annulment / appeal of General Court order
C-521/15	20.12.17	Spain v. Council	Annulment
C-577/15P	14.12.16	SV Capital OÜ	Annulment / appeal of General Court order
C-589/15 P	12.09.17	Alexios Anagnostakis & others v. Commission	Annulment / appeal of General Court order

A typology of applicants and defendants

The identification of both applicants and defendants in EMU cases decided by the Court of justice since 2008 is a prerequisite for analysing sovereignty conflicts.

Applicants

Almost all natural and legal persons can, directly and indirectly, trigger a judgment of the Court of justice of the European Union. The Commission and the member states can use the infringement procedure against a member state refusing to comply with EU law. The member states and EU institutions (Commission, Council and Parliament, and for the purpose of protecting their own prerogatives: the Court of Auditors, the European Central Bank and the Committee of the Regions) can ask the Court to annul an EU legal act or condemn EU institutions for failure to act. Other natural and legal persons can also bring an action if they demonstrate that a Union act affects them individually. The action for damages against EU acts is very liberal in that it can be triggered by any potential applicant (although it is far less liberal when it comes to the substance and the reasons justifying a financial compensation). And, of course, private and public litigants who have standing before national courts may start a proceeding at the domestic level, and see their case elevated to the level of the CJEU through a preliminary reference whereby a national court asks the latter to either interpret an EU rule or assess the validity of an EU rule.

In the nine cases under scrutiny (Table 1), no ruling is the result of an action of the Commission against a member state, on the basis of the infringement procedure. No inter-institutional dispute has been triggered by the Commission, the European Council, the Council or the Parliament, who enjoy privileged legal standing before the Court in

annulment proceedings. Five judgments of the Court are based on an annulment procedure triggered by either a member state or a private litigant. Three times the Court has rendered a preliminary ruling, answering a question asked by a national court (the Bundesverfassungsgericht, the Irish Supreme Court and the High Court of Ireland). The ninth ruling is an action for damages started by a private litigant.

In seven out of the nine cases brought before the Court of Justice, the applicants (Table 2) are civil society actors. More precisely, two main categories can be distinguished.

The first one is made of individuals and groups invoking a public interest to counter EU economic and monetary measures. Some of them may have a political position (stemming from the opposition, either an individual member of a opposition party present in the parliament such as 'Die Linke' in Germany) while others are citizens with no political responsibility.

In Pringle (C-370/12), a member of the Irish Parliament, belonging to the opposition, used a litigation strategy at national level, pushing the Irish Supreme Court to refer to the CJEU. The former asked whether the setting up of a permanent international body (European Stability Mechanism) competent to grant financial assistance to Eurozone members went against the foundations of EMU.

In Gauweiler (C-62/14), the proceedings at domestic level start with a small group of German academics and former politicians contesting bailout politics before the *Bundesverfassungsgericht (Federal Constitutional Court* (FCC). Then, the contestation widened as the legal complaints against the ESM, the TSCG and the ECB's OMT were filed by several thousands of German citizens from the whole political spectrum (from the controversial CSU politician P.Gauweiler to the opposition party *Die Linke*). For the first time in the history of European integration, the FCC made a request to the CJEU for a

preliminary ruling, asking whether the ECB had transgressed the limits of its powers derived from the Treaties with the announcement of the OMT Programme. For this reason, and because of the context of crisis, this case was extremely salient.

In Alexios Anagnostakis v. Commission (C-589/15 P), a Greek citizen asked the Court to set aside a judgment by which the General Court dismissed his action for annulment against a Commission Decision. The Commission had rejected the application for registration of the European citizens' initiative (ECI) called 'One million signatures for a Europe of solidarity'. As a new instrument of participatory democracy introduced by the Lisbon treaty, the ECI offers civil society the opportunity to take an initiative, provided that a petition would be signed by a minimum of one million citizens. Although the ECI at issue had reached this number of petitioners, the Commission rejected it, arguing that the 'proposed citizens' initiative falls manifestly outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties'[1]. The ECI, initiated by Alexios Anagnostakis, pleaded in favour of the establishment of a principle of the 'state of necessity', defined as follows: 'When the financial and the political existence of a State is in danger because of the serving of the abhorrent debt the refusal of its payment is necessary and justifiable'.

The second category of litigants is composed of different individuals and organizations, claiming that their private interests have been affected by the crisis of the banking system in the European Union. Some of them are depositors in large banks in Cyprus, and have brought cases before the General Court against the Commission and the ECB, the latter having requested the restructuring of these banks as a condition for the grant of financial stability aid through the European Stability Mechanism. They appeal before

[1] http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/559.

the Court of justice of the orders of the General Court dismissing their actions against the Commission and the ECB (Ledra Advertising Ltd C−8/15 P to C−10/15 P, Konstantinos Mallis C-105/15P to C-109/15P). Others are members and shareholders in a credit union (ILP), recapitalised by a decision of the Ministers of finance, approved by the European Commission, without the consent of the general meeting of ILP (Gerard Dowling v. Minister for finance C-41/15). Thus, they contest the substance of the decision - increasing of the capital of the company, allotting new shares without offering on a pre-emptive basis to existing shareholders, lowering the nominal value of the company's shares, altering the company's memorandum and articles of association- although these measures derive from the application of an agreement between the Irish government and the Commission.

In SV Capital OÜ v. EBA (C-577/15P), the appellant is a private company using the new EU rules and mechanisms of banking supervision established in response to the economic financial crisis. More precisely, SV Capital claims that, according to an EU directive, two directors of the branch of a Finnish bank, established in Estonia, should have been removed by supervisory authorities as they failed to satisfy the requirements of 'sufficiently good repute' and 'sufficient experience' to direct the business of the credit institution.

In the two remaining cases (out of the nine), the application has been made by a member state seeking annulment of an EMU decision taken by EU institutions.

In UK v. Parliament & Council (C-270/12), the United Kingdom did seek the annulment of article 28 of Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps. Under this article, the European Securities and Markets Authority (ESMA) can intervene in financial

markets of Member States, through legally binding acts, should there be a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union'. ESMA was established on 1 January 2011 as one of the three European Supervisory Authorities aimed at ensuring the stability of the banking system in Europe, as a complement to the national supervisory authorities. As a consequence, Regulation No 236/2012 vested ESMA with extensive advisory, notification, and regulatory powers with respect to short selling, which the UK contested, considering that the delegation of powers goes far beyond what is possible under EU law. The UK's application can be seen as a conflict about power sharing between the EU and the member states.

In Spain v. Council (C-521/15), the government of Spain challenged a Council decision imposing a fine on Spain for the misrepresentation of deficit data in the Autonomous Community of Valencia. The Council's power to impose such fines flows from Article 8(1) of Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, which is part of the Six-Pack adopted in 2011 to deal with the financial crisis. It can be seen as a contestation of budgetary surveillance measure. This time, the EU authority whose decision is contested was the Council of ministers. Unlike UK v. Parliament and Council, the case raised by Spain is less a matter of principle than a defence of specific Spanish interests.

Table 2 – Applicants and Defendants in judgments of the Court of justice on Economic and monetary policy since 2008

Case Number	**Applicants**		**Defendants**	
C-270/12	UK	Member state	European Parliament and Council	Supported by Spain, France, Italy, and the Commission
C-370/12	Mr Pringle	Irish Parliamentarian	Government of Ireland, Ireland, The Attorney General implementing a EU norm	
C-62/14	Mr Gauweiler & others, Die Linke	Individuals (academics) Political group	Deutsche Bundesbank (German Central Bank), the Bundesregierung (Federal Government) and the Deutscher Bundestag implementing a ECB decision	Intervening party : Bundesregierung
C-8/15 P to C-10/15 P	Ledra Advertising Ltd and others	Depositors in large banks in Cyprus	Commission and ECB	
C-41/15	Gerard Dowling & others	Members and shareholders in a credit union	Minister for finance (Ireland) implementing a EU norm	Intervening parties : Permanent TSB Group Holdings plc, Permanent TSB plc
C-105/15 P to C-109/15 P	Konstantinos Mallis & others	Depositors in large banks in Cyprus	Commission and ECB	

C-521/15	Spain	Member state	Council	Supported by the Commission
C-577/15P	SV Capital OÜ	Private company	European Banking Authority	Supported by the Commission
C-589/15 P	Alexios Anagnostakis & others	Individual in charge of a European Citizens Initiative	Commission	

Defendants

Out of the nine cases, six have been targeted at EU institutions and agencies, and three at national authorities all of which were implementing EU norms (Table 2).

In the first situation, the Commission, the Council, the Parliament, the European Central Bank and the European Banking Authority are acting as defendants, and are legally challenged for decisions taken in response to the economic and financial crisis. More specifically, there are five different situations, depending on whether the defendant is: the Commission alone (Alexios Anagnostakis C-589/15P), the Commission together with the ECB (Ledra Advertising Ltd C−8/15 P to C−10/15 P, Konstantinos Mallis C-105/15 P to C-109/15 P), the EBA (SV Capital OÜ C-577/15), the Council alone (Spain v. Council C-521/15), the Council together with the Parliament (UK v. Parliament & Council, C-270/12). In the three cases where the Commission is not defendant, it always comes in support of the defendant.

The second set of rulings concern national authorities as defendants, and more precisely: in the Pringle case (C-370/12), Ireland ratifying, approving or accepting the Treaty establishing the European stability mechanism; in Gerard Dowling (C-41/15), the Irish Minister of finance recapitalising a credit union in application of the EU financial assistance programme; and in Gauweiler (C-62/14), the Deutsche Bundesbank (German

Central Bank) implementing OMT decisions, the Bundesregierung (Federal Government) and the Deutsche Bundestag (Lower House of the German Federal Parliament) for not acting with regard to those decisions. In all three cases the national authorities are either implementing EU economic and monetary policies, or not acting against the implementation of these policies.

Which sovereignty?

Identifying sovereignty and conflicts of sovereignty

In this section we try to identify the four types of sovereignty and see how they fit with our dataset of Court's judgments (Table 3).

In the first section of this article, we took as an indicator of supranational sovereignty the position of EU institutions. Thus, the positions of the Commission, as well as the Parliament, the ECB and the EBA in several of the cases studied above can be seen as a defense of supranational sovereignty. The Council, while reflecting the interest of the member states, defended supranational sovereignty, as it acted as a collective actor participating in the decision process. Supranational sovereignty is also defended when member states individually implement EU legislation at the domestic level. Hence supranational sovereignty is located in EU institutions, which include the Council representing the *collective* interest of the member states, as well as in the member states implementing decisions taken by EU institutions. In the sample selected, supranational sovereignty only appears in the category of the defendants.

Following from this, we consider that national sovereignty is not defended by the member states when acting collectively within the Council but only by the member

states acting for their own purposes against EU institutions. Decisions of the Council, even if they are taken by unanimity, consensus or by a large majority of member states, are part of the EU decision-making process, and thus must be seen as reflecting supranational sovereignty. When member states act on their own purposes, two situations must be distinguished. When applying EU economic and monetary policies at domestic level, the member states act as agents of supranational sovereignty (see above). This is only when they use litigation strategies against EU economic and monetary policies that they clearly defend national sovereignty. In two cases, we found Spain and the UK defending national sovereignty against EU institutions and other member states supporting supranational sovereignty.

No case of parliamentary sovereignty is present in our sample. Neither national Parliaments nor the European Parliament acted as plaintiffs or defendants in the cases under scrutiny. In the case of Gauweiler (62/14), the Bundestag is questioned for not having opposed the ECB's Outright Monetary Transactions decision, but in this situation the German assembly can be seen as implementing a EU rule and contributing to supranational sovereignty. If we enlarge the definition to the European Parliament (which we first and foremost consider as reflecting the supranational dimension of sovereignty see Warren 2018), then we have a second example with the case C-270/12 where the UK challenged a regulation adopted by the Parliament together with the Council. But as this regulation is the result of the ordinary legislative procedure, and thus does not result from a position defended by the Parliament alone, it cannot be seen as representing parliamentary sovereignty.

Finally, popular sovereignty cannot be found in our nine cases if we define it as the position of the 'people', or at least of the community of citizens living in a member state. Yet, we use a more extensive definition of the people, including all groups and

individuals coming from the civil society. They are part of seven proceedings at both domestic and EU level, and always acting as applicants. If we enlarge the definition to a very pure – and to a certain extent extreme - definition of representative democracy where the government is the mouth of the people, applicants, then all nine cases can be seen as initiated in the name of popular sovereignty.

These observations allow us to refine the indicators of sovereignty that we proposed in the first section of this paper, and propose a refined list of indicators (see Table 3), where all actors defend primarily a certain type of sovereignty, while also defending, as a complement, other type of sovereignty.

Table 3 – Sovereignty attributed to the different parties in judgments of the Court of justice on Economic and monetary policy since 2008

	Defend.s primarily:	May also defend:
Commission, ECB, EBA	Supranational sovereignty	
Parliament	Supranational sovereignty	Parliamentary sovereignty
Council	Supranational sovereignty	National and popular sovereignty
Member states	National sovereignty	Supranational and popular sovereignty
Individuals, companies, political parties	Popular sovereignty	
National parliaments	Parliamentary sovereignty	Supranational or national sovereignty

Table 4 summarizes the results of different types of sovereignty conflicts in the Court of Justice's EMU rulings. Two main observations can be made.

First, EU institutions enforcing EU economic and monetary law have never acted as plaintiffs. We could not find cases motivated by inter-instutional turf battles, as it is often the case in other policy fields. Second, two main categories of litigants have brought cases before the Court: member states defending national sovereignty; private litigants defending popular sovereignty. All of them have acted against supranational sovereignty, directly (application against EU institutions) or indirectly (application against member states applying EU law). The 'story' that these rulings tell is that of a resistance coming from either national governments or the civil society (acting as applicant) and opposed to supranational sovereignty (being the defendant). When the Court protects supranational sovereignty represented by member states applying EU law, we might consider that national sovereignty is not really challenged because the decision made by national governments can be seen as national sovereignty being consistent with supranational sovereignty. In one case (C-270/12), national sovereignty can be found in both sides, as some member states have presented observations in support of the Commission and the ECB.

Table 4 – Conflicts of sovereignty judgments of the Court of justice on Economic and monetary policy since 2008

	Applicants				Defendants			
	Supra	Nat	Parl	Pop	Supra	Nat	Parl	Pop
C-270/12		x			x	(x)		
C-370/12				x	x	(x)		
C-62/14				x	x	(x)		
C–8/15 P to C–10/15 P				x	x			
C-41/15				x	x	(x)		
C-105/15 P to C-109/15 P				x	x			
C-521/15		x			x	(x)		
C-577/15P				x	x			
C-				x	x			

589/15P								

Which sovereignty does the Court of justice support?

In these nine judgments, the Court has consistently supported supranational sovereignty. The Court, just like the General Court in first instance, has ruled in favour of the Commission and the European Central Bank, supporting the programmes decided by both institutions towards the member states most affected by the financial crisis (Ledra Advertising Ltd v. Commission and ECB C−8/15 P to C−10/15 P, Konstantinos Mallis v. Commission and ECB C-105/15 P to C-109/15 P). The Commission's refusal to give effect to a European Citizens' Initiative in favour of more solidarity and less austerity has also been confirmed by the Court of justice (Alexios Anagnostakis C-589/15P). And the Parliament and the Council have also won their case against the UK (UK v. Parliament and Council C-270/12), which had the effect of validating the delegation of power to the European Securities and Markets Authority.

In other cases, supranational sovereignty was indirectly defended by the Court in cases where national authorities implemented EU rules, like the Deutsche Bundesbank applying the ECB OMT programme (Gauweiler C-62/14), or the Irish government agreeing to the setting up of the European Stability Mechanism (Pringle C-41/15). In those cases, both supranational and national sovereignties were supported: the former because the validity of EMU rules was confirmed; the latter because, on the one hand, EMU rules have been adopted on the basis of a delegation of power to the Commission and the ECB decided by the member states, and, on the other hand, because national

authorities used their sovereignty to implement EMU rules. In the context of EMU cases, when national sovereignties are defended on both sides of the dispute (applicant and defendant), the Court always ruled in favour of national sovereignty supporting the supranational one (Gauweiler C-62/14, Pringle C-370/12, Gerard Dowling v. Minister for finance C-41/15), never in favour of national sovereignty opposing supranational sovereignty (Spain v. Council C-521/15, UK v. Parliament and Council C-270/12), hence clearly defending the integration project against other preferences.

Parliamentary sovereignty was only indirectly involved in cases brought before the Court of justice, but each time it was, the Court came in support. Thus, the Court ruled in favour of the European Parliament (together with the Council) against the UK in the case about ESMA powers (UK v. Parliament and Council C-270/12). Even more indirectly, the Gauweiler ruling (C-62/14) does not point at a lack of action from the Bundestag against ECB's outright monetary action, as Peter Gauweiler, citizens and Die Linke blamed the Bundestag. Just like national sovereignty, it can be argued that parliamentary sovereignty is not defended as such, but more as a side effect of supranational sovereignty protection.

The Court never ruled in favour of popular sovereignty and against EU decisions (or against national decisions taken in application of EU policies). From this, a blunt conclusion would be that the Court puts European integration above any other consideration. It is however equally possible to develop three different strands of arguments. 1°) applicants who can be seen as defending popular sovereignty might not represent the entire citizenship of a country or even a significant minority; 2°) they sometimes defend their own private interest (shareholders in banks) 3°) a classical understanding of representative democracy as opposed to post-democracy (Crouch

2004), would argue that national governments act in the name of the people .

The European judges have indeed clearly defended the economic and monetary policies decided at EU level and implemented at national level, against any form of legal challenges coming from the civil society. Those groups and individuals who fought against austerity policies could not find support to their cause in the Court of justice of the European Union.

Judicialisation processes have indeed taken place: citizens, stakeholders, national parliamentarians or governments have challenged European economic norms on judicial grounds over a hundred times. The nine cases on which the Court of Justice has ruled have systematically defended the legality of these norms decided at the EU level. This judicial attitude is consistent with those of other European constitutional courts, which have, equally consistently, confirmed the legality of the new EU economic and financial governance mechanisms (Fasone 20014; Fontan and Saurugger, forthcoming). A comparative approach to this issue allows us to see that this attitude is widespread, not only at the European or member state levels but also in American courts.[2] In the US, district courts have developed a jurisprudence which refrains from performing judicial review on policymaking performed by the Fed and the Supreme Court has altogether decided not to hold hearings of such cases (Berstein, 1989). In 1985, a district court stated that "courts lack both the competence and the authority to determine such abstract issues". Up till now, the US judicial review has followed this logic (Canova 2015; Conti-Brown, 2016).

While supranational sovereignty is indeed absent in the US case, we observe a similar pattern in the rulings of higher courts, including constitutional courts and the Court of

[2] We would like to thank Clement Fontan for bringing these elements to our attention and for providing us with references.

Justice. In times of crises, courts seem to have a tendency to defend the survival of the system. This means that calls of sovereignty from actors others than decision-makers are rejected or the Court, such as in the US system, declines its capacity to rule.

Conclusion

The aim of this article was to analyse the position of the Court of justice of the EU with regard to the conflicts of sovereignty that emerged in the context during and in the aftermath of the EMU crisis. In a context of economic and financial crisis which lead to an expansion of legal rules and hence more integration, and hence a potentially more central place of courts, this article wanted to establish whether this strengthening led to a defence of supranational sovereignty by the Court of Justice rulings or whether the Court also took parliamentary, popular and national sovereignty into account.

The results based on our data shows the Court has exclusively supported supranational sovereignty, whether plaintiffs were civil society actors or member states. This research result is consistent with other studies on constitutional courts, which point out that in the field of economic and financial questions, courts do not question the either supranationally or domestically democratically decided rules, either through abstaining to rule on those questions, or through defending the established rules as legitimate.

Our analysis has however also shown that the distinction between these four different sovereignties is a complex endeavour in the case of the CJEU: supranational sovereignty can be seen as, on the one hand, the defence of integration decided intergovernmentally by member states or, on the other, as decisions taken by supranational organisations

such as the Commission and the ECB, or through classic community decision making based on a cooperation between the European Parliament and the Council, after a proposals of the Commission. While the EU's institutional response to the crisis has been used as evidence to support the rise of new intergovernmentalism, defending the claim that member states are led to 'pursue more integration but stubbornly resist further supranationalism' (Puetter 2012, 168), the analysis of the rulings seem to indicate that the Court remains a defender of supranational integration against lose intergovernmental policy coordination leaving more leeway to individual member states.

At the same time, does this result mean that the Court of Justice, and constitutional courts more generally, ignore popular or parliamentary sovereignty altogether? It can indeed be seen as problematic that when confronted with a choice between, one hand, upholding an institutional framework born during an extreme crisis and therefore ensuring a need for stability and, on the other hand questioning the democratic character of these decisions, the CJEU has (not yet) engaged in substantive control of EMU crisis measures. Nevertheless, the complexity of embedded sovereignties, as this article has attempted to illustrate make this question less clear-cut than it might seem.

List of cases

C-270/12 – UK v. Parliament & Council

C-370/12 - Thomas Pringle v Government of Ireland and Others

C-62/14 - Peter Gauweiler and Others v Deutscher Bundestag

C−8/15 P to C−10/15 P - Ledra Advertising Ltd and others v. Commission and ECB

C-41/15 - Gerard Dowling and others v. Minister for finance

C-105/15 P to C-109/15 P - Konstantinos Mallis and others v. Commission and ECB

C-521/15 – Spain v. Council

C-577/15P - SV Capital OÜ v. European Banking Authority

C-589/15 P - Alexios Anagnostakis v. Commission

Bibliography

Aalberts Tanja E. (2012), Constructing Sovereignty between politics and law, London, Routledge

Adams, M., Fabbrini, F. & Larouche, P. (2014). *The Constitutionalization of European Budgetary Constraints*. London: Bloomsbury Publishing.

Adler-Nissen Rebecca and Gammeltoft-Hansen Thomas (eds) (2008), Sovereignty Games. Instrumentalizing State Sovereignty in Europe and Beyond, Houndmills, Palgrave Macmillan

Adler-Nissen, R. (2014). *Opting out of the European Union: diplomacy, sovereignty and European integration*. Cambridge University Press.

Adler-Nissen, R. (2014). *Opting out of the European Union: diplomacy, sovereignty and European integration*. Oxford, Oxford University Press.

Amtenbrink, F. (2014). New Economic Governance in the European Union: Another Constitutional Battleground? In *Varieties of European Economic Law and Regulation*, edited by K. Purnhagen & P. Rott, 207–34. Dordrecht: Springer International Publishing.

Bernstein Mark F. (1989), The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens, 75 Va. L. Rev. 111

Beukers, T., de Witte B. & Kilpatrick, C. (2017). *Constitutional Change through Euro-Crisis Law*. Cambridge: Cambridge University Press.

Canova, Timothy A. (2015). The Role of Central Banks in Global Austerity, Indiana Journal of Global Legal Studies, Volume 22, Issue 2, 2015, pp. 665-695

Caporaso, J. A. & Tarrow, S. (2009). Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets. *International Organization* **63**(4): 593–620.

Chalmers, D., Jachtenfuchs, M. and Joerges, C. (eds) (2016). *The End of the Eurocrat's Dream . Adjusting to European Diversity.* Cambridge, Cambridge University Press

Conti-Brown, P. (2016). Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve. *Geo. Mason L. Rev.*, *24*, 617

Contiades, X. (2013). *Constitutions in the Global Financial Crisis: A Comparative Analysis*. London: Routledge.

Crouch, Colin (2004). *Post-democracy,* Policty Press

Daniele, L., Simone, P., & Cisotta, R. (Eds.). (2017). *Democracy in the EMU in the Aftermath of the Crisis*. Springer.

Dawson, M. (2015).The Legal and Political Accountability Structure of Post -Crisis EU Economic Governance. *Journal of Common Market Studies* **53**(5) :

Dawson, M., H. Enderlein, and C. Joerges eds. (2015). *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation.* Oxford : Oxford University Press

Dyson, K. (2014). *States, Debt, and Power: "Saints" and "Sinners" in European History and Integration*. Oxford: Oxford University Press.

Fabbrini, F. (2014). The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective. **32** *Berkeley J. Int'l L.* 64.

Fasone, C. (2014). Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective, *EUI Working Paper MWP 2014/25*

Fontan, C. and Saurugger, S. (forthcoming), ….

Hall, P. A. (2012). The Economics and Politics of the Euro Crisis. *German Politics* **21**(4): 355–71.

Hinarejos, A. (2015a). The Role of Courts in the Wake of the Eurozone Crisis. In *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation* ed. by M. Dawson, H. Enderlein, and C. Joerges, Oxford, Oxford University Press, 112-136

Hinarejos, A. (2015b). Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union: European Court of Justice, Judgment of 16 June 2015, Case C-62/14 Gauweiler and others v Deutscher Bundestag. *European Constitutional Law Review*, **11**(3), 563-576

Hirschl, R. (2004). *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press.

Hirschl, R. (2008). The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Sciences* **11**: 93–118.

Höpner, M. & Schäfer, A. (2012). Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting. *International Organization* **66**(3): 429–55.

Joerges, C. (2016). 'Integration through law and the crisis of law in Europe's emergency', in *The End of the Eurocrat's Dream . Adjusting to European Diversity.* Edited by D. Chalmers, M. Jachtenfuchs and C. Joerges, Cambridge, Cambridge University Press, 299-338.

Leuffen, Dirk, Rittberger Berthold and Schimmelfennig, F. (2012), *Differential Integration,* Basingstoke, Palgrave, McMillan

Mac Amhlaigh Cormac (forthcoming), 'Late Sovereignty in post-integration Europe: Continuity and Change in a Constitutive Concept', in Rebecca Adler-Nissen and U. Pram-Grad, Micropolities in the Margins of Europe, Routledge,

MacCormick, Neil (2002). Questioning Sovereignty: Law, State, and Nation in the European Commonwealth. Oxford: Oxford University Press

Mancini G. F. (1989), 'The Making of a Constitution for Europe', *Common Market Law Review* 26, 595-614.

Martinsen, D. S. (2015). *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union*. Oxford: Oxford University Press.

Matthijs, M. & McNamara, K. (2015). The Euro Crisis' Theory Effect: Northern Saints, Southern Sinners, and the Demise of the Eurobond. *Journal of European Integration* **37**(2): 229–45.

Puetter Uwe (2014). *The European Council and the Council. New Intergovernmentalism and Institutional Change,* Oxford, Oxford University Press

Ruffert, M. (2017). 'The EMU in the ECJ : A new dimension of dispute resolution in the process of European integration, in *Democracy in the EMU in the Aftermath of the Crisis,* ed by L. Daniele, P. Simone and R. Cisotta, Springer, 335-352

Ruffert, M. (2017). The EMU in the ECJ: A New Dimension of Dispute Resolution in the Process of European Integration. In *Democracy in the EMU in the Aftermath of the Crisis* (pp. 335-352). Springer, Cham.

Saurugger, S. (2016). Politicisation and Integration through Law: Whither Integration Theory? *West European Politics* **39**(5): 933–52.

Saurugger, S. & Terpan, F. (2017). *The Court of Justice of the European Union and the Politics of Law*. Basingstoke: Palgrave Macmillan.

Saurugger, S., & Terpan, F. (2016). Do crises lead to policy change? The multiple streams framework and the European Union's economic governance instruments. *Policy Sciences*, *49*(1), 35-53.

Scharpf, F. W. (1997). Economic Integration, Democracy and the Welfare State. *Journal of European Public Policy* **4**(1): 18–36.

Scharpf, F. W. (2013). Monetary Union, Fiscal Crisis and the Disabling of Democratic Accountability. In *Politics in the Age of Austerity*, 108–42. London: Polity Press.

Scharpf, F. W. (2015). After the Crash: A Perspective on Multilevel European Democracy. *European Law Journal* **21**(3): 384–405.

Stone Sweet, A. (2000). *Governing with judges: constitutional politics in Europe*. Oxford: Oxford University Press.

Stone Sweet, A. (2010). The European Court of Justice and the Judicialization of EU Governance. Living Reviews in EU Governance. Available at SSRN: https://ssrn.com/abstract=1583345 or http://dx.doi.org/10.2139/ssrn.1583345

Storm, S. &. Naastepad, C. W. M. 2015. "NAIRU Economics and the Eurozone Crisis." *International Review of Applied Economics* **29**(6): 843–77.

Streeck, W. & Schäfer, A. (2013). *Politics in the Age of Austerity*. Hoboken: John Wiley & Sons.

Tate, C. N. & Torbjorn, V. (1995). *The Global Expansion of Judicial Power*. New York: NYU Press.

Terpan, F. (2015). Soft law in the European Union—the changing nature of EU law. *European Law Journal*, *21*(1), 68-96.

Tuori, K. & Tuori, K. (2014). *The Eurozone Crisis: A Constitutional Analysis*. Cambridge: Cambridge University Press.

Tuori, K., & Tuori, K. (2014). *The Eurozone crisis: a constitutional analysis*. Cambridge University Press

Walker Neil (1998), 'Sovereignty and differentiated integration in the European Union', European Law Journal, 4(4), 355-388

Walker Neill (2003), 'Late Sovereignty in the European Union', in Neil Walker (ed.), Sovereignty in Transition. Portland: Hart Publishing

Warren, T. (2018). The European Parliament and the eurozone crisis: An exceptional actor?. *The British Journal of Politics and International Relations*, DOI.1177/1369148118768141.

Wind Marlene, (2001), *Sovereignty and European Integration: Towards a Post-Hobbesian order.* London & New York: Palgrave/Macmillan