Sovereignty and the Shaping of Economic Governance in the European Union

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1 Introduction

In her view on the *Pringle* case,[1] Advocate General Kokott unfolded an interesting analysis with regard to the scope of Article 125 of the Treaty on the Functioning of the European Union (TFEU),[2] the no bail-out clause. In order to sustain her argument that this provision did not preclude the euro states from concluding the Treaty Establishing the European Stability Mechanism (the ESM-Treaty),[3] Kokott linked three principles: national sovereignty, stability and solidarity.[4] According to the Advocate General (AG), taken together, these three principles militated against a broad interpretation of Article 125 TFEU, in which the ESM-Treaty was considered to be contrary to European Union (EU / Union) law. This is a surprising cocktail of principles. Stability, national sovereignty and solidarity do not necessarily make easy bedfellows. To many people, holding fast to national sovereignty is not a good recipe for a stable Europe.[5] And should stability be reconciled with national sovereignty, it might appear that this would harm the value of solidarity. One could, after all, argue that the strict conditionality which is attached to financial assistance in the Eurozone[6] is not exactly beneficial to Member States at the receiving end.[7]

The central aim of this paper is to identify the content of the principle of national sovereignty and to analyse how it interacts with the principles of stability and solidarity with regard to EU economic governance, a terrain with an increasingly constitutional dimension.[8] In order to answer these questions, we divide this paper in two parts. The first prong of our research is largely theoretical in nature and looks at the principles of sovereignty, stability and solidarity in a constitutional and conceptual way. The second prong of our research takes a more practical viewpoint and focuses on the economic constitutional framework which the EU and the Member States have set up and in

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[1] Case C-370/12 *Pringle v Ireland* [2013] OJ C26/15, judgment of 27 November 2012 nyr.

[2] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 125.

[3] Treaty Establishing the European Stability Mechanism of 1 February 2012 (ESM-Treaty).

[4] Case C-370/12 *Pringle v Ireland* (n1) Opinion of AG Kokott, paras 126-144.

[5] Olli Rehn, Vice-President of the European Commission and member of the Commission responsible for Economic and Monetary Affairs and the Euro, 'Speech by Vice-President Rehn at the Italian Parliament' (Rome, 17 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-719_en.htm> accessed 5 December 2014.

[6] Article 136(3) TFEU (n2).

[7] cf Karsten Schneider, 'Yes, But … One More Thing: Karlsruhe's Ruling on the European Stability Mechanism' (2012) 14(1) German Law Journal 53, 70-72.

[8] From a European law perspective, some people might contest whether these three notions are really principles. Solidarity, for instance, is mentioned in Article 2 of the Consolidated Version of the Treaty on European Union [2012] OJ C326/13 (TEU). Unlike, for example, Article 4 or 5 TEU, this provision does not speak of *principles*, but of *values*. The same is true for democracy. The shift from principles to values was a deliberate choice of the European Convention, when the forerunner of Article 2 TEU was drafted. Arguably, this had to do with the fact that the nature of a *value* is more subjective than that of a *principle*, which was believed to be important in the light of the accession of ten former Soviet satellite countries. See Rene Barents, *Het Verdrag van Lissabon. Achtergronden en commentaar* (Kluwer 2008) 176-177. Whatever may be of this shift, in this paper we nonetheless hold on to Kokott's choice of the term principles. This is also applicable to the issue of stability, which Kokott does not expressly list as a principle, but which in our opinion certainly may also be qualified as such. See in this respect para 2.3.

which they currently operate. Specifically, this part concentrates on the, mainly, executive measures which are adopted in the context of the European Semester.[9]

This paper includes three EU Member States in its analysis: Germany, the Netherlands and the United Kingdom (UK). Both as regards the first prong of our research and as regards the second prong of our research, these countries have a distinct position. Conceptually speaking, this distinctiveness is apparent in that all states look towards the concept of sovereignty in a fundamentally different way. In a practical sense, a first distinction lies in the fact that Germany and the Netherlands are part of the Eurozone, whereas the UK is not. Secondly, Germany and the Netherlands differ in that the latter country was subject to excessive deficit and excessive macroeconomic imbalances procedures in 2013, whereas Germany has been subject only to the regular monitoring procedures.

2 Theoretical Perspective

2.1 Sovereignty in three Member States

'The Union was established by still sovereign States': thus starts AG Kokott her exploration, in *Pringle*, of the issue of sovereignty as a 'basic structural principle of the European Union'.[10] For several reasons, this is a remarkable statement. For one thing, as far as the authors are aware, this is the first time that a Court institution actually considers the sovereignty of the Member States to be a basic structural principle of the Union.[11] When it comes to the term 'sovereignty', European lawyers are used to the language of the seminal decisions *Van Gend en Loos*[12] and *Costa v ENEL*.[13] In these decisions the focus of the Court did not lie on expounding the fundamental status of the Member States as 'Masters of the Treaties', but, quite the other way around, on the perimeters of their powers.

This brings us to a second reason why Kokott's account is remarkable. In line with the rulings in *Van Gend en Loos*[14] and *Costa v ENEL*,[15] many European lawyers have been brought up with the idea that, within the context of European integration, 'still sovereign States' no longer exist. According to some commentators, sovereignty has simply faded away in the process of uniting Europe.[16] Others speak of 'divided sovereignty' or 'pooled sovereignty'.[17] Whatever the precise meaning of these visions, they are hard to reconcile with Kokott's assertion in *Pringle* that the ESM-Treaty, 'as a Treaty governed by international law', constitutes 'an expression of the Member States' sovereignty and their freedom to enter into treaties'.[18] This is because, one way or the other, all such visions on the European legal order assume that EU law, ultimately, regulates whether and to which extent the Member States indeed have this particular freedom.

Tellingly, Kokott's point about sovereignty in relation to the freedom on the part of the Member States to conclude the ESM-Treaty was, during an earlier round on the legality of this treaty, also embraced

[9] The European Semester is a yearly cycle of economic policy coordination.
[10] Case C-370/12 *Pringle v Ireland* (n1) Opinion of AG Kokott, para 137.
[11] A quick search in Conclusions by Advocates General of the CJEU shows that when sovereignty pops up, this is in the context of 'sovereignty clauses' in legislation – thus bearing on specific competences – or something like 'territorial sovereignty' – thus connecting to the vocabulary of international law. In a distinct constitutional sense, however – ie relating to the source and nature of constitutional authority – the notion is virtually absent. Note that it matters whether one conducts a search query into the English term 'sovereignty' or the German term 'Souveränität'. 'Sovereignty' produces 192 hits, whereas 'Souveränität' produces 86 hits. This has to do with the fact that in Germany, doctrine distinguishes between 'Souveränität' and 'Hoheitsrechte', whereas in the English language 'sovereignty' is often used interchangeably with 'sovereign rights'.
[12] Case 26/62 *Van Gend en Loos* [1963] ECR 1.
[13] Case 6/64 *Costa v ENEL* [1964] ECR 585.
[14] (n12).
[15] (n13).
[16] Konrad Schiemann, 'Europe and the Loss of Sovereignty' (2007) 56(3) ICLQ 475-490.
[17] See, for example: Robert Schütze, *From Dual to Cooperative Federalism. The Changing Nature of European Law* (OUP 2009); and Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 CMLRev 703.
[18] Case C-370/12 *Pringle* (n1) Opinion of AG Kokott, para 138.

by a staunch defender of national sovereignty: the German Federal Constitutional Court (FCC). Discussing the status of Article 136(3) TFEU, the legal basis for the ESM-Treaty, the FCC explained that this provision 'confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established'.[19] Hence, it might seem as if EU law and national law are in perfect harmony. Such a conclusion, however, would be premature. In the reasoning of the FCC at least, hidden behind the veil of sovereignty are premises on the nature of democracy and the function of a constitution.[20] It is questionable whether these premises would be downright accepted by constitutional actors throughout the Union. In the Netherlands for example, the Council of State (*Raad van State*) appears to take a wholly different view as regards the possibility of realising democracy in the EU.[21] There is little doubt that this difference in opinion can be attributed to the absence of sovereignty as a foundational concept in Dutch constitutional doctrine. As a result of this absence, the Dutch, unlike the Germans, do not have serious conceptual qualms about transferring democratic powers to the European level. This position also affects the question whether the Member States, by establishing the ESM outside the Union framework, acted in a lawful manner. Although the Council of State stops short of rejecting this move, it is concerned about the fact that the Member States 'have wilfully chosen an approach outside the autonomous and institutional legal order of the EU'.[22]

The different approach of the Dutch Council of State highlights a third reason why Kokott's statement on the issue of sovereignty is noteworthy. If it is true that there is no consensus between the Member States on the meaning and current value of this issue, it is hard to see how sovereignty, as the AG Kokott suggests in *Pringle*, can be a 'basic structural principle of the European Union'. For an assessment of the merits of this argument, we will look into the constitutional doctrine of Germany, the Netherlands and the United Kingdom, three Member States with diverse traditions when it comes to sovereignty. This might also help to clarify whether national sovereignty has indeed changed in the face of the process of European integration, as many accounts of this process interpret *Van Gend en Loos*[23] and *Costa v ENEL*.[24]

2.1.1 Germany

She who searches for the word 'sovereignty' in the German Basic Law, the federal constitution, searches in vain. Nonetheless, the notion plays a pivotal role in German constitutional law. Ever since the founding of the Second Empire, the first modern German state, in the period 1866-1871, sovereignty is a crucial concept in, first, establishing the unity of the legal order and, secondly, in legitimising this legal order. Given that Germany is a federal state and has a long history of federalism, this may sound strange.[25] But perhaps it is precisely because of this tradition that the Germans, frustrated for so long by the lack of constitutional unity in their lands, by the end of the nineteenth century, when statehood was finally achieved, clung to the idea of national sovereignty.

Since the days of the Weimar Republic, which was founded in 1919, sovereignty in Germany lies with the people. The Basic Law (Grundgesetz (GG)) contains two provisions that express this: Article 146 GG, which reserves the right of the people to enact another constitution, and Article 20(2) GG, which states that '[a]ll state authority is derived from the people'. In the case law of the FCC, especially the latter provision rose to prominence. In short, Article 20(2) GG requires democratic legitimation of all state authority.[26] More specifically, this means that the German Parliament, as the main

[19] *ESM Case*, BVerfG, 2 BvR 1390/12, order of 12 September 2012, para 236 <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html > accessed 20 February 2015.

[20] See below, part 2.1.1.

[21] Advies W06.12.0042/III, 1 maart 2012 (NL). See further below, part 2.2. In the absence of a constitutional judge, the Council of State is the most important interpreter of the Dutch constitution.

[22] Advies W01.12.0041/I, 1 maart 2012 (NL). Translation by the authors from '*Wel constateert de Afdeling met enige zorg dat de lidstaten van meet af aan, dat wil zeggen ook al met de instelling van de Europese Financiële Stabiliteitsfaciliteit, doelbewust hebben gekozen voor een aanpak buiten de autonome rechtsorde en het institutionele kader van de EU om'.*

[23] (n12).

[24] (n13).

[25] See Stefan Oeter, 'Federalism and Democracy' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2007) 62-67.

[26] See Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart Publishing 2010) 30-35.

representative of the sovereign people, has to be in command of all essential decision making affecting the *demos*, and that all government acts, through an unbroken chain of legitimacy, can be traced back to the sovereign. Sovereignty, then, is in Germany above all else a *democratic* theory, which revolves around the people's right to self-determination.[27]

Just like in other Member States, during the twentieth century, the concept of sovereignty has gained in importance in Germany as a result of the process of European integration. Inextricably linked to this rise, dating from 1993, is the *Maastricht* judgment.[28] It was in *Maastricht*, that the FCC for the first time developed its critical, sovereignty-based reading of the integration process, which, twenty years later, has become a dominant feature of the European constitutional debate.[29] This reading rests on a couple of constitutional pillars. Apart from Article 20(2) GG, mention should be made of Article 23(1) GG – an 'integration clause' – and Article 79(3) GG – an 'eternity clause'. Combined, these three provisions, in the hands of the FCC, have acquired the meaning that the Basic Law sets certain constitutional boundaries to further European integration, which only the people, in their capacity as constituent power, can surmount.[30] Legislative *organs*, even when empowered to amend the constitution, are not allowed to transgress these boundaries. The Basic Law, the FCC explained in its *Lisbon* judgment of 2009, 'not only presumes sovereign statehood for Germany but guarantees it'.[31] The EU, in the meantime, should be satisfied with the status of 'association of sovereign states' (*Staatenverbund*).

For its equation of sovereignty with statehood, the FCC has been firmly criticised. Criticism even came from a fellow Constitutional Court, the Czech *Ústavní soud*. According to this Court, the German FCC is wrong in not recognising that 'the democratic process on the Union and domestic levels mutually supplement and are dependent on each other'.[32] In a nutshell, this is indeed the crux of the matter. Does democracy, in order to flourish, require a 'primary political area', as the FCC maintains on the basis of the German constitution?[33] Or is it possible, in an existential sense, to cut democracy loose from the nation state, as the Czech Court and, also, the Dutch Council of State seem to suggest?[34]

Whether the FCC provides a convincing account of sovereignty, is a matter of constitutional and theoretical debate. What is important to note here, in a final word on Germany, is that the FCC's approach to sovereignty translates into real legal consequences. Particularly in its *Lisbon* decision, the FCC designates a number of policy terrains, which, because of their closeness to the constitutional identity of Germany, should remain well in range of the democratic control of German constitutional authorities, especially the Federal Parliament.[35] Among the terrains that are mentioned by the FCC in *Lisbon*, is budgetary power. Today, a couple of years later, this power stands at the centre of attention. And, one may add, the FCC's doctrine on sovereignty is really making itself felt for the first time. Until now, at least, the way the challenge of democracy has been approached during the euro crisis seems mainly driven by the need to placate national parliaments.[36] Surely, there are

[27] Ernst-Wolfgang Böckenförde, *Die verfassunggebende Gewalt des Volkes. Ein Grenzbegriff des Verfassungsrechts* (Suhrkamp Verlag 1986).
[28] *Maastricht Case*, BverfG, 2 BvR 2134/92, order of 12 October 12 1993; [1994] 1 CMLR 57.
[29] Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 European Law Journal 389.
[30] *Lisbon Case*, BVerfG, 2 BvE 2/08, order of 30 June 2009, paras 207-231 <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html> accessed 20 February 2015.
[31] ibid para 216.
[32] *Treaty of Lisbon II*, Pl ÚS 29/09, judgment of 3 November 2009, para 139.
[33] *Lisbon* (n30) para 301.
[34] cf Peter Häberle, *Europäische Verfassungslehre* (Nomos 2009) 35.
[35] *Lisbon* (n30) paras 250-260.
[36] cf the (disappointed reaction of the Parliament in) European Parliament resolution of 23 May 2013 on future legislative proposals on EMU: response to the Commission communications. <www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-222> accessed 5 December 2013.

various reasons for this development. That being so, it corresponds neatly with the FCC's view that, in sensitive political areas, democracy should above all mean *national* democracy.[37]

2.1.2 The Netherlands

Although geographically close, the Netherlands are, constitutionally speaking, a world apart from Germany. In the Netherlands, you will not encounter a guardian of the constitution such as the FCC. Indeed, as was mentioned above, in the Netherlands you will not even find a concept of sovereignty that underlies the constitution. The Dutch constitution is, at its core, lacking in principle. Sovereignty, a concept fraught with ideological overtones, 'is simply not part of the Dutch constitutional alphabet', as Bruno de Witte remarked in a chapter on the Netherlands in a well-known study on sovereignty from 2003.[38] The winds may be changing, however. In particular among politicians, talking about sovereignty is very much en vogue nowadays. The reason for this is the euro crisis, which fuels an – already before the outbreak of the crisis – increasingly sceptical attitude towards European integration. It might well be that the rise of sovereignty in political parlance will leave its mark on a phenomenon which is often associated with the absence of sovereignty as a legal concept: the openness of the Dutch legal order towards international and European law.

The absence of sovereignty in Dutch constitutional law can be traced back to 1814, when the first constitution for the Kingdom of the Netherlands was adopted. After years of political strife during the so-called French years, the Dutch had lost their taste for grand theories with respect to constitution-making. The constitution that subsequently came into being in 1814 constituted a compromise. There was an important role for the monarchy. But this role was tempered by an autonomous role for parliament, and nowhere in the constitution were there references to a royal will underpinning the constitutional system, as was common in most Restoration regimes of the time. Even though there have been major constitutional changes in the past 200 years, essentially, this constitutional framework is still in place today.[39] The Dutch, after 1814, never experienced a revolution or other event which could have provided them with a constitutional moment to establish popular sovereignty.

In day to day constitutional practice, the lack of a concept of sovereignty in constitutional law is often not apparent. Despite some constitutional oddities, the Netherlands are a parliamentary democracy like so many other European states. In other ways, however, the absence of sovereignty is noticeable. As we just said, the Dutch constitutional system is marked by a very open attitude towards legal norms from outside. Of itself, this is not remarkable. What is remarkable is that this openness is accompanied by a distinctly deferential position of the national constitution. Unique among the Member States, the Dutch constitution is thought to play practically no role in the reception of EU law in the national legal order. The narrative of *Van Gend en Loos*[40] and *Costa v ENEL*[41] is fully accepted by both political organs and courts.[42]

The light weight of the national constitution also partly explains the reasoning, discussed above, of the Council of State. Even if this reasoning increasingly sits uncomfortably with public and political opinion regarding the EU, it flows rather logically from the manner in which the constitution is generally perceived in the Netherlands. Lacking a strong normative fundament, it is hard to see how the constitution can be put in place against European integration as a bulwark of democracy, in the same way as the Basic Law in Germany. Being neutral in character, the document does not provide an argument which makes *national* democracy markedly different from *European* democracy.[43] This

[37] *ESM Case* (n19) para 257.
[38] Bruno de Witte, 'Do Not Mention the Word: Sovereignty in Two Europhile Countries, Belgium and the Netherlands' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 361.
[39] A major revision took place in 1848, Europe's year of revolutions. This revision, among others, introduced the principle of political ministerial responsibility and as such planted the seeds for a less political role for the King. Even so, the constitution still puts the King in front of the Staten-Generaal, the Dutch Parliament. And legislative power is still partly in the hands of the King and the ministers.
[40] (n12).
[41] (n13).
[42] This deferential position can also be ascribed to another trait of Dutch constitutional law: a ban on constitutional judicial review. The ban cannot explain everything, though. Even if courts were empowered to guard the constitution, they would, under present conditions, miss a handle by which they could elevate the constitution to a level of higher normative intensity.
[43] Article 91(3) of the Dutch Constitution.

neutrality resonates in the way sovereignty is normally approached in the constitutional debate. Not used to categories such as *demos* or political community, these debates quickly break into a conversation on concrete powers. This, in turn, makes sovereignty an easy prey for criticism. For how should one assess which powers belong to the category of national sovereignty and which not?

2.1.3 The United Kingdom

When the Dutch foreign minister, Frans Timmermans, in June 2013 on behalf of the Dutch cabinet declared that, as far as the Dutch were concerned, the time of an 'ever closer Union' is over, this was cheered in Whitehall.[44] Timmerman's declaration was thought to fall in line with a long-awaited speech on Europe which Prime Minister David Cameron had delivered a few months earlier.[45] As both Timmerman's declaration and Cameron's speech were concerned with limiting interference by Brussels, this enthusiasm was understandable. However, on a closer look, the British may find that the Dutch are not exactly on the same level as they are on the dossier of Europe. As it turned out, despite the dramatic language about an 'ever closer Union', the Dutch statement mainly amounted to an inventory on the basis of the principle of subsidiarity. Cameron's words, in contrast, really could be interpreted as an effort to convince his audience that the States of Europe are wrong to continue on a journey, which has an 'ever closer Union *among the peoples of Europe*' as its *Leitmotiv*. The speech was about a 'defence of our sovereignty', not just about making a better functioning division of competences.

In approaching sovereignty as an existential concept, which cannot be tampered with, the British are on the same wavelength as the Germans. When it comes to the foundation of the concept, however, British and German constitutional doctrine significantly differs. Whereas the German version of sovereignty is first and foremost a democratic theory, the British notion of sovereignty is more institutional in nature. Sovereign in the United Kingdom is not a pre-constitutional *demos*, but an institution, the British Parliament. This has historical reasons, which precede by some 100 years the American and French Revolutions in which modern theories of sovereignty were moulded. The sovereignty of Parliament – a notion which was coined many years later by the famous constitutional theorist Albert Dicey – is a concept that, as it were, accommodates an agreement which was reached by the leading constitutional actors after a century full of civil war. The sovereignty of Parliament actually refers to the sovereignty of the *King-in-Parliament*, by which is meant that together, the three main forces of society can make and unmake any law they want.[46] Sovereignty in the UK is thus, originally, a class-based concept, which was modelled on the medieval ideal of a mixed constitution.

Today, the class-based rationale of parliamentary sovereignty has largely faded.[47] To many people, the doctrine is, just like its German counterpart, mainly about democracy, as it is the House of Commons which calls the shots in Parliament.[48] Because in Germany the protection of sovereignty lies to an important extent in the hands of an unelected court, one could even argue that democracy, and therefore sovereignty, is better off in the UK than in Germany. Conceptual flaws, such as the problem that it is not easy to establish which *demos* is actually represented in the British Parliament,[49]

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[44] Frans Timmermans, 'NL "subsidiarity review" – explanatory note' (Dutch Ministry of Foreign Affairs, 21 June 2013) <www.government.nl/documentsand-publications/notes/2013/06/21/nl-subsidiarity-review-explanatory-note.html> accessed 20 February 2015.

[45] David Cameron, 'EU Speech at Bloomberg' (Bloomberg Headquarters, London, 23 January 2013) <www.gov.uk/government/speeches/eu-speech-at-bloomberg> accessed 20 February 2015.

[46] Apart from the King, the Lords and the Commoners. See generally Maurice Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998).

[47] The House of Lords is still not elected, though. And there are still 92 Hereditary Peers and 26 Lords Spiritual left in the upper chamber.

[48] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010).

[49] Here one can think of the problem of the so-called Westlothian question, the constitutional asymmetry that Scottish MP's in Westminster can influence policy that affects the lives of English subjects, while their English counterparts are excluded from influencing similar policies in Scotland as a result of the 1998 Scotland Act, which established a Scottish parliament. On the Westlothian question, see Paul Bowers, 'The West Lothian Question - Commons Library Standard Note' (Parliament and Constitution Centre, London, 18 January 2012) <www.parliament.uk/business/publications/research/briefing-papers/SN02586/the-west-lothian-question> accessed 5 December 2013.

can be put into perspective this way. However, this view may have to be nuanced too. Precisely because the British constitution is so flexible, makes it also susceptible to judicial change. This became clear in the well-known *Factortame* case, in which the House of Lords affirmed the supremacy of European law over national law.[50]

After *Factortame*,[51] there was intense discussion as to whether the doctrine of parliamentary sovereignty still retained its essence – eg, whether Parliament was still free to make and unmake any law whatsoever. Relief for adherents to the doctrine came in 2002, in the *Thoburn v Sunderland* case, where LJ Laws held that the foundation for the relationship between EU law and national law was still very much the latter.[52] However, this defence came at a prize. To sustain the argument that primacy of EU law and parliamentary sovereignty can go hand in hand, Laws crafted a distinction between *constitutional* statutes – which could only be expressly repealed by Parliament – and *ordinary* statutes – as regards which the doctrine of implied repeal continued to exist. And that classification, which pretty radically seems to alter the idea of the sovereignty of Parliament, Laws founded on the common law – judge made law. This was possible, Laws explained, because it is British 'courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided'.[53]

The place of *Thoburn* in British constitutional law is not exactly clear.[54] In a way, it only further confused the already diffuse debate on sovereignty in the UK.[55] However that may be, Parliament itself has made it perfectly clear that it thinks that institution alone constitutes the ultimate authority for the validity of EU law. It did so in the much discussed European Union Act 2011.[56] However, paradoxically, the same Act has made some commentators also question whether *Parliament* is still sovereign. Underlying this questioning is the important insertion that the future transferral of important powers to the EU requires approval by a referendum.[57] This way, Parliament would surrender its authority to the electorate.[58] As, formally speaking, Parliament can always repeal the European Union Act 2011 under its own doctrine, this criticism seems misplaced. Substantively speaking, on the other hand, such an assumption would perhaps open the way for a more metaphysical, German-style conception of sovereignty.

2.2 Solidarity

The notion of solidarity, unlike national sovereignty, surfaces at several places in EU law. In the preamble to the Treaty on European Union (TEU),[59] the Member States express that they desire to 'deepen the solidarity between their peoples'. Article 2 TEU lists solidarity as one of the features that characterises European society. And Article 122(1) TFEU refers to 'a spirit of solidarity between

[50] *Factortame v Secretary of State for Transport (no 2)* [1991] 1 AC 603 (HC).
[51] ibid.
[52] *Thoburn v Sunderland City Council* [*2002*] EWHC 195 (Admin) para 66.
[53] ibid para 60.
[54] Some endorsement of LJ Law's position in *Thoburn* (n52) can be found in a recent Supreme Court judgment: *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3. In this case, the UK Supreme Court was confronted with questions relating to the interpretation of the EIA Directive (Environmental Impact Assessment). One of the questions that came up was whether the Directive could be interpreted in such a way that (national) courts were expected to carefully scrutinise national legislation on public and private projects. According to the UK Supreme Court, such an interpretation could run counter to Article 9 of the Bill of Rights, which precludes the questioning in a court of the work of Parliament. And 'there may be fundamental principles … of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorize the abrogation' (para 207). The UK Supreme Court noted that the case under consideration was somewhat different than *Thoburn* (n52) in that the possibility of conflict was between two constitutional instruments instead of between a constitutional statute and an ordinary statute, but all the same commended Laws JL for his 'penetrating discussion' (para 208).
[55] Kenneth Armstrong, 'United Kingdom – Divided on Sovereignty?' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 327-350.

[56] European Union Act 2011(UK) s 18 : Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

[57] ibid ss 2-4.
[58] cf Vernon Bogdanor, 'Imprisoned by a Doctrine' (2011) 32(1) Oxford Journal of Legal Studies 179, 188.
[59] TEU (n8).

Member States', which may lead the Council to decide upon 'measures appropriate to the economic situation'.[60] Obvious though it may be that solidarity is a principle of the EU, however, these examples do no exactly make clear what it amounts to in this particular context.

In a constitutional sense, solidarity is a concept that is strongly linked to the value of democracy. In order to accept that there is such a thing as a common good – which, in turn, can be considered necessary to establish freedom – one cannot do without a certain degree of solidarity.[61] Solidarity, it might be argued, goes to the core of a 'social contract'. If solidarity is not sufficiently present, the fabric of a constitutional system risks falling apart. Examples of such a breakdown, may, in Europe, be found in Spain, the UK and Belgium, where, for several reasons, some people are no longer prepared to 'pay the bills' for other people in society. Solidarity, it appears, is therefore inextricably linked to the issue of sovereignty in the German interpretation of the word. What is at stake in countries such as Spain, the UK or Belgium, is which social contract should be adhered to. And that is essentially a question of self-determination.

Is this also the way in which AG Kokott linked both concepts to each other in *Pringle*? At first glance, the answer seems to be no. Sovereignty, in Kokott's Opinion, did not so much refer to one particular version of a common good, as to multiple versions of various common goods, which, in the case of the ESM, coincided. Solidarity, subsequently, is presented as a value that facilitates that 'still sovereign States' are permitted to help each other out financially, if certain conditions are being met, in order to stabilise the 'Union'.[62] However, on further consideration, the very word 'Union' seems to imply that Kokott's considerations may not differ that much from what was said about solidarity as a constitutional concept. When states form a group, as the Member States of the EU do, they essentially act in the same way as individuals who conclude a social contract.[63] In order to attain their common goals, a certain amount of unity and order is needed, and that cannot be achieved without a degree of solidarity.[64]

That being said, when states that group together maintain a claim on sovereignty, as most Member States in the EU do, this almost by definition entails that their unity is more precarious and instable than the unity of a people. This for example became clear when Prime Minister Cameron recently declared that the UK would refuse certain welfare benefits to Romanian and Bulgarian migrants. On this point, apparently, solidarity with fellow Member States (and, one may add, fellow Union citizens) is thin. In the context of the Economic and Monetary Union (EMU), solidarity has also been traditionally weak. In a recent paper on the subject of solidarity, Borger in this respect cites a line from a memorandum of 1995 written by the, then, German finance minister Theo Waigel, which is also interesting to reproduce here. According to Waigel, the participants in the EMU formed 'a community of solidarity in the sense that the stability of the common currency will be reliably and permanently secured through strict budgetary discipline in all the participating countries'.[65] Waigel, this sentence makes clear, approached solidarity in a *negative* manner. The monetary and economic interdependence of the Member States was mainly founded on *individual* behaviour, which, in a substantive sense, left their national sovereignty intact as much as possible. In his article, Borger argues that, as a result of the current crisis, this negative approach to solidarity, in a normative sense, has been reinforced with a *positive* component – in the sense that Member States are now also prepared and allowed to aid each other financially.

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[60] cf also Article 3(3) TEU (n8), Article 67 TFEU (n2) and Title IV of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391. The term 'sovereignty', by contrast, is not mentioned at all in the Treaties, at least, not in the English version. The Dutch version of the Treaties mentions 'soevereiniteit' once, in Article 355(5)(b) TFEU (n2).

[61] These insights were most powerfully expressed by Jean-Jacques Rousseau, notably in his 1762 treatise *Du Contrat Social*.

[62] Case C-370/12 *Pringle v Ireland* (n1) Opinion of AG Kokott, para 143.

[63] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2005) 71 and 94.

[64] See Vestert Borger, 'How the Debt Exposes the Development of Solidarity in the Euro Area' (2013) 9(1) European Constitutional Law Review 7, 10.

[65] ibid 11; Theo Waigel, 'Proposal for a Stability Pact for Europe' (Agence Internationale d'Information Pour la Presse, November 1995) 2 <www.cvce.eu/content/publication/2005/7/4/50fc7cc3-0a4d-4762-9ee5-e312d32d41f1/publishable_en.pdf> accessed 20 February 2015.

An important question is to what extent this reinforced the stretching of the positive solidarity approach, without harming, in an existential sense, the principle of sovereignty. As the architecture of the EMU is still very much a work in progress, this is difficult to predict. As will become clear in the more practice-oriented prong of this article, the way in which the European Semester has been set up and operates, does, until now, not really test the mixture of these two principles. That is, solidarity within this regime remains largely a national affair. In the near future, however, this may well change. One of the plans that is being currently worked out, concerns the combination of contractual arrangements with each individual Member State – something which alludes to national sovereignty – with a 'solidarity mechanism' on the European level for structural national reforms, next to already existing emergency funds.[66] The European Parliament has already announced that it thinks that 'this mechanism should be funded by means of a new facility triggered and governed under the Community method as an integral part of the EU budget, but outside the Multiannual Financial Framework (MFF) ceilings, so as to ensure that the European Parliament is fully involved as a legislative and budgetary authority'.[67] That would seem to sit uncomfortably with national sovereignty.[68]

2.3 Stability

The principle of economic stability dominates the headings of some of the key documents that have been adopted in the context of EU economic governance. This started already with the Stability and Growth Pact (SGP) 1997, and was confirmed by the 2011 Treaty on Stability, Coordination and Governance (TSCG) and the 2012 Treaty on a European Stability Mechanism (ESM-Treaty). Referring to financial stability, has, moreover, become a standard element in statements on concrete financial assistance and in general documents on the development of the EMU.[69] Although it contains no clear-cut definition, the TSCG contains several elements that shed further light on the principle. Relevant is first of all the preamble that links the 'stability of the euro area' to the need for sound and sustainable public finances and more particularly to the prevention of government deficit becoming excessive. Economic stability is thus the overarching objective of such economic policies. As such it establishes the link between national economic policies and the relevance of those to the EU (and/or the Eurozone) at large. Thus, economic stability underpins the necessity of EU involvement in national economic policies. Article 9 TSCG refers to the 'proper functioning of the EMU and economic growth' as well as the objectives of 'fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability'.

In its *Pringle* decision, the Court of Justice of the European Union (CJEU) ruled upon the interpretation of the principle of the stability in the framework of the ESM.[70] The ESM has explicitly been set up to be activated 'if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[71] The argumentation of the ESM Member States is that: 'Given the strong interrelation within the euro area, severe risks to the financial stability of Member States whose currency is the euro may put at risk the financial stability of the euro area as a whole'.[72]

The CJEU based its reasoning that the ESM was in line with the so-called 'no bail out clause' of Article 125 TFEU on the higher objective at stake. It argued that budgetary discipline as well as the 'no-bail out clause' had to be seen in light of its higher purpose, the achievement of financial stability of the Eurozone.[73] As the ESM serves the purpose of stability as well, its legality could be ensured. Thus, the EMU, supplemented with the TSCG and the ESM-Treaty, may in institutional terms form a patchwork, but in substantive terms it is based on the common objective of economic stability. This is

[66] European Commission, 'Towards a Deep and Genuine Economic and Monetary Union: The introduction of a Convergence and Competitiveness Instrument' (Commission Communication) COM(2013) 165 final <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0165:FIN:EN:PDF> accessed 5 December 2013.
[67] European Parliament Resolution of 23 May 2013 on future legislative proposals on EMU: response to the Commission communications <www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-222> accessed 5 December 2013.
[68] TEU (n8) art 14(2).
[69] See Vestert Borger, 'The ESM and the European Court's Predicament in Pringle' (2013) 14(1) German Law Journal 113.
[70] Case C-370/12 *Pringle* (n1) para 58-60.
[71] ESM Treaty (n3) art 3.
[72] ibid rec (6).
[73] Case C-370/12 *Pringle* (n1) para 135.

supported by the premise of the ESM-Treaty, that it must not be viewed as a separate instrument, but as a last-resort mechanism to be employed only if the regular forms of economic policy coordination have failed to deliver.[74] Price stability as the central objective of EU monetary policy under Article 127 TFEU is, thus, being supplemented by financial stability as the overarching objective of economic policies. Moreover, on the basis of the *Pringle*[75] decision it might be argued that all provisions relating to economic policies of the Union must be interpreted in light of this objective.

The fact remains, however, that neither the Treaties, nor the CJEU itself have further defined the meaning of financial stability.[76] The European Central Bank (ECB) has published a definition on its website which reads as follows:

> The condition in which the financial system – comprising financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances, thereby mitigating the likelihood of disruptions in the financial intermediation process which are severe enough to significantly impair the allocation of savings to profitable investment opportunities.[77]

This definition must be explained from the ECB's position in Europe's financial system, but its core elements are capable of being applied in a broader way. These elements include the ability of the European economy to withstand shocks and the unravelling of macroeconomic imbalances. It will, however, remain impossible to define economic stability in a totally objective way.

The principle of economic stability thus plays an ever more important role in shaping EU law, but without it being interpreted in a coherent manner or its scope being clearly defined. It becomes even more complex if we extend the analysis to the implications of the principle in light of economic and political realities. The severe austerity measures that have been introduced in Eurozone member states that have received financial support have been motivated on the grounds of economic stability. Economists and politicians, as well as citizens of these countries, have, however, contended that these measures have resulted in the exact opposite: instability and a much longer road to economic recovery. Repercussions on political stability have made themselves felt as well. The upsurge of the Greek extreme right-wing political party Golden Dawn is a compelling example.

Economic stability is thus an ambiguous principle, not only with regards to its content, but also with regard to the instruments that are considered suitable to achieve it.

3 National Sovereignty, Economic Stability and Solidarity in EU Economic Governance

The second element of our paper concerns the relation between the three principles of national sovereignty, economic stability and solidarity. A first question is how and where these values conflict and how such conflicts are legally resolved. But it is equally relevant to analyse how attempts are made to reconcile these values. To this end, not only the treaties and legislative acts that have been developed so far, but also executive measures (such as the policy recommendations that the Commission, Council and European Council have imposed on the Member States) will be included in our analysis. The national responses in substantive terms (eg, were such decisions implemented?) but also in institutional terms (eg, have national budget setting procedures been altered?) will also be taken into consideration.

Economic governance in the EU (understood here as the economic part of the EMU) has been substantially strengthened as a reaction to the economic and financial crisis. Following new provisions on economic policy added by the Treaty of Lisbon, secondary law to further elaborate these

[74] ESM Treaty (n3) rec (4).
[75] Case C-370/12 *Pringle* (n1).
[76] The only references the Treaties make to economic stability are to be found in the new Article 136(3) TFEU (n2), in which economic stability serves as the foundation for the ESM and Article 127(5) TFEU (n2) which regards it as the obligation of the ECB to contribute to the stability of the financial system.
[77] European Central Bank, Glossary <www.ecb.europa.eu/home/glossary/html/glossf.en.html> accessed 18 February 2014.

provisions has been adopted (the so-called 'legislative six-pack in 2011 and a 'two-pack' in 2013). In addition, 25 EU Member States adopted the Treaty on Stability, Coordination and Governance in the economic and monetary union (TSCG or 'Fiscal Compact') in 2012. These legal acts elaborate the rules on both public finances of the Member States and their macroeconomic policies. Since the entry into force of the legislative six-pack, for both parts of economic policy financial sanctions may be imposed on Member States that fail to fulfil the requirements. Obviously, this may be seen as a crucial factor indicating a loss of national sovereignty. However, it takes many procedural steps before sanctions may actually be imposed and the Member States' governments still have a substantial role in the procedures. Moreover, the procedural and enforcement framework is less strict for EU Member States outside the euro group.

Arguably, the actual, substantive involvement of the EU in national economic policies is more important for determining the division of powers between the EU and the Member States than is the procedural framework. The involvement of EU institutions in national economic policies is twofold.[78] The regular dialogue of the EU institutions within the framework of, *inter alia*, the European Semester is supplemented with intensified systems of monitoring in case of problems: the excessive deficit procedure (EDP) and the excessive (macroeconomic) imbalances procedure (EIP). The EU institutions may more directly and concretely influence national economic policies within the framework of these latter procedures, but the Member States obviously escape such involvement in case of sound public finances and effective economic policies. For the year 2013, the three countries included in this analysis, Germany, the Netherlands and the UK, all have a distinct position. The UK is not part of the Eurozone. The Netherlands was subject to excessive deficit and excessive macroeconomic imbalances procedures in 2013, whereas Germany was subject only to the regular monitoring procedures (no EDP or EIP applicable). One of the questions to be addressed is thus whether these differences result in differentiated arrangements with regard to the question of sovereignty in the EU.

3.1 The Netherlands

The Dutch National Reform Programme for 2013 addresses a number of recommendations made by the Council in the previous year.[79] First, the government expressed the pursuit of sound budgetary policy (and, thus, the correction of the existing excessive deficit) as a first priority. The second issue regarded the reform of the pension system, most notably the raising of the retirement age to 67 in 2021. This was a reaction to the concrete and specific Council recommendation to link the pension age to life expectancy, to ensure solidarity among and within generations, and to link the raising of the pension age to labour market measures to effectively ensure that people work longer. Moreover, the positive effect on public finances should be secured. The Dutch government responded to this recommendation by, *inter alia*, raising the pension age more quickly. The previous year's recommendations on the reform of the housing market had been equally significant and specific. The Council had advised phasing out mortgage interest deductibility, establishing a more market-oriented mechanism in the rental market, and aligning rents in the social housing sector to household income. The Dutch government addressed all of these recommendations in some way. Other issues addressed by the Dutch government concern strategies in the fields of research and innovation, labour market participation, education and the fight against social exclusion and poverty. The Dutch government dealt with most of these issues in its stability programme for 2013[80] as well. Some of the measures mentioned in the national reform programme are further elaborated in the stability programme, eg the financial consequences of the reform of the housing market. The same applies to various taxation measures. The reform of the health care system (alarmingly described as one of the causes why budget deficits and public debt 'will spiral out of control' if no measures are adopted)[81] is addressed only by the stability programme, and without a high level of concreteness of the measures planned.

[78] In fact, a third type of involvement may be identified for countries that have received financial assistance on the basis of the ESM. This is actually the most far reaching form of EU involvement. The ESM is, however, excluded from the scope of this paper.

[79] Government of the Netherlands, 'National Reform Programme 2013: The Netherlands' (29 March 2013) 8 <http://ec.europa.eu/europe2020/pdf/nd/nrp2013_netherlands_en.pdf> 8 accessed 18 February 2014.

[80] Ministry of Finance and Ministry of Economic Affairs, 'Stability Programme of the Netherlands' (29 April 2013) <http://ec.europa.eu/europe2020/pdf/nd/sp2013_netherlands_en.pdf> accessed 18 February 2014.

[81] ibid 24.

The Commission's response to the Dutch national reform programme and the stability programme focused on issues addressed in previous years and was partly based on the In-depth Review of Macro-economic Imbalances.[82] This in-depth review identified the private debt and the housing market as the biggest challenges for the country, and addressed the national balance surplus in a quite detailed manner.[83] Some of the recommendations were general in nature such as the recommendation to promote innovation and research,[84] although the Commission did state that sectoral innovation policies should be complemented by an adequate level of public funding for non-earmarked fundamental research.[85] Other recommendations, however, have reached higher levels of concreteness. The reform of the housing market was too slow in the eyes of the Commission, both the limitation of the mortgage interest tax deductibility and the application of a more market oriented pricing mechanism in the rental market. The Commission called on the Dutch government to speed up these reforms. Also the pension system was subjected to concrete recommendations, *inter alia* to reform the so-called second pension pillar. The recommendations on the labour market included measures to enhance participation of those at the margin of the labour market and to abolish specific tax disincentives on labour.

The Council recommendation takes over all elements of the Commission's proposal. Even the wording of the various recommendations is the same.[86] The Council adopted a separate decision on the persisting excessive government deficit on 18 June 2013.[87] The recommendation prescribes precise objectives to be achieved. Whilst granting the Netherlands an additional year to correct the excessive government deficit (deficit target of 3.6% of GDP over 2013; 2.8% over 2014),[88] the exact measures have not been identified. Instead, the recommendation addresses the development of the economic situation in the country and the measures adopted by the government. It observes the need 'to adopt additional consolidation measures of at least 1 % of GDP in 2014', without specifying or even suggesting what such measure might entail. One element, though, concerns the advice to reform national health care as it becomes an ever heavier burden on the government's budget.

The following interim conclusions may be drawn with regard to the Dutch situation. First, the influence of the EU on national economic policies extends to areas which used to be national prerogatives, and which are indeed outside the sphere of EU legislative competences. These include research and innovation, the national pension system, the labour market, the housing market and taxation. Moreover, EU institutions exercise little restraint in providing concrete and precise recommendations in these domains.

A second conclusion is that the EU exercises restraint when it comes to national public finances. Even though the Commission has set specific objectives for the Dutch government to pursue, it has generally refrained from indicating what measures should be adopted. This is all the more remarkable in light of the persisting excessive deficit situation in the country.

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[82] European Commission, 'Staff working document – In-Depth Review for the Netherlands in Accordance with Article 5 of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances – Accompanying the Document Communication from the Commission to the European Parliament and the Council and to the Eurogroup – Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances' (Commission Working Document) SWD (2013) 121 final.

[83] This latter point remained unaddressed by the Commission's country specific recommendations.

[84] Research and innovation had also been part of the Commission's In-depth review for the Netherlands (n82) 5.

[85] European Commission, 'Staff working document – Assessment of the 2013 National Reform Programme and Stability Programme for the Netherlands – Accompanying the Document Recommendation for a Council Recommendation on the Netherlands' 2013 National Reform Programme and Delivering a Council Opinion on the Netherlands' 2013 Stability Programme for 2012-2017' (Commission Working Document) SWD (2013) 369 final, 4.

[86] European Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of the Netherlands and delivering a Council opinion on the Stability Programme of the Netherlands, 2012-2017 [2013] OJ C217/89.

[87] European Council Recommendation of 18 June 2013 with a view to bringing an end to the situation of an excessive government deficit in the Netherlands (Brussels, 18 June 2013) <http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/126-07_council/2013-06-21_nl_126-7_council_en.pdf > accessed 20 February 2015.

[88] ibid rec (16).

The last conclusion at this point regards the social dimension of the recommendations. Even though the social dimension is hardly addressed by the relevant measures of the legislative six-pack, the recommendations contain substantial recommendations to stimulate the Dutch government to adopt measures in this field. Some of these measures are, moreover, quite specific (eg the recommendation that social housing for disadvantaged citizens should be available also in high demand locations). They relate to many of the corner stones of social policies (including the pension system and access to the labour market). The social part of the recommendations thus constitutes a substantial pillar of macroeconomic surveillance.

3.2 Germany

Germany has been doing relatively well throughout the economic crisis. As we will see, however, this has not prevented the Council and the Commission issuing economic recommendations as strict as those addressed to the Netherlands, a country that faced both excessive government deficits and macroeconomic imbalances.

In its stability and reform programmes, the German government addressed a wide variety of issues and policies.[89] Having achieved a budget surplus in 2012 and with good prospects to consolidate it, both programmes underlined the ambition to continue to pursue sound budgetary policies. With regard to education and innovation, the German government listed a number of concrete investments that had been made (in reaction to prior recommendations). Also specific measures to reform the pension system were elaborated.[90] As part of the stability programme, these related to the sustainability of public finances, but also to the broader objective of the sustainability of the pension systems in general. The measures included elements to ensure that the risks and benefits are spread fairly across the generations. Two types of protection had been offered to pension participants: upper limits to contributions had been set and minimum levels of security had been guaranteed. The German government addressed the health care system in more concrete terms than the Dutch government had done. It contended that the introduction of the Statutory Health Insurance Act in 2011 had already resulted in 'moderate trends in health care expenditure'. Also the measures to address the financial burdens of long term care were quite specific in nature (eg to stimulate home care services). Closely related were the measures to expand the capacity of child day care.[91]

Another objective was the achievement of a balanced budget for all government levels by 2014.[92] It included measures to subject the *Länder* to the same budget rules as the federal government as well as measures to support the *Länder* in stabilising financial situations at municipal level.[93] As such, the federal structure of Germany was at stake.

Perhaps less striking is the emphasis the German government put on the implementation of the obligations flowing from the Europluspact. Given that Germany was the biggest proponent of the adoption of the Europluspact, this may come as no surprise.

The national reform programme addressed, furthermore, a number of issues that had been included in prior country specific recommendations. The first issue concerned the efficiency of the tax system. Administrative burdens had been relieved by new legislation on corporate taxation and travel allowances.[94] Germany had also been advised to address weaknesses in the financial sector by adopting legislation on advisory services for financial instruments (to enhance consumer transparency) as well as Financial Market Stabilization Acts for financial assistance to troubled banks.[95] Prior country specific recommendations had also addressed infrastructure and competition. With regard to competition in the services sectors, the German government had adopted some

[89] Federal Ministry of Finance, 'German Stability Programme: Update 2013' (Berlin, April 2013) <http://ec.europa.eu/europe2020/pdf/nd/sp2013_germany_en.pdf> accessed 18 February 2014 (Stability Programme); and Federal Ministry of Economics and Technology, 'National Reform Programme 2013' (Berlin, March 2013) <http://ec.europa.eu/europe2020/pdf/nd/nrp2013_germany_en.pdf> accessed 18 February 2014 (National Reform Programme).
[90] Stability Programme (n89) 37.
[91] National Reform Programme (n89) 13.
[92] Stability Programme (n89) 29.
[93] National Reform Programme (n89) 8.
[94] ibid 9.
[95] ibid 10.

legislative measures (eg relaxing and eliminating advertisement regulations and price regulation reforms for lawyers). Other possible measures in this field were only 'considered' by the German government. With regard to railways, transport infrastructure and energy, the government elaborated both investments and measures to increase competition. The recommendation had explicitly mentioned the need for expansion of the cross-border electricity and gas networks. Although the German government addressed the expansion of these grids, the cross-border dimension did not receive particular attention.

Given the positive situation with regard to public finances and the functioning of the economy at large, it might strike one as surprising that the actual country specific recommendations were far from lenient. Even on public finances, the Commission came to various points of critique. Although the Commission acknowledged the overall soundness of public finances in Germany and the fact that the medium-term budgetary objective (MTO) had been achieved,[96] it was critical of effective application of the so-called debt brake in the *Länder*. Furthermore, the Commission viewed the measures to improve the efficiency of public spending on health care and long-term care as insufficient to contain expected future costs.[97] The Commission made concrete suggestions to curtail expenditure by focusing on prevention and rehabilitation and independent living. A number of recommendations related to the taxation system. The Commission recommended changing the VAT-system, improving tax collection, reducing high taxes and social security contributions on low wages and adopting tax measures to stimulate second earners. Recommendations in the social sphere included the increasing of fulltime child care facilities, policies to facilitate the long-term unemployed to access the labour market, and policies against school drop outs.

Particularly harsh were the recommendations on the services sector and the energy sector. Further measures on top of those mentioned by the German government were deemed necessary whereas others not mentioned were added to the list. To the latter category belonged the recommendation to subject more public contracts to EU public procurement legislation. With regard to the energy sector, the Commission concluded that the coordination of national energy policies with those of the neighbouring countries was insufficient (the German government had not addressed this issue). However, not all of the recommendations were particularly concrete (eg to take 'further measures' to increase competition in the railway sector). Also with regard to Germany the Council copied all elements from the Commission's proposal.

The following points may be observed with regard to Germany. The first observation is the fact that Germany performed well in both public finances and the functioning of the national economy has not led to a lenient approach of the EU institutions. Despite the lack of intensified monitoring in the framework of the Excessive Deficit Procedure (EDP) and Excessive Macroeconomic Imbalances Procedure (MIP), the EU institutions have been critical of German economic policies and applied the regular European Semester mechanisms to come to more or less concrete recommendations.

A second point to be observed is that the monitoring involved (more than in the Dutch example) areas which are covered by far reaching EU legislative competences, such as services, public procurement and network sectors. Some of the recommendations made could, thus, have been enforced by other European enforcement mechanisms (most notably the infringement procedure). Yet, the recommendations make no reference to possible breaches of EU law or, indeed, to a distinction between the parts of an area which are covered by EU legislation (eg removing obstacles to competition in network industries) and those which are not (eg the need to invest in these sectors). This further complicates the analysis of what is the actual impact of the EU in these areas.

The last observation concerns the recommendation on the coordination of energy policies. This is proof of the fact that economic governance reaches beyond national economies in isolation, but includes a horizontal dimension as well.

3.3. The United Kingdom

[96] European Commission, 'Recommendation of 29 May 2013 for a Council Recommendation on Germany's 2013 national reform programme and delivering a Council opinion on Germany's stability programme for 2012-2017' (Commission Recommendation) COM (2013) 355 final.
[97] ibid 4.

The United Kingdom has negotiated a number of protocols to opt out of specific Treaty regimes. As regards economic policy, Article 4 of Protocol 15[98] establishes that several economic provisions do not apply to the UK, including for our purposes the relevant obligation to avoid excessive deficits (Article 126(1) TFEU),[99] the power of the Council to give notice to a Member State to take the necessary measures to reduce the excessive deficit (Article 126(9) TFEU), and the power to take measures (including financial sanctions) against Member States for continuing failure to conform with those decisions under Article 126(11) TFEU. As such the legal regime applicable to the United Kingdom is less stringent compared to the Eurozone Member States.

Both in 2012 and 2013 the Commission addressed: 1) the excessive UK deficit (in addition to the ongoing EDP procedure); 2) the housing sector; 3) (youth) unemployment; 4) the banking sector and credit options for SMEs; 5) network innovation and energy; and, finally, 6) attention to low-income households and the reduction of child poverty.[100] The 2013 National Reform Programme of the UK responded to the 2012 recommendations; the UK government acknowledged and addressed all six Council recommendations at length, and stated its support for the European Semester mechanism.[101] Moreover, the information on its measures to implement the recommendations was detailed. As regards e.g. the stagnating housing market, the UK adopted several measures to stimulate demand for home ownership and an increase of housing supply. For example, the Get Britain Building scheme aimed to provide development credit to stalling building projects.[102] As regards the recommendation that both bank and non-bank funding of the private sector should increase, the UK responded by adopting a range of measures (both at central level and at the level of devolved administrations) including its Funding for Lending Scheme (FLS).[103] This scheme provides funding for banks with good lending performance, in the hopes of providing incentives for banks to support businesses, in particular SMEs.[104] In addition, the Business Finance Partnership (BFP) aimed to create several funds with private sector sources of income, which should provide additional non-bank funding to starting businesses.[105]

In reaction to these UK plans, the Commission's 2013 recommendations included that spatial planning laws should be adjusted in order to stimulate the housing market. The analysis preceding the actual recommendations noted *inter alia* that green belt considerations had resulted in too limited opportunities for construction. Moreover, government intervention aimed to heighten house demand might exacerbate the problem, as it might lead to increased inflation in case housing-supply should not increase. The Commission recommended that the UK liberalise its spatial planning laws to stimulate the supply-side of the market. In light of the prior analysis, this recommendation is, thus, more specific than might be concluded on the basis of its wording.[106]

This high level of attention for the housing market was also the result of the Commission finding a macroeconomic imbalance in the British housing sector and the accompanying high levels of private debts.[107] Another macroeconomic imbalance was found in external competitiveness. Regaining the pre-crisis dynamics in service exports and boosting the underlying drivers of productivity in the

[98] TEU (n8) Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

[99] Although the UK will still endeavour to avoid excessive deficits as pointed out by Article 5 of Protocol 15, this does not take the form of an obligation. It has, however, resulted in an excessive deficit procedure.

[100] European Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of the United Kingdom and delivering a Council opinion on the Convergence Programme of the United Kingdom, 2012/13 to 2017/18 [2013] OJ C217/93, 10-11; European Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of the United Kingdom and delivering a Council opinion on the Convergence Programme of the United Kingdom, 2012-2017 [2012] OJ C219/91, 12-13.

[101] HM Treasury, 'Europe 2020: UK National Reform Programme, 2013' (HM Treasury, 30 April 2013) 3.

[102] ibid 18.

[103] ibid 17.

[104] Bank of England, 'Consolidated Market Notice' (Bank of England, 28 November 2013). <www.bankofengland.co.uk/markets/Documents/marketnotice131128cons.pdf> accessed 5 December 2013.

[105] HM Treasury, 'Europe 2020' (n101) 35.

[106] European Council Recommendation on the National Reform Programme of the UK 2013 (n100) 10.

[107] European Commission, 'Macroeconomic Imbalances – United Kingdom 2013' Occasional Papers 143 <http://ec.europa.eu/economy_finance/publications/occasional_paper/2013/op143_en.htm> accessed 5 December 2013.

industrial sectors were crucial according to the Commission. Explicitly mentioned here were the spill-over effects to other European economies given the size of the British economy.[108]

Returning to the country specific recommendations, the 2013 recommendation on youth unemployment reached a high level of specificity as well, by recommending the UK to introduce a Youth Guarantee; to '[i]ncrease the quality and duration of apprenticeships, simplify the system of qualifications and strengthen the engagement of employers, particularly in the provision of advanced and intermediate technical skills'.[109] Other recommendations were less specific, such as those concerning bank and non-bank funding to businesses and network infrastructure investiture. These recommendations only specified general objectives, such as the reduction of entry barriers for the banking sector and promoting more efficient and robust planning procedures for infrastructure investment.[110]

The British government, the Council and the Commission all reiterated the importance of the UK's commitment to the EDP procedure.[111] The Convergence Report (which is the counterpart of the stability programmes of the Eurozone Member States) pointed out that the UK was intent on limiting the government deficit below the SGP threshold of 3% in the coming years.[112] Thus, the exemption of Article 4 of Protocol 15 seemed to have little effect in terms of a more lenient approach of both EU institutions and the British government. However, EU institutions seemed to pursue a cautious approach to prescribing concrete measures. An exception concerned the recommendation to apply standard rate VAT more widely.[113]

With regard to compliance within the EDP framework, however, notable differences emerge. While the Netherlands was faced with a deadline to correct its excessive deficit by 2014,[114] the UK has self-imposed a longer term (and non-sanctionable) deadline of 2017/2018.[115] Moreover, the self-imposed UK deadline is significantly less strict than the 2014/2015 deadline agreed upon by the Council in 2009 for the UK EDP procedure.[116] The UK Convergence Programme did confirm the EU deadline of 2014/2015 and restated the UK's commitment to the EDP procedure, but subsequently foresaw progress towards a 2017/18 deadline only.[117] Nevertheless, the Council and Commission recommendations acknowledged the UK's position, but reiterated the 2014/2015 deadline, thereby causing a substantial discrepancy.[118]

Again, the Council has merely rubberstamped the 2013 recommendations proposed by the Commission as the wording of both documents is almost entirely identical.[119] The 2012 recommendations show a slightly different picture. The Commission had noted the risk that the positive impact of new policies on employment and incomes would be offset by declining amounts available for benefits.[120] The eventual text of the recommendations by the Council took this a step

[108] ibid 3.
[109] European Commission, 'Recommendation for a Council Recommendation on the United Kingdom's 2013 National Reform Programme and Delivering a Council Opinion on the United Kingdom's Convergence Programme for 2012-2017' (Commission Recommendation) COM (2013) 378 final, para 3.
[110] European Council Recommendation on the National Reform Programme of the UK 2013 (n100) 10-11.
[111] ibid 5-6, 10; HM Treasury, '2012-13 Convergence Programme for the United Kingdom: Submitted in Line with the Stability and Growth Pact' (HM Treasury, 8 April 2013) 19-20.
[112] HM Treasury, '2012-13 Convergence Programme' (n111) 29.
[113] European Council Recommendation on the National Reform Programme of the UK 2013 (n100) 10.
[114] Ministry of Finance and Ministry of Economic Affairs, 'Stability Programme of the Netherlands' (n80) 7.
[115] HM Treasury, '2012-13 Convergence Programme' (n111) 29-30.
[116] European Council Recommendation to the United Kingdom with a view to bringing an end to the situation of an excessive government deficit 2009 (Brussels, 30 November 2009) 11-12 <http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-07_council/2009-12-02_uk_126-7_council_en.pdf> accessed 20 February 2015.
[117] HM Treasury, '2012-13 Convergence Programme' (n111) 29.
[118] European Council Recommendation on the National Reform Programme of the UK 2013 (n100) 5-6, 10; and European Commission, 'Recommendation for a Council Recommendation on the UK's 2013 National Reform Programme' (n109) 6.
[119] ibid.
[120] European Commission, 'Recommendation for a Council Recommendation on the UK's 2012 National Reform Programme' (n109) rec (10).

further with the recommendation that the UK government should actually take measures to address this issue.[121]

The main interim conclusion is therefore that the Commission and Council cannot be seen to be taking a more cautious approach with regard to UK than they do towards other Member States. The level of specificity of the measures is in some cases quite high. Moreover, they extend to 'sovereignty sensitive areas' (such as national employment policies) just as much as in other Member States. The importance of the monitoring mechanism was, furthermore, underlined by the British government itself which elaborated the respective national programmes quite seriously and extensively and responded to all recommendations previously made. On the other hand, the UK special position on the basis of the Treaty reservations has taken effect as well by unilaterally postponing compliance to the SGP criteria.

3.4 The European Semester evaluated

What are the effects of national sovereignty on the coordination of economic policies of the EU? In EU law, national sovereignty can be linked to the principle of conferral, providing that the EU only possesses those legal powers that have been explicitly conferred upon it by the Member States (Article 5(2) TEU). This system applies to all Union powers, but is particularly manifested in the EU's legislative competences. Rather than a general legislative power, the EU possesses only sector-specific powers, albeit that some of these have a rather broad range in practice (Article 114 TFEU regarding harmonisation in the internal market being a prime example).

The coordination of economic policies is obviously covered by the principle of conferral as well. However, the coordination of economic policies has not been categorised but is a stand-alone power of which the exact scope cannot be derived from Article 5 TFEU. This has enabled *inter alia* the change of macroeconomic policies from a light regime to the current much more strict and elaborate regime as a result of the legislative six-pack and two-pack.

Next to the scope of the power to coordinate economic policies, also the substance of policies covered by this power is an issue. As has been shown, economic surveillance includes many areas of national policy, some of which have traditionally been 'sovereignty sensitive' and which for that reason have been excluded from the sphere of the EU's legislative competences. Major issues related to the national welfare states (such as pension and health care) have as such come into the realm of the EU.

On the other hand, other elements of the EU's economic policies underline national sovereignty. Member States have, and continue to play, a key role. The initiative, by drafting national programmes, remains at the national level. Furthermore, the set-up of the surveillance mechanism is to a great extent country-specific, and thus involves the institutions of the Member States in relation to few EU institutions, as well as national economic policies in some isolation. The development of economic policies is as such not transferred to the EU level; rather the national development of economic policies acquires a European dimension that contributes to their legitimacy.

Remarkably, solidarity as meant by AG Kokott, is only limitedly relevant in the field of EU economic policies. The focus lies on individual economies and the dialogue with national institutions. EU institutions address cross border effects of national economic policies only to a limited extent (the competitive capacity of the British economy and the coordination of energy policy with regard to Germany). Considerably more attention is given to *internal* solidarity in the sense of social policies of the Member States. Rather than stimulating inter-state solidarity, EU economic policies thus stimulate intra-state solidarity. Whereas inter-state solidarity affects national sovereignty in more concrete manner, the effects of stimulating intra-state solidarity are two-fold. In the sense of EU institutions encroaching on national social policies (especially in the concrete ways of the Commission), this may be seen as affecting national sovereignty. In the sense of such recommendations stimulating the political community of the Member States (which may indeed be argued as well), however, it may be viewed as supporting national sovereignty.

[121] European Council Recommendation on the National Reform Programme of the UK 2012 (n100) rec (13).

But from a more distant perspective, solidarity manifests itself in the principle of equality of the Member States as well. Although the legal regimes differ the substantive involvement of EU institutions differs less than perhaps could have been expected as was shown in the previous analysis of the functioning of EU economic policies. Again, inequality may nevertheless be the first principle that springs to mind when comparing the Member States receiving financial assistance to other EU Member States.

The third principle, economic stability, is hardly made explicit, but underlies the very power of EU institutions to coordinate economic policies. In relation to national sovereignty, again two opposite conclusions may be drawn. First, national sovereignty may be seen to be affected by the transfer of power to pursue the objective of economic stability at the European level. Arguably, however, the possibility of the EU pursuing economic stability may equally be seen to enhance the capacity to act for individual Member States beyond what they could have achieved individually.

4. Sovereignty, Solidarity and Stability Interacting: A Confederal Comeback?

In a recent article, Cuyvers puts forward the thesis that the EU can best be understood as a 'modified confederation', which, because of its apparent success, may also be used as a model for transnational government more generally.[122] To sustain and explain his argument, Cuyvers gives several examples, which, in a nutshell, revolve around the EU's focus 'on market over military'.[123] Although his article does not engage with this, Cuyver's thesis may be reinforced by affairs and developments with respect to the EMU. That is, where it concerns the presumption that state sovereignty is still a 'basic structural principle of the European Union'. From what has been analysed in this paper, it may be argued that the Member States not only still hang on to a conception of national sovereignty in a formal manner, but also that they have constructed an architecture which to a considerable extent accommodates such a conception.

Whether the affairs and developments with respect to the EMU also reinforce the idea that this 'modified confederation' rests on sound foundations, as Cuyvers suggest, is another matter. Many commentators – lawyers, economists and historians alike – doubt whether the combination of monetary union and confederation is, in the long term, workable.[124] Solidarity and stability in a monetary union, they argue essentially, is only to be achieved in a political union – in which the Member States are no longer sovereign. However, such a union, most commentators agree, is far away. This becomes for example apparent in the government programme which has recently been presented by the German Grand Coalition of Christian Democrat Union, Christian Social Union and Social Democratic Party. In this programme, the parties state that national budget responsibility and supranational joint liability are irreconcilable.[125] Solidarity in Europe, according to the coalition, goes hand in hand with national responsibility.[126]

These starting points seem to leave little room for doubt. As far as Germany is concerned, stability in the EU has to be based on national sovereignty. Two critical remarks might be raised here. The first regards the effects on solidarity. The strong connection between stability and national sovereignty has led to adverse social effects, most notably in the Member States receiving financial assistance. This may even adversely affect stability in the long run, as we explained earlier in part 2.4. The situation is a bit different outside the domain of the ESM in which, at least intra-state, solidarity is manifested

[122] Armin Cuyvers, 'The Confederal Comeback: Rediscovering the Confederal Form for a Transnational World' (2013) 19(6) European Law Journal 711.
[123] ibid 725.
[124] See recently François Heisbourg, *La Fin du Rêve Européen* (Stock 2013).

[125] Bundesregierung, 'Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD' (Berlin, 16 December 2013) 159 <www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf> accessed 5 December 2013: ‚Das Prinzip, dass jeder Mitgliedstaat für seine Verbindlichkeiten selbst haftet, muss aber erhalten werden. Jede Form der Vergemeinschaftung von Staatsschulden würde die notwendige Ausrichtung der nationalen Politiken in jedem einzelnen Mitgliedstaat gefährden. Nationale Budgetverantwortung und supranationale, gemeinsame Haftung sind unvereinbar'.

[126] ibid 158: ‚Unser Grundsatz ist dabei: Solidarität und Eigenverantwortung gehören zusammen'.

more clearly. The norms regarding sound public finances may be seen as a matter of inter-state solidarity and structural economic policy coordination is marked not only by a focus on measures that foster economic growth but also by measures to stimulate intra-state solidarity. However, inter-state solidarity is a less visible element here.

A second issue regards the interpretation of national sovereignty itself. The only way in which a German-style conception of sovereignty can be retained in a confederal monetary union, it appears, is by establishing clear rules between the sovereign members.[127] The nucleus of sovereignty in the vision of the German Constitutional Court, national self-determination, is effectively curtailed in this way. In the context of the economic policy of the Union, this happens in a variety of ways. As the analysis above shows, when it comes to the measures which come together in the European Semester, what is particularly striking is the substantive and political role of the European Commission. This results in an intriguing paradox. One of the main reasons why the German Constitutional Court is prepared – under its sovereignty review – to accept that German budget authority is restricted by measures which are adopted in a European context, is that these particular measures do not allow European institutions to compromise this national authority.[128] But what if, *in practice*, the Commission more or less assumes a role which erodes the national budgetary power?

Questions like these turn sovereignty into an ambiguous concept. However, it might be argued that national sovereignty is not so much limited by developments in the EMU, as much as consolidated or even enhanced. Even if there is a trend to limit actual self-determination on a national level by restricting the freedom to act in economic and budget areas, this trend is instigated by the Member States themselves, who, for various reasons, do not feel inclined (yet) to construct a real political union. The type of Europeanisation that we are witnessing now is based on intergovernmentalism rather than on supranationalisation. Accordingly, one could agree with AG Kokott that sovereignty is indeed a 'basic structural principle of the European Union'.

The confederal thesis may not be very convincing if you take a Dutch perspective on sovereignty and approach the concept as only a bundle of transferrable competences. In such a perspective, current developments perhaps rather amount to a limitation of national sovereignty instead of a consolidation thereof. This point of view, in turn, could be criticised by posing the question what exactly is the added value of sovereignty as a 'basic structural principle of the European Union' on top of the attribution principle?[129]

Another thing is that a Dutch perspective on sovereignty gives a different quality to the cocktail of principles which are studied in this paper. When sovereignty is understood as competence, there do not seem to be inherent boundaries. Simply put: solidarity is needed at the level at which sovereignty is exercised.[130] As a Dutch perspective on sovereignty does not put any normative constraints on what can be decided at the European level, there is no constitutional impediment for an approach to solidarity that is much thicker and more positive than the approach to solidarity which was described earlier in this paper.[131] Whether such a more positive approach is feasible in the light of public opinion can of course be open to debate. But based on this narrative it is difficult to come up with a *legal* argument why solidarity would not be able to cut through national lines, like the German Constitutional Court or the British Parliament do. This, in turn, would also unlock the door for a broader attitude

[127] Cuyvers (n122) 734-735.

[128] *ESM Case* (n19) paras 210-213.

[129] Constitutional lawyers from federal states could point out that the equation of attribution with sovereignty is not sound. While crucial for sovereignty, as this principle does not recognise a general legislative power at the supranational level, the principle of attribution is not distinctive for entities where states claim to remain sovereign. Federal states also work with the attribution principle. See, for example, Article I, Section 8 of the US Constitution.

[130] Simply put, this is because decisions in the EU's multi-layered decision-making process are often not the result of a single exercise of competence by one organ. Especially in the economic governance of the Union that is currently taking shape, there is most of the time both a role for institutions at the European level and institutions at the national level. However, this multi-layered nature does in itself not cut the link between solidarity and the exercise of competence.

[131] Above, part 2.2.

towards economic stability, by taking into account other factors that affect stability, such as social cohesion.

What the above shows, is that the interaction between sovereignty, solidarity and stability heavily depends on the definition of each of them. On one reading, it might seem as if they are in harmony. But as soon as the outlook on one of them changes, the principles may be seen to conflict. Only to a limited extent is the content of the principles fixed by law. To a large extent, however, the meaning of the three principles is far from clear. Solidarity surfaces at various points in different guises and the same is true for stability. And the meaning of sovereignty can vary from Member State to Member State. AG Kokott has made an attempt in *Pringle* to tie the three maxims together. For that effort she is to be applauded. During the Euro crisis, sovereignty, solidarity and stability have surfaced as three indispensable and inseparable concepts. However, it is important to realise that the interaction between the principles does not always boil down to a zero-sum game. This interaction is also partly the product of particular constitutional and political narratives which correspond with ‘une certaine idée de l'Europe’.