Report on the compatibility of reform scenarios with the EU Treaties

by Elisabeth Lentsch
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<td>BoP</td>
<td>Balance of Payment</td>
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<td>CCI</td>
<td>Convergence and Competitiveness Instrument</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>DGS</td>
<td>Deposit Guarantee Schemes</td>
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<td>EIB</td>
<td>European Investment Bank</td>
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<td>EMEF</td>
<td>European Minister of Economy and Finance</td>
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<td>EMF</td>
<td>European Monetary Fund</td>
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<td>MEP</td>
<td>Member of the European Parliament</td>
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<td>MFF</td>
<td>Multiannual Financial Framework</td>
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<td>MTO</td>
<td>Medium-Term Objective</td>
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<td>MoU</td>
<td>Memorandum of Understanding</td>
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<td>OMT</td>
<td>Outright Monetary Transaction</td>
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<td>SGP</td>
<td>Stability and Growth Pact</td>
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<td>SRB</td>
<td>Single Resolution Board</td>
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<td>Single Resolution Fund</td>
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<td>Single Resolution Mechanism</td>
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<td>Single Supervisory Mechanism</td>
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<td>TSCG</td>
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1. Introduction
The aim of this report is to examine from a legal viewpoint the proposals on further EMU integration. The European Union and in particular the Eurozone have returned into a phase of stable growth and the urgency of reform seemed to have disappeared. Still, there is consensus that a robust and resilient framework of the euro area is missing and the necessity to resolve such is imperative. In this sense, various initiatives and proposals floated to address the needs and concerns of a functioning system of the Economic and Monetary Union. The EU institutions invested increased efforts to initiate the debate on further development of the EMU. While general ideas and roadmaps dominated the official reports and communications for a long time, detailed legislative proposals on the next steps appeared only recently. The present report aims to highlight the general strategy and priorities of the EU official side on the future of the EMU, complemented with suggestions and aspects from other stakeholders, academia and think tanks. A detailed scrutiny of the recently issued legislative proposals on their feasibility under the existing Treaty framework shall be a core element of the report.

The paper is structured as following. It starts by giving an overview of the debate at EU level on possible future scenarios for the Economic and Monetary Union. Subsequently, the suggested reforms for the fiscal and economic union will be addressed, followed by the concomitant institutional changes. The recent legislative proposals in these fields are scrutinised in very detail on their compatibility with the EU Treaties. Finally, developments in the financial union are covered before an overall conclusion completes the paper.

2. Economic rationale for reforms
The economic and financial crisis revealed the weaknesses of the architecture and institutional design of Economic and Monetary Union. Even though, monetary policy and fiscal policies are considered two sides of the same coin, only the previous policy field was communitarised. Member States kept their sovereignty for economic and fiscal policies. National governments decide on raising public revenues and their use, covering the fields of taxation, debts and the public spending and regulate economic policy fields. These fields were regulated supranationally only by a quite loose coordination framework and some fiscal rules. The common currency led to uniformly low interest rates of Eurozone government bonds at the financial markets due to the belief that the bonds within the euro area were equivalent. When the contrary was revealed, the markets reacted by sharply increasing the interest rates and thereby causing the rise of government deficits and debts in several Member States.¹ Thereby, imbalances between the euro area Member States increased and led to instability within the Monetary Union.

In response to the crisis a bunch of anti-crisis legislation and measures was adopted, both at EU and intergovernmental level. From an economic view, the monetary unification is considered incomplete without a significant fiscal capacity at EU level able to absorb negative shocks in Member States. This is grounded in the conviction that a common monetary policy, which implies the absence of exchange rate instruments at national level, to be effective requires fiscal authorities to respond and even more so in moments of economic shocks. An independent and powerful central bank would control the inflation by money supply and that the financial markets would discipline the national fiscal policy.

Accordingly, the Maastricht Treaty determined only limits on Member States’ debts and deficits, and thereby aimed to prevent the difficulties. However, these fiscal rules were not able to prevent economic and fiscal distress in the Member States, but rather punished Member States for running larger deficits. As a consequence the financial markets reacted, very late, however, by pricing the Member States’ debts based on default risks. The great recession of 2009 led to increased divergences among Eurozone members. The system of capitalism involves endogenous booms and busts in economies triggering divergence in competitiveness among the Member States, which need to be corrected afterwards. Upswings lead to much stronger inflation pressures by booms and raised wages, downswings led to higher costs for internal adjustment in some Member States. The EMU falls short in a unified euro area and a full shock proof system. Thus, the economists view on making the EMU crisis proof is to bring economic convergence between all participating Member States and create a common approach in the system for a “European Business Cycle”. To achieve the target of “One market, one money”, common adjustment mechanisms for competitiveness and a stabilising function or a transfer union is considered necessary. In this sense, the call for a genuine Economic and Monetary Union was growing louder and louder.

3. **Official reform initiatives**

Several reports and communications by the leading EU actors were issued dealing with ideas on a roadmap for EMU reforms. These cover a step-by-step plan for change aiming for long term objectives.

The European Council President, Herman Van Rompuy initiated a report towards a genuine Economic and Monetary Union in close cooperation with the Presidents of the Commission, the Eurogroup and the European Central Bank in 2012. It outlined an agenda on four
building blocks: an integrated financial framework, an integrated budgetary framework, an integrated economic policy framework, the strengthening of the democratic legitimacy and accountability. While this initiative focused on the procedural way forward, the subsequent Commission’s Blueprint for a deep and genuine EMU – Launching a European Debate, outlined substantial changes. Based on these previous works, the four presidents of the EU institutions developed an ambitious timeframe and stage-based process towards a genuine economic and monetary union.

Accordingly, the Commission started its activities on investigating the options for further integration steps in the field of EMU. In 2014, after the European Parliament elections and with a newly appointed Commission, a new discussion process started and resulted in the Five Presidents’ report on Completing Europe's Economic and Monetary Union. Its spirit was guided by the ambition to complete the EMU at the latest in ten years' time by means of three subsequent stages. It aims for the creation of an economic, financial, and fiscal union as well as for reconsideration of respective institutional and accountability elements. A strong general message on the future of the European Union was sent with the Commission’s White Paper on the future of Europe: Avenues for unity for the EU at 27, considering various scenarios for the potential state of the Union by 2025. The ensuing reflection paper on the deepening of the economic and monetary union covers rather general ideas than specific suggestions for the progress of the EMU. A more detailed and long awaited policy package and specific initiatives and legislative reform proposals were issued in the so-called Saint-Nicolas package of 6th December 2017. The far-reaching ideas contain ambitious aspects for the EMU, which require the political consensus and a new underlying Treaty framework. As for the short and medium-term reforms, the aim is to exploit the existing legal tools.

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10 Four Presidents' report, Towards a genuine economic and monetary union (2012).
11 Phases: I: 2012-2013: Ensuring fiscal sustainability and breaking the link between banks and sovereigns; II: 2013-2014: Completing the integrated financial framework and promoting sound structural policies; III: post 2014: Improving the resilience of EMU through the creation of a shock-absorption function at the central level.
12 e.g. European Commission, COM (2013) 166 Towards a Deep and Genuine Economic and Monetary Union - Ex ante coordination of plans for major economic policy reforms.
13 Five Presidents' Report, Completing Europe’s Economic and Monetary Union (2015). 1) immediate steps (July 2015-June 2017); 2) completing the EMU architecture (for a period of up to seven to eight years); and 3) final stage (by 2025).
4. Fiscal Union

With the debates on the completion of the EMU, EU officials emphasised the need for further development of the common fiscal rule system towards a fiscal union.\textsuperscript{16} The European Union is not constructed as a federal state. In comparison to states, it lacks the competence to collect EU or euro area tax, a proper own budget and a treasury as well as fiscal power. To the contrary, economic and fiscal policies remain in the hands of the Member States. Increased interdependence of the euro area Member States because of the common monetary policy was addressed by essential rules on coordination of national economic and budgetary policies and fiscal discipline. The deficit and debt limits of the Member States’ fiscal policies were considered crucial in a monetary union to ensure sustainable national budgetary positions, relevant for their treatment at the financial markets. The underlying objective, covered by Articles 123, 124, 125 TFEU, is to submit the Member States’ refinancing to the capital markets like private economic subjects, and thereby achieve a market disciplining effect to sound public finances necessary for the common monetary union.\textsuperscript{17}

As proved over time, the Treaty rules and in particular the Stability and Growth Pact (SGP) were not able to prevent national fiscal deficits and debts rising during the economic and financial crisis. In reaction, the fiscal rules for EU Member States were considerably strengthened and evolved to a complex legal framework at EU and intergovernmental level, involving supervision, coordination and possible sanctions of the national economic and fiscal policies.\textsuperscript{18} Being ultimately adopted and imposed by the Council, these rules still do not provide for a credible mechanism to enforce fiscal discipline of the Member. The push for more fiscal discipline was combined with more focus on national ownership to work on economic and fiscal reforms.\textsuperscript{19}

4.1. TSCG incorporation

Such national ownership for fiscal discipline led to the conclusion of the intergovernmental Treaty on Stability, Coordination and Governance. Doing this outside the EU legal framework was triggered by the resistance of some Member States to advance the supranational fiscal discipline rules.\textsuperscript{20} The Treaty established rules on the design of the national fiscal

\textsuperscript{16} Five Presidents’ Report, Completing Europe’s Economic and Monetary Union, p. 13f; European Commission, COM (2017)291 Reflection paper on the deepening of the economic and monetary union, p. 15.

\textsuperscript{17} B. Kempen, ‘Article 126’ in R. Streinz (ed.), Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (2018), para 2. Only the capital market mechanisms shall provide for financial means and honour sound budgetary policies via low interest rates.

\textsuperscript{18} See Lentsch, Report on the institutional consequences of fiscal and economic integration measures, 2017.

\textsuperscript{19} See ibid.

\textsuperscript{20} The European Council Meeting in December 2011 led to reform proposals on more EU oversight over Member States’ fiscal and economic policies. The new rules were meant to be included into the EU Treaty, requiring unanimity. The UK prevented the Treaty amendment by a veto. The majority of Member States still aimed for reforms. The previous political commitment and claims of Merkel and Sarkozy led to the insistence on concluding the respective rules in the form of an intergovernmental treaty. P. Craig, ‘The Financial Crisis, the EU Institutional Order and Constitutional Responsibility’ in F. Fabbrini (ed.), Modern Studies in European Law: What Form of Government for the European Union and the Eurozone? (Bloomsbury Publishing, 2015), pp. 17–36, p. 31.
frameworks to be incorporated at national legal orders. As a measure taken at the height of the crisis, there was also a so-called ‘repatriation’ clause included into the Treaty, foreseeing that the substance of the TSCG should be integrated into Union law within five years at most from its entry into force. “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.”

In fact, this provision is only binding to the contracting parties of the intergovernmental treaty and may not be interpreted as an obligation for the EU level. Nonetheless, the Commission issued as part of a bundle of concrete EMU reform initiatives of 6th December, 2017, a legislative proposal for the incorporation of the so-called Fiscal Compact into EU law. The main motivation for its integration is to bring democratic accountability, legitimacy and institutional strengthening, which reflects the general approach of the EMU agenda to integrate intergovernmental arrangements into the Union framework. Along these lines, the Commission proposed a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States.  

4.1.1. Substance
The core of the TSCG, the balanced budget rule of Article 3 TSCG is concentrated in Article 3 of the proposed Directive. Accordingly, the Member States have committed themselves to set up a national legal and institutional framework of binding and permanent country-specific numerical fiscal rules to promote the compliance with the fiscal obligations under the TFEU in the area of budgetary policy. These fiscal obligations provide for national budgets to be in balance or in surplus. This is deemed to be fulfilled if the annual structural balance of the general government budget, the annual cyclically-adjusted balance net of one-off and temporary measures, is less than -0.5% of GDP in structural terms. Thereby, the rules of the revised SGP are tightened, which set the defined range between -1% of GDP and balance or surplus, in cyclically adjusted terms, net of one-off and temporary measures.

21 Article 16 TSCG.
25 Article 3(3) TSCG. In case of the government debt ratio being below 60% of GDP and a low risk to long-term fiscal sustainability exists, the MTO may be set as low as the structural deficit of at most 1% of GDP.
26 Article 2a of Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies: Each Member State shall have a differentiated medium-term objective for its budgetary position. These country-specific medium-term budgetary objectives may diverge from the requirement of a close to
Just as the Treaty and SGP rules, exceptional circumstances justify temporary deviation from these precepts.\textsuperscript{27} Otherwise, significant deviations from the MTO or the adjustment path towards it shall trigger an automatic correction mechanism.\textsuperscript{28} Apart from the transformation of the fiscal rules, detailed provisions of the legislative proposal relate to the national independent bodies, which shall act as observers of the compliance with the rules. They shall be established under a statutory regime grounded in national laws, regulations or binding administrative provisions. They shall consist of experts in the field and have adequate and own resources to carry out their mandate effectively and extensive and timely access to information to fulfil their given tasks. They may not take instructions from budgetary authorities or other public or private body, and have capacity to communicate publicly in a timely manner.\textsuperscript{29}

As regards the details on the fiscal rules and the respective legal and institutional framework, the legislative proposal reflects the rules already set out in the SGP.\textsuperscript{30} According to Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States the Member States (except for the UK\textsuperscript{31}) are obliged to put in place numerical fiscal rules, which are specific to them and which effectively promote the compliance with the Treaty obligations in the area of budgetary policy.\textsuperscript{32} The effective and timely monitoring of compliance with these country-specific numerical fiscal rules shall be based on reliable and independent analysis carried out by independent bodies endowed with functional autonomy vis-à-vis the fiscal authorities for the Member States, and the consequences in the event of non-compliance. Furthermore, the consequences of non-compliance with the rules shall be

\begin{itemize}
  \item balance or in surplus position, while providing a safety margin with respect to the 3 % of GDP government deficit ratio. The medium-term budgetary objectives shall ensure the sustainability of public finances or a rapid progress towards such sustainability while allowing room for budgetary manoeuvre, considering in particular the need for public investment.
  \item Taking these factors into account, for participating Member States and for Member States that are participating in ERM2 the country-specific medium-term budgetary objectives shall be specified within a defined range between -1 % of GDP and balance or surplus, in cyclically adjusted terms, net of one-off and temporary measures.
\end{itemize}

\textsuperscript{27} Article 3(3) European Commission, COM (2017)824 Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, Article 3(1) lit b TSCG and Article 3(3) lit b TSG.


\textsuperscript{31} Article 8 Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41.

\textsuperscript{32} Article 5-7 ibid..
determined. In case of non-compliance with the fiscal rules, the independent bodies shall call on the budgetary authorities to activate the national correction mechanism and assess the consistency of the planned measures, the progress of the correction over the defined time-frame and the occurrence or cessation of any exceptional circumstances, which may allow a temporary deviation from the correction path. The envisaged new rules go further by obliging the Member States shall ensure that budgetary authorities comply with recommendations of the independent bodies, otherwise explain publicly their decision not to do so.

Most controversial was the introduction of Article 7 TSCG because it relates to the voting modalities in relation to the excessive deficit procedure, which is defined at EU level. Accordingly, the euro area countries commit to support the Commission’s recommendations at all stages of the Excessive Deficit Procedure considering that a euro area Member State is in breach of the deficit criterion within the excessive deficit procedure, unless a qualified majority opposes it. This rule is departing from the required majority enshrined in Article 126 TFEU and interferes with the EU Treaties. The content of Article 7 TSCG was explicitly left out of the proposal. The latter example reflects that several important elements of the TSCG are not brought into the EU framework. Consequently, several parts of the intergovernmental treaty remain in force, such as the rules for the Euro Summit and its President in Article 12 TSCG, which would involve necessary Treaty amendments.

4.1.2. Legal basis
The envisaged incorporation of the core of the TSCG into the EU legal framework shall apply to euro area Member States and is open for voluntary participation of Member States whose currency is not the euro. Thus, this legislation shall be adopted in the form of a Directive, based on Article 126(14) subpara 2 TFEU. “The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.”

This special procedure allows the adoption of secondary law amending, changing or specifying the provisions in the protocol on the excessive deficit procedure, being part of the primary law. According to the Treaties, the Member States are obliged to avoid running excessive deficits. Thereby, the sustainability of national budgets necessary for the stability

33 Article 6 ibid.
35 The reverse majority voting was also introduced by the secondary legislation of the six-pack.
36 Article 1 (2) and Article 4 ibid.
of the euro area shall be guaranteed. The Excessive Deficit Procedure outlined in Article 126 TFEU provides for detailed steps to correct existing excessive deficit in a Member State.\(^{38}\)

The Protocol annexed to the Treaties defines and concretises the relevant reference values and sets out that the Member States shall ensure that national procedures in the budgetary area to enable them to meet their obligations in this area deriving from the Treaties.\(^{39}\) The proposed Directive is dealing with common rules for the alignment of the national budgetary frameworks, in regard to the balanced budget rules and the respective correction mechanism. As determined in Article 3 of the Protocol on the Excessive Deficit Procedure, the governments of Member States are obliged to ensure the appropriate national procedures in the budgetary area enable them to meet their obligations in this area deriving from these Treaties. This includes the establishment of national frameworks of numerical fiscal rules preventing the occurrence of excessive government deficits.

### 4.1.3. Concluding remarks

As outlined, the proposed regulation does not bring significant substantive novelties and must be regarded as merely symbolic. The envisaged incorporation of the core of the Fiscal Compact touches in particular on institutional matters, which are to be implemented already according to the TSCG. Several crucial and legally controversial elements of the intergovernmental agreement were left out. These remain in force under the existing intergovernmental treaty and beside the EU framework, which triggers the justified question of the necessity for the envisaged incorporation.\(^{40}\)

### 4.2. SGP Flexibility

In the last years, a more flexible approach of the application of the SGP rules gained space, which is deemed necessary to allow national budgetary policies to confront asymmetric shocks and promote growth and jobs.\(^{41}\) In line with the Treaty rules and respective SGP provisions, the reference values set out in primary law are not absolute. The Commission emphasised its ambition to fulfil its tasks in economic governance by taking into account the cyclical economic conditions, investment, structural reforms and fiscal responsibility of the Member States.\(^{42}\) In fact, the Commission and the Council shall in their assessment of the compliance with such include the country-specific government investment expenditure\(^ {43}\), medium-term economic and budgetary position of Member States\(^ {44}\) and all other relevant

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\(^{38}\) Article 126 (2)-(9) TFEU.

\(^{39}\) Article 3 second sentence of Protocol No 12 on Excessive Deficit Procedure.

\(^{40}\) D. Fromage and B. de Witte, *The treaty on stability, coordination and governance* (2017).


\(^{43}\) Article 126(3) 2nd sentence TFEU and Article 2 of Protocol No 12 on Excessive Deficit Procedure: “investment” is the gross fixed capital formation as defined in the European System of Integrated Economic Accounts.

\(^{44}\) Article 126(3) TFEU and Article 2(3)-(7) Regulation 1177/2011 of the European Parliament and of the Council of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the
factors. In this spirit, the Commission considers the Member States’ contribution to the European Fund for Strategic Investments, planned expenditures for major structural reforms and economic cyclical situations in the Member States and the Union as a whole.

While such increased use of the given flexibility of the SGP fiscal rules economically is strongly argued for, it adds even more to the politicised handling of the implementation and enforcement of the respective economic and fiscal rules. Thereby, the Commission plays a key role in gathering information and assessing the economic and fiscal situations in the Member States with the power to initiate respective proceedings.

4.3. Sovereign-debt reduction

Liquidity crises may occur more easily in a monetary union lacking the implicit guarantee of national central banks of always being able to pay out the government bonds. Consequently, raised interest rates may affect Member States not able to service their debts, and an outright default (e.g. stopping payment of interest on the outstanding debt) is more likely in a monetary union. The EMU rules were not able to prevent the increasing levels of deficits and debts in particular during the crisis. Sovereign debt levels in the EU increased in particular during the crisis and afterwards. Some Member States used budgetary resources to support the failing banking sector and infrastructure projects. At the same time the tax income decreased and the social expenditure rose when automatic stabilisers were activated. Fast increasing levels of public debt create fears of debt sustainability problems which have effects on the level of interest rates for refinancing at the financial market. The higher the debts grow, the riskier the activity on the capital markets is perceived and consequently higher interest rates for refinancing of the respective Member State are applied. In addition, the higher interest rates produce higher debt servicing costs, resulting in a negative spiral. Highly indebted states remain vulnerable to shocks for many years and huge efforts are necessary also to address market doubts on the Member States’ solvency. Thereby, the political discretionary space becomes limited and puts sovereigns under excessive deficit procedure OJ 2011 L 306/33 including the development of the medium-term economic, budgetary, and debt positions.


46 ibid., p.12f. They must be major reforms with verifiable direct long-term positive budgetary effects, raising potential sustainable growth, and be fully implemented.

47 ibid., p.14f.

48 Articles 121 and 126 TFEU, For instance, based on an overall assessment of the relevant factors, it initiates the excessive deficit procedure.


50 Article 126(2) TFEU in combination with the Protocol No 12 on Excessive Deficit Procedure.


52 ibid., p.2.

pressure. The legislative response at EU level was to introduce the possibility to enact sanctions for non-compliance with the obligation to keep the debt level below 60% of GDP. This included specific provisions for the reduction of any such excessive debt level in satisfactory pace by an average rate of 1/20th per year. Furthermore, euro area Member States are obliged to report ex ante on national debt issuance plans to the Eurogroup and the Commission. On the other side, the Commission took increasingly into account the country-specific circumstances, and in particular its reform efforts for growth and sustainability of public finances when assessing the compliance with the fiscal rules. Nevertheless, the public debt level in the euro area is still very high and will remain so for a long time. This induces risks for further crises and prevents growth. A long-term strategy for sustainable debt and debt reduction in euro area countries is considered essential to secure adequate refinancing costs of Member States. The linkage between Member States and banking systems most relevant for the stability of both was tackled. Certainly, the most crucial elements in regard to the funding crisis of euro area Member States were the creation of collective financial assistance mechanisms as well as the Eurosystem starting to purchase sovereign bonds of the EU Member States. These measures were targeted to help restoring the stability in the euro area at risk by severe fiscal distress of a Member State. One of the envisaged strategies addressed the liquidity constraints of various euro area Member States in the form of joint issuance or guarantee of government debt. This should bring protection against liquidity crises rooting in the lack of control over the currency in which debt is issued. Thereby, each Member State’s debt would be guaranteed by the other Member States and would thereby reduce the respective costs. This should bring action space for policies aimed at reducing the national debt and help to restore the stability

55 Article 2(1a) Regulation 1177/2011 of the European Parliament and of the Council of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure OJ 2011 L 306/33 and Article 4 TSCG.
61 Grauwe, Economics of monetary union, p. 235.
in the euro area and the government debt markets.\(^\text{62}\) The proposed creation of a European redemption fund aims at transferring excessive Member States’ debts exceeding the 60% level into such a fund, for which all participating Member States would be jointly and severally liable.\(^\text{63}\) Thereby, the participating member enters into payment obligations towards the Fund and is obliged to repay the transferred debts within a total of 25 years.\(^\text{64}\) A concomitant Redemption Pact should ensure the strict conditionality and immediate penalty payments in case of non-compliance with the rules.\(^\text{65}\)

From a legal point of view, the Treaties do not foresee any competence for pooling euro area debts into joint bonds or a European Redemption Fund. In fact, the Europeanisation of sovereign debt in the form of joint and several liabilities would contravene the established principle of each country being responsible for its own debt and respecting the set debt limits.\(^\text{66}\) Thus, a revision of the Treaties would be required.\(^\text{67}\)

Lacking of political support, the mentioned proposals were not included in the subsequent official documents on the development of the EMU. Instead, a new common Euro area financial instrument for the common capital market in the monetary union was suggested. The creation of a private Euro Area Safe Asset through markets instead of public collective bonds shall increase the supply of safe assets in the euro area and diminish the nexus between banks and Member States. According to the initiative, the Euro area should issue European Safe assets avoiding sovereign risk-sharing, but pooling sovereign bonds and put them in tranches with different credit rating.\(^\text{68}\) Following the findings for the creation of Eurobonds, the limits to public risk-sharing set out by Article 125 TFEU must be respected. In this sense, legally important for the creation of new forms of Euro area assets is the avoidance of risk-sharing or mutualisation of fiscal responsibility among the Member States.

The sovereign bond-backed securities (SBBS) as a securitized financial product shall be created and issued to investors by a private sector entity assembling underlying portfolios of sovereign bonds from the market.\(^\text{69}\) The SBBS would consist of various securities differentiated in tranches with increasing risks allowing the diversification of default risk of the euro area Member States. The priority of payments would depend on the holding of

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\(^{64}\) ibid., p. 3.


assets of the tranches. They stand in contrast to the proposed Eurobonds, which would mutualise debts between the Member States. For the SBBS, the euro area Member States would only bundle sovereign bonds into a new financial instrument. The structure of the underlying government assets would be predefined, e.g. as the bonds’ weight would be in line with the contribution to capital of the ECB. Thereby, the bank and financial institutions may better diversify their sovereign exposure and contribute to the diminishing of the bank-sovereign loop. The Member States remain subject to market discipline.

4.4. Sovereign default mechanism

In particular the Greek financial difficulties led to debates on the establishment of a European mechanism for dealing with unsustainable debts and default of a euro area Member State. So far, there are no rules under the EU legal framework on how to deal with the insolvency of Euro area or EU member states. The Union only provides for rules on the prevention of state insolvency, by the obligation for Member States to avoid public deficit and debt and the respective excessive deficit procedure. Furthermore, the rules on prohibition of bailing out a Member State should enshrine the disciplining effect on the national fiscal behaviour by the market forces. These rules were not able to prevent EU Member States from suffering of severe financing problems during the crisis and sovereign default became a prominently debated issue. In monetary union excessive debts of a member may be dealt with by fiscal expenditure cuts, a bail out by other union members or default. Emergency funding and financial assistance packages were mobilised to avoid sovereign default and meet funding difficulties at the markets. They were legally accepted compliant with the Treaty prohibition to bail out Member States as long as they are indispensable to safeguard the financial stability of the euro area as a whole and set under strict economic policy conditionality. Article 125 TFEU played a decisive role and was shaped by the CJEU’s jurisdiction. The ESM tools serve as a form of sovereign debt restructuring, consisting of stretching bond maturities or haircut of private debt, do not bring any reduction of debt in the respective Member State. Thereby, they ensure liquidity of euro area Member States at the financial markets. They are characterised by political

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70 Brunnermeier, Langfield, Pagano, Reis, van Nieuwerburgh and Vayanos, ESBies: Safety in the tranches: The most senior component (70% and called “European Sage Bonds”) would be protected by mid-tier (‘mezzanine’) and first-loss (‘junior’) securities (together 30%). In case of insolvency of a Member State, the creditors would need to accept first the high-risk of the junior tranche.

71 European Commission, COM (2018)339 Proposal for a regulation on sovereign bond-backed securities, p.3; For details see Brunnermeier, Langfield, Pagano, Reis, van Nieuwerburgh and Vayanos, ESBies: Safety in the tranches;


74 Article 125 TFEU.

75 Article 3 TESM, CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756.
influence and the contractual approach both in regard to the financial assistance and the macroeconomic conditions attached.\textsuperscript{76}

With a view to revive the credibility of the no-bail-out clause and to address the problem of unsustainable debts in the Member States, a statutory legal mechanism for restructuring sovereign debts was discussed. Thereby the unsustainable debt burden could be reduced in an orderly manner.

So far, even though sovereign insolvencies are a well-known historical phenomenon\textsuperscript{77} no sovereign default mechanism evolved at European or international level. Deriving from international practice and due to a missing public law system, the private law model in form of contractual arrangements under the New York and London laws have become the common practice. Thereby, Collective Action Clauses as part of the issuance of bonds provide for rules on restructuring of debts, covering the applicable procedures and conditions for initiating and negotiating a restructuring process.\textsuperscript{78}

A number of proposals to create a statutory regime for dealing with sovereign debts were raised by academics as well as official institutions. However, so far none of these initiatives were taken up by the Commission or the Presidents of the EU institutions. The International Monetary Fund suggested a Sovereign Debt Restructuring Mechanism.\textsuperscript{79} Further ideas relate to a European Crisis Resolution Mechanism\textsuperscript{80} or a proper European Monetary Fund\textsuperscript{81}. It is also suggested to build such scheme on the already existing ESM and transform it into a “resolvency” mechanism.\textsuperscript{82} This should bring transparent, and ex-ante calculable institutional and procedural rules and enhance legal certainty for all involved parties.\textsuperscript{83} In addition, it may also have preventive and disciplining effect for Member States conducting their fiscal policies. This approach supports the Treaty principles of decentralisation of fiscal policy and respective responsibility.\textsuperscript{84}

\textsuperscript{76} Paulus, Christoph and Tirado, Igancio, ‘Sweet and Lowdown: A Resolvency Process and the Eurozone’s Crisis Management Framework’, p. 4; Nieminen and Picarelli, Sovereign debt restructuring, p.5.

\textsuperscript{77} See C. Reinhart and K. Rogoff, This Time is Different. Wight countries of Financial Folly (Princeton University Press, 2011).


\textsuperscript{81} D. Gros and T. Mayer, How to Deal with Sovereign Default in Europe: Create the European Monetary Fund Now!, CEPS Policy Brief No. 202 (2010).

\textsuperscript{82} Paulus, Christoph and Tirado, Igancio, ‘Sweet and Lowdown: A Resolvency Process and the Eurozone’s Crisis Management Framework’.


Such statutory mechanism should facilitate as ultima ratio mechanism an agreement between the debtor Member State not able to pay back its debts and its lenders on future obligations in order to re-establish sustainability of its public finances. The respective procedure should be led by an independent specialised tribunal or court.\(^{85}\) This should include rules for all various and diverse creditors, including the private sector creditors, private bondholders, banks and non-sovereigns. So far, in particular the private sector is subordinated to sovereign and international lending institutions, which undermines the pari passu principle.\(^{86}\) Apart from the necessary Treaty changes or amendment of the existing ESM, the EU Member States could contribute to removing the shortcomings in this field and start respective developments at European level. A rule-based and comprehensive procedure characterised by independent judgement, consideration of the debtor’s and creditors’ interests.

4.5. Euro area fiscal stance

The events of the crisis led to claims for greater coordination of euro area Member States’ fiscal policies and common fiscal stimulus. A fiscal stance of the euro area should gain space and attention in the Eurozone members and contribute to the objective for collective responsibility and a general interest of the euro area as a single entity.\(^{87}\) In general a fiscal stance shall give orientation to fiscal policy by governments’ discretionary decisions on tax and expenditure.\(^{88}\) Due to the lack of a proper euro area fiscal instrument, a euro area fiscal stance is determined by the sum of the fiscal stances at national level.\(^{89}\) Thereby, the difficulty for the definition and assessment of an appropriate euro area fiscal stance of priorities for an adequate policy mix of employment, growth and social fairness lies in the differences of the country-to-country perspective. Furthermore, coordination in substantive fields of fiscal policies goes beyond what is allowed under the Treaties. Thus, these obstacles may only be overcome by enhanced forms of cross-country coordination or further fiscal integration.\(^{90}\)

A fiscal stance of the euro area as such was not foreseen by the Maastricht Treaty framework. So far, the legal framework of economic governance only allows for guidance and recommendations to Member States to consider the euro area wide perspectives in their fiscal decisions. Accordingly, the euro area fiscal stance is covered in the annual recommendation for the economic policy of the euro area.\(^{91}\) It plays an increased role in the

\(^{86}\) ibid., p.6.
\(^{88}\) ibid., p. 4.
\(^{89}\) European Commission, COM (2017)291 Reflection paper on the deepening of the economic and monetary union, p. 15.
\(^{90}\) noted in the Five Presidents’ Report, Completing Europe’s Economic and Monetary Union, p. 14.
context of the assessment of the draft budgetary plans of the euro area Member States according to the Two-pack Regulation.\(^{92}\)

A further and institutional step towards an increased euro area stance was taken by the activation of a European Fiscal Board in 2015. Established by a Commission’s Decision, five international experts provide independent analysis at European level on the performance of national budgets against the objectives set out in the EU fiscal governance framework.\(^{93}\) The focus lies on the exchange of best practices and facilitating common understanding on matters related to the Union fiscal framework.\(^{94}\) In this way, it shall bring better compliance with the fiscal rules and assess the appropriate euro area fiscal stance and inform the public. Thereto, it coordinates and cooperates with the independent national fiscal councils of the euro area members, which were to be created to monitor the compliance with the EU fiscal rules.\(^{95}\) The European Fiscal Board has advisory competences only.\(^{96}\) One specific task of the Board is to assess the appropriate fiscal stance at the euro area level, against the background of EU fiscal rules. Thereby, it looks at the euro area as a single and distinct entity, which shall add to the policy debate in the euro area. This shall serve as an input to the Member States’ budgetary plans for the forthcoming year as well as for the Commission’s and Council’s assessment of them.\(^{97}\)

4.6. Euro area fiscal union

Measures for compliance with the EU fiscal rules at national level as well as the enhancement of a common fiscal stance including the creation of euro area bodies, even though with limited competence, push towards a fiscal union of the euro area. The Eurozone is a special entity with a common currency but without a unified polity and institutions. One principled economic argument for a common fiscal policy is the strong interdependence of the members of the currency union, whose monetary policy may only be effective if fiscal policy is steering into the same direction.\(^{98}\) This is of particular importance in cases of asymmetric macroeconomic shocks in the euro area, which so far, the Member States have to compensate at national level.\(^{99}\) Accordingly, the theory of the Optimum Currency Area

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\(^{96}\) European Commission, Decision (EU) 2015/1937 of 21 October 2015 establishing an independent advisory European Fiscal Board.

\(^{97}\) European Fiscal Board, Assessment of the prospective fiscal stance appropriate for the euro area (2017). Accordingly, it issued in June 2017 its first advice thereto.


stresses a certain degree of centralisation of national budgets to address asymmetric shocks in the different regions by temporary means. Without the monetary policy tools to address macroeconomic instability fiscal adjustment devices have become crucial instead to regain competitiveness. Private markets do not provide sufficient insurance against declines in consumption during an economic crisis. This may be achieved by a common fiscal capacity as central adjustment mechanism to be activated in case of asymmetric shocks. One believe prevails that a strong common financial crisis management requires a powerful institution able to adopt relevant decisions and holding power over a fiscal capacity to support public investment for euro area wide public goods.

In the past, two opposed options for a fiscal union design at EU level were mapped out at political level. One approach calls for more sharing of sovereignty for fiscal policies. This suggests the equipment of a supranational institution, such as a euro area finance minister with veto power over Member States’ budgets in order to ensure economic and fiscal coordination being guided by euro area perspective rather than by national interests. Eventually it could force sovereigns to adopt the required fiscal policy stances in case of resistance. A first step into this direction can be seen in the Two-pack legislation, which assigns the Commission to assess the draft budgetary plans of the euro area Member States and with the right to ask for revision. The Treaty rules however do not foresee any sovereignty sharing for economic and fiscal policies and prohibit respective legally enforceable action.

Another line of vision for a fiscal union assumes the necessity of more risk-sharing of fiscal means at EU level. This would involve a common euro area fiscal capacity and/or treasury,

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100 Grauwe, *Economics of monetary union*, p. 217. According to the theory of optimum currency areas, countries in a monetary union need to rely on alternative adjustment devices, namely price and wage flexibility, capital and labour mobility, or a federal budget. The latter can have direct stabilising impact in case of asymmetric shocks (eg sustaining disposable income in crisis countries).
which a European Finance Minister would manage by redistributing the resources among members.  

Finally, a combination of the previous approaches suggests more risk-sharing in exchange of more sovereignty-sharing.  

Thereby, a euro area fiscal capacity should contribute to the implementation of fiscal rules and policies as well as structural reforms in the euro area combined with more control over national fiscal policies.  

These far reaching fiscal integration proposals touch upon the constitutional obstacles set out by the EU Treaties as well as the national constitutional laws. Nevertheless, the EU institutions seized on these debates. The Four Presidents’ Report advocated the creation of an EU fiscal tool to be activated to cushion asymmetric shocks and protect against the costs associated with negative fiscal externalities. Its activation would be conditional on the implementation of the necessary structural reforms in the Member States. At first, the use of the available structural funds should be linked to macroeconomic conditionality. The subsequent Blueprint by the Commission advocated the gradual development of an autonomous fiscal capacity for the EMU admitting the need for some elements of Treaty amendments. It proposed a process of 3 phases including a short term approach with the creation of a ‘convergence and competitiveness instrument’ (CCI) within the EU budget, but outside the MFF to provide financial support for structural reforms in Member States. For the medium term and building on the CCI, a dedicated fiscal capacity for the euro area should be created using only own resources of the EU. As for the long run after the year 2017, a euro-area budget with stabilisation objectives by developing a fiscal capacity should be established. The Commission outlined possible features for the proposed Convergence and Competitiveness Instruments, as a first step to a fiscal capacity for the euro area. Thereby, financial support should serve as incentive for the necessary structural reforms in Member States with financial difficulties. A contractual agreement with the EU institutions

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107 Allard, C., Koeva Brooks, P., Bluedorn, J., Bornhorst, F., Christopherson, K., Ohnsorge, F., Poghosyan, T., et al., Toward a Fiscal Union for the Euro Area (2013), p.18. A veto power over national fiscal decisions or the power to set national spending and/or borrowing plans as enforcement power. This would allow timely and pre-emptive intervention, when budget plans are clearly inconsistent with the targets derived from fiscal rules. But also Treaty changes as transfer of new powers of sovereignty. So far Two-pack allows the Commission to request the revision of budget plans if not in accordance with common principles for the euro area, however this is not enforceable.

108 Glienickie Group, Towards a Euro Union (2013): A gradual “loss” of sovereignty may be considered depending on the non-compliance with the fiscal rules. Institutionally this means that the bodies mandated to implement and enforce fiscal rules at central level with the euro area’s collective interest in mind.


111 ibid.

112 European Commission, COM (2013) 166 Towards a Deep and Genuine Economic and Monetary Union - Ex ante coordination of plans for major economic policy reforms.
shall ensure that the receiving Member State implements the targeted structural reforms in exchange of the financial means.\textsuperscript{113}

The Five Presidents’ report reiterated the need for stronger economic policy coordination and called for the creation of a fiscal stabilisation function for the euro area. Such fiscal capacity shall guarantee to not undermine the incentives for sound national fiscal policy-making. It should first be developed within the EU budgetary instruments and it should not be an instrument for crisis management.\textsuperscript{114} In addition, it emphasises the need of more joint-decision making on fiscal policy in the long run. A Euro area treasury may be the place for such collective decision-making.\textsuperscript{115}

The Reflection paper takes up these calls arguing that such function would reduce the risk of idiosyncratic national policies, expand the scope of available counter-cyclical tools and allow for better fiscal coordination and appropriate governance safeguards. It is suggested to equip the debated Euro area Treasury with the necessary surveillance of the national fiscal policies.\textsuperscript{116} The resources thereto may come from an extra fund or the existing investment funds, whose compliance and fulfilment with the country-specific recommendations may be monitored within the European Semester.\textsuperscript{117}

This implies that the macroeconomic recommendations adopted within the European Semester shall be linked with fiscal means, first under the umbrella of the existing EU structural and investment funds, which may be extended at a later stage and under respective Treaty revisions to a proper euro area fiscal capacity, managed under a Treasury.

\textbf{4.7. Concluding remarks}

The official documents speak of a fiscal union for the euro area to safeguard the integrity of the Eurozone. In this light, recent steps for EU fiscal rules cover the recuperation of rules promoting the national ownership for fiscal discipline. At the same time, the use of the existing discretionary powers under the SGP rules is encouraged and highlights the available political leeway in the field, with strong political power of the Commission. The problem of high sovereign debts and respective reduction was taken up by initiatives for pooling sovereign debts and thereby bringing action space for suffering Member States to address them.

However, the introduction of Eurobonds or a European redemption fund requiring political consensus for relevant Treaty amendments lost momentum in the debate. Aiming to address the consequences of possible insolvencies of euro area Member States, respective legal mechanisms are called for, but not considered at the official level. The establishment of a proper European Resolvency Mechanism would allow for a rule-based and non-political


\textsuperscript{114} Five Presidents’ Report, \textit{Completing Europe’s Economic and Monetary Union}, pp. 14f.

\textsuperscript{115} ibid., p.18.


\textsuperscript{117} ibid., p. 25.
option to solve insolvency of Member States. Such regional system would certainly be a
decisive and leading example for the general development of the insolvency laws at the
international level.

Small, but essential steps into the direction of a fiscal union concern the ambitions by EU
officials to increase the emphasis on the euro area performance as a whole. The definition of
a common euro area fiscal stance and increased cooperation of national fiscal boards with a
European Fiscal Board shall promote the consideration of such common approach by the
national actors. Several far reaching proposals involving more competence at supranational
level, such as veto powers over the national budgetary decisions or a euro area fiscal
capacity for redistribution of fiscal means as well as a combination of such approaches were
expressed by national stakeholders and international institutions. Such steps touching upon
sensitive national sovereignty matters would certainly require the adaption of the EU legal
framework. EU institutions seized on these debates.

5. Economic Union
The overall characteristic of EMU is the common currency and related monetary policy
carried out at supranational level combined with economic policy decisions largely remaining
in the Member States’ hands. Country-specific economic models and structures
accommodate but at the same time also inform strong economic heterogeneity among the
members of the euro area. These are rooted in the historical development of economic
strategies and structures in each Member State. They are reflected in the structural variety
of the national labour and product markets, social security and welfare systems, as well as
the banking and financial architectures. 118 The effective functioning of an Optimum Currency
Area with a single currency requires a high degree of economic integration including trade
and factor mobility. 119 Accordingly, a certain degree of convergence of the national
economies was and is considered essential and was determined as condition for entering the
common monetary union. 120 At the beginning, the belief prevailed that economic
convergence would ensue automatically in reaction to the market forces by increased
competition among Member States and the common monetary policy, as the exchange rate
volatility and the option for devaluing the national currency were eliminated. 121 So far, the
reality shows that the internal market does not bring the competition needed for the

118 auf dem Brinke, Anna, Henrik Enderlein, and Joachim Fritz-Vannahme, What kind of convergence does the
120 See already Committee for Study of Economic and Monetary Union - Chair Jacques Delors, Report on
economic and monetary union in the European Community (1989), pp. 11 and 26; The inclusion of convergence
criteria for entry into the EMU originated in the compromise between the economists’ coronation theory
postulating economic convergences as a precondition to monetary integration and the vehicle theory, which
considered convergence as an automatic effect of eliminating the exchange rate volatility in the monetary
union.
converging effect. Hence, the latter, in particular the market of services, shall be strengthened to promote the competition and thereby the adjustment of wages and prices and the real exchange rate channel to work more effectively. What is more, such measures may only have converging effect among the Member States in the long and may not prevent cyclical divergences in the short run. As a consequence, macroeconomic asymmetric shocks, hitting members within a monetary union differently, may only be confronted by national fiscal policies being under control of each euro area Member State. The euro area is lacking the required degree of integration, but suffers from economic imbalances and divergence in competitiveness.

This became apparent from 2009 onwards, when several Member States lacked sufficient resilience to withstand the effects of the economic shocks. Furthermore, the single interest rate based on the average inflation rate across the euro area set by the European Central Bank was considered to even contribute to the large structural and cyclical divergences across euro area members and influenced strongly the consequent divergence of growth and inflation rates. Instead of convergence, rather divergence between the EMU Member States increased.

In this light, measures to confront this divergence seemed inevitable. Economists outline that effective economic coordination, a centralised fiscal tool, a transfer mechanism or an automatic equalising mechanism would be necessary for the functioning of the monetary union. Furthermore, they distinguish between cyclical and structural divergences. While the structural divergences are grounded in political decisions in particular at national level, the cyclical divergences are triggered by asymmetric endogenous or exogenous generated shocks in the Eurozone. The latter are regarded jeopardizing the functioning of the currency area and would require adequate reaction tools.

5.1. Structural convergence

The central focus of the Commission’s recent initiatives is the assistance for Member States to develop and implement national institutional, administrative and structural reforms. These shall contribute to reducing structural divergences, which were identified to prevent

\begin{itemize}
  \item 122 H. Enderlein, P. Bofinger, L. Bonne, P. de Grauwe, J.-C. Piris, J. Pisani-Ferry, M. J. Rodrigues, A. Sapir and A. Vitorino, *Completing the Euro - A road map towards fiscal union in Europe: Report of the “Tommaso Padoa-Schioppa Group”* (2012), p. 30: Single market competition is considered as not sufficient for the following reasons: “(I) the necessary reforms are likely to take years or decades before showing a far-reaching effect; (II) given the importance of non-tradables in EMU economies, even after a broadening of the tradables market, large parts of the economy will remain “sheltered” from foreign competition; (III) consequently, even in a much better functioning Single Market context the risk of large endogenous asymmetries would in all likelihood persist”.
  \item 123 Five Presidents’ Report, *Completing Europe’s Economic and Monetary Union*, pp. 5-7.
  \item 125 Enderlein, Bofinger, Bonne, Grauwe, Piris, Pisani-Ferry, Rodrigues, Sapir and Vitorino, *Completing the Euro - A road map towards fiscal union in Europe*, p. 15.
  \item 126 ibid., p. 25.
\end{itemize}
the emergence of an optimum currency area. This was deemed particularly necessary to push for resilience and recovery from recessions and reduce the sovereign debts and ensure the principle of fiscal responsibility.

On the one hand, the convergence process should be advanced by introducing common standards or harmonisation of areas of common interest in the medium term. Such measures may concern the field of labour markets, competitiveness, business environment and public administration as well as business taxation frameworks by legislative acts. On the other hand, country specific structural reforms in the Member States are strived for enhancing a more economically homogenous EMU. The common guidelines and country specific recommendations agreed under the European Semester set out recommendations embracing a variety of policy fields. Such recommendations however lack any legal binding effect.

The implementation of recommended structural reforms was addressed by enhancing stronger surveillance and enforcement tools. This includes the aim to foster the ownership for necessary reforms at national level. National parliaments, social partners, national independent boards and other relevant stakeholders should be increasingly involved in the cooperation and dialogue within the European Semester. To this end, the Council recommended by a non-binding act, Member States to establish national independent boards. These bodies should identify and assess the developments in productivity and competitiveness at the national level. Their findings should also inform the supranational level, in the framework of the European Semester and the Macroeconomic Imbalance Procedure. In a longer term, these national independent expertise and recommendations were considered to become more binding.

128 Enderlein, Bofinger, Bonne, Grauwe, Piris, Pisani-Ferry, Rodrigues, Sapir and Vitorino, Completing the Euro - A road map towards fiscal union in Europe, pp. 25, 32: Thereby, the heterogeneities in the euro area have to be distinguished between cyclical and structural divergence. While the structural divergences root in political decisions and in particular at national level, the cyclical divergences are triggered by asymmetric endogenous or exogenous generated shocks in the Eurozone.; The Five Presidents' Report, Completing Europe’s Economic and Monetary Union identified that the severe divergences within the EMU need to be balanced, in particular when they result in large social and inter-regional cleavages. Ultimately, reducing structural heterogeneities is an inherently political decision. An appropriate source of funding would certainly be the European Union budget, based on true own resources and on the basis of a political debate in the European Parliament.


130 Five Presidents' Report, Completing Europe’s Economic and Monetary Union.


however, induce the difficulty of legitimation in particular in the field characterised by being based on discretionary and political judgements of the economic situations and reforms.  

Structural reforms and their implementation have become central in the economic and fiscal surveillance procedures at EU level. In fact, the support for implementation of structural reforms in the Member States was furthered by technical support of the Commission. In addition and most crucial, is the extension and involvement of the economic governance findings, in particular on the need of structural reforms, to the other EU policy fields. This followed the practice of the crisis tools, which conditioned the receipt of financial assistance from the EU or other Member States on structural reforms. A further push for enhancing the Member States to implement structural reforms was put on the main agenda of the EMU reforms.

5.1.1. Technical support for economic governance reforms at the national level

The Commission started to offer concrete technical support for Member States to design and carry out structural reforms as part of their efforts to support job creation and sustainable growth. Its Structural Reform Support Service started in 2015 to provide technical assistance aiming at national capacity building. This involves the organisation of workshops, expert advice, working visits, training, data collection, research, methodology development, IT capacity building, studies, evaluations and awareness-raising campaigns, systems and tools. Accordingly, the Service manages the Structural Reform Support Programme for the years 2017-2020, involving a budget of € 142,8 million, which under the post-2020 MFF proposal shall be raised up to € 840 million for the years 2021-2027. Such technical assistance may be engaged on a voluntary basis and upon request from a Member State. Furthermore, the Service provides assistance in designing and implementing structural reforms drawing on resources to manage the technical assistance budget under the EU Structural and Investment Funds. Technical support may be offered for a variety of policy fields, such as public financial management, administration, business environment, trade, competition, labour markets, education and training, social security systems, migration and agriculture. It is also open to non-euro area Member States to support their convergence process for joining the Eurozone.

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137 Up to 160 staff members are based in Brussels and in some Member States, under the guidance of Vice-President Valdis Dombrovskis and managed by Director-General Maarten Verwey.
5.1.2. Financial support for economic governance reforms at the national level

A move away from the sanction-based approach of the SGP rules to the instalment of incentives for the implementation of structural reforms gained room in the EMU debates and finally was taken up in the reform proposals. Thereby, the available financial funds and firewalls under the EU legal framework shall be linked to findings under the European economic coordination process. Taking up the idea for CCI, financial support shall incentivise Member States to implement the necessary country-specific structural reforms. In this light, the existing tools under the cohesion and investment policy of the Union gained importance since the economic and financial crisis. It is designed to reduce disparities among regions and Member States and in this way promote economic convergence and resilience to economic shocks at national and local level in the European Union. The resources of the European Fund for Regional Development, European Social Fund and Cohesion Fund as well as of the European Investment Bank (EIB) already played a strategic role in fostering convergence, long-term growth, investment and financial stability in the Member States.

The use of these resource pools is planned to be linked even stronger to the findings under the European Semester with the aim to support economic reform processes in the Member States. Accordingly, as condition for receiving financial means from the European Structural and Investment Fund (ESI) and European Fund for Strategic Investment (EFSI), the Member States shall commit ex-ante to reforms according to their National Reform Programmes. In fact, already since 2013, the Council’s country-specific recommendations adopted under Article 121(2) TFEU form part of the analysis of the situation relevant for the

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143 See the two Communications: European Commission, COM (2013)165 Communication Towards a Deep and Genuine Economic and Monetary Union - The introduction of a Convergence and Competitiveness Instrument; European Commission, COM (2013) 166 Towards a Deep and Genuine Economic and Monetary Union - Ex ante coordination of plans for major economic policy reforms.


145 European Commission, COM (2017)823 Communication on a European Minister of Economy and Finance (2017), p. 4. About half of the EU funding is currently channelled to concrete projects through the five European Structural and Investment Funds. One specific example to maximise the absorption of EU funds for the enhancement of public investments over time and also in the event of economic difficulties for stabilisation with exceptional measures was the support of the Greek real economy through EU Funds. European Commission, COM (2015)400 Communication A New Start for Jobs and Growth in Greece (2015).


Partnership Agreements of the ESI Funds. Furthermore, the non-compliance with recommendations in the excessive-deficit procedure, the excessive imbalance procedure or relevant adjustment programmes is connected to financial assistance of the ESI Funds programmes and may result in a Commission’s proposal to the Council on the suspension of commitments or payments. Another legislative proposal for amendment of the Common Provision Regulation was issued by the Commission as part of the December 2017 package. It suggests an ex-ante macroeconomic reform commitment of the Member State according to the respective National Reform Programmes as condition for the ESI and EFSI Funds. It would be the Commission to adopt a decision laying down these reform commitments and the amount of allocated support from the performance reserve. The monitoring and reporting on the milestones would then be part of the European Semester and the annual Country Reports by the Commission providing updated assessment of reform progress. In this light, the Commission proposed a pilot phase for such tool under the European Regional Development Fund, the European Social Fund and the Cohesion Fund between the years 2018 and 2020. Thereby, Member States may apply for fund-specific programmes. Accordingly, a Member State would propose to the Commission a detailed set of measures for the implementation of structural reforms, including milestones and targets as well as a timetable for the reform measures. Subsequently, the Commission would assess the proposal, take observations and may even require the Member State to revise the reform commitment. In the form of an implementing act, the Commission would adopt a decision on the reform commitments, the amount of financial aid and relevant performance reserves for such support. Full implementation of the reform commitment should result in full payment of the support managed directly and without involvement of the Member States by the Commission. As regards the amount of the financial aid it should be proportionate to the nature and importance of the reform and complement other measures or operations supported from Union funds. The Member State would regularly report within


151 ibid.

152 New Article 91(4) ibid.
the mechanisms of the European Semester on the progress in the achievement of the reform commitment, covered by its National Reform Programme. Thereupon, the Commission would assess respective progress and might publish its findings in the Country Report.  

In the long run, such a Reform Support Programme shall consist of a proper budget line for extra grants for the reform delivery tool, which shall comprise €22 billion under the MFF post 2020. This follows the idea for a proper euro-area dedicated fiscal capacity to provide for structural reform assistance. Thereby, the Member State would propose to the Commission specific reforms based on the challenges identified under the European Semester. Based on dialogue, the Commission and the Member State would agree on detailed set of measures, milestones, and targets for their implementation and a timeline by taking into account the observations from the other Member States, on the reform commitment package. The Commission would adopt an implementing decision on the reform commitments to be implemented by the Member State and the financial contribution allocated. The supported Member State should report on the progress through their National Reform Programme within the European Semester, which the Commission would assess and may publish its findings in the Country report. It is upon the Commission to decide on the disbursement of the financial aid based on the fulfilment of the agreed milestones and targets. Further synergies with the European Investment Bank and a future European Monetary Fund may be established in the future. Certainly, the resources of EU Funds may be used for structural reforms in the Member States under the competence to support of economic, social and territorial cohesion. According to Article 175 TFEU, the economic policies of the Member States and the respective coordination at EU level shall contribute to these objectives. As suggested by the Commission, this approach may be reversed. The investment support via diverse funds of the cohesion policy might be functionalised to achieve the implementation of the findings under the economic governance framework. In case of non-compliance with the agreed reforms, the financial support would be withheld. Such instrument resembles the Memoranda of Understanding, applied outside the EU Treaty, under the ESM framework. Thereby, financial assistance was

153 New Article 23a ibid.
155 van Rompuy, Towards a Genuine Economic and Monetary Union, p. 5: In October 2012, the idea of the establishment of a fiscal capacity of the Union came up. It should be used for functions not covered by the MFF of the EU budget. M. Monti, D. Daianu, C. Fuest, K. Georgieva, I. Kalfin, A. Lamassoure, P. Moscovici, I. Simonyté, F. Timmermans and G. Verhofstadt, Future Financing of the EU: Final report and recommendations of the High Level Group on Own Resources (2016) included the discussion of a Eurozone budget. It is suggested to include public finances for a Eurozone capacity for the next MFF.
156 European Commission, COM (2017)822 Communication on new budgetary instruments for a stable euro area within the Union framework, p.10.
made conditional on the implementation of structural reforms.\(^{159}\) The suggested reform delivery tool should introduce such approach into the EU framework. This is legally problematic as the EU Treaties do not provide for the competence of the Commission to conclude specific contractual agreements with Member States, and in particular in the field of economic policy.\(^{160}\) In fact, the coordination competence of the EU in the field sets out a detailed system of macroeconomic monitoring and surveillance. Corrective structural reform measures identified at EU level may be invoked by the Council. However, any supported structural reform based on this procedure may not intervene with the full discretion in decision-making of the concerned Member State.\(^{161}\) Although, it is argued that the respective Member State enters voluntarily the commitment, a carrot-sticks-approach becomes problematic in circumventing the legally non-binding recommendations and findings within the economic and fiscal policy coordination under Article 121 TFEU procedure, being based on peer-pressure and sanctions as touching on highly sensitive matter of public expenditure. Furthermore, with the empowerment of the Commission to decide on the content and the disbursement of financial means, the institutional decision-making set-up for economic policy coordination is circumvented.

### 5.1.3. Convergence assistance for Member States on their way joining the Euro

The Commission’s MFF proposal foresees a budget line of €2,16 billion for financial and technical support to Member States for their convergence path to joining the euro under Article 140 TFEU.\(^{162}\) Both instruments shall follow the same rules as the instruments for the Technical Support Instrument and the Reform Delivery Tool by the end of 2023.\(^{163}\) The use of such Programmes is voluntary and Member States keep full ownership of the reforms carried out.\(^{164}\)

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\(^{160}\) See A. Steinbach, The Structural Reforms in EU Member States: Exploring Sanction-Based Mechanisms (2016). In fact, the German government even suggested a significant revision of Protocol 14 of the TEU by adding tangible powers to the European Commission, such as the right to conclude agreements with euro area countries to improve competitiveness, investment and budgetary discipline. N. Blome, C. Hoffman, P. Müller, C. Reiermann, G. Repinski and C. Schult, ‘Angela’s Agenda: A Grand, Controversial Plan for Europe’, Spiegel Online, 21 October 2013.


\(^{164}\) ibid., p.10.
5.1.4. Concluding remarks
The existing rules for the coordination of national economic policies are based on soft forms of action, such as peer pressure and recommendations. The enforcement of fiscal rules proved to be not effective enough to advance sustainable convergence across the euro area. In reaction, the SGP reforms introduced more targeted country-specific measures aiming for increased compliance with the findings under the European Semester. The recent reform’s novel approach supplementing the rules on fiscal discipline with their sanctioning mechanism including cuts in the lending policy by the European Investment Bank, by a support strategy for Member States undertaking structural reforms, deemed necessary for the resilience and convergence of the euro area. Apart from the technical advice by the Commission’s Structural Reform Support Service, the Member States shall receive financial support for national reform measures. Thereby, the system of conditional financial support by the IMF and the ESM based on contractual agreements shall be adopted for the EMU framework. As a first step, the fiscal sharing component of cohesion policy shall stretch to the field of economic policy coordination and should be further developed to a proper reform delivery tool. In reality, even though the basic argument relates to the voluntary commitment of the Member States to use such tools, it is opposed to the established system of detailed procedural rules under the Treaties and respective SGP. In addition, the respective power would introduce an important shift of competences from the Council to the Commission.

5.2. Cyclical divergences
Cyclical divergences between Member States are considered as a fundamental challenge for a functioning EMU. Economic booms and busts are a typical characteristic of the dynamics of capitalism and are generally addressed by macroeconomic stabilisers. In a monetary union, Member States are not able to guarantee to holders of bonds denominated in the common currency the pay out of maturities. By contrast, with an own currency for each country an implicit guarantee is sometimes assumed due to the competence of the central bank to provide liquidity. The mentioned lack of guarantee of liquidity may trigger a liquidity crisis, in particular in a phase of recession. Sudden stop of capital flows may prevent Member States to use their automatic budget stabilisers, which aggravates the problem.

The budgetary rules at EU level, such as the prohibition to run excessive deficits and debts are designed to prevent financial distress. They are not meant to confront financial and economic crises. Certainly, the EU budget and its use within the Union policies, in particular the cohesion policies, has effect on cushioning asymmetric shocks. However, the effects

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167 Grauwe, The Future of the Euro. During a recession, budget deficits increase automatically by activation of stabilisation mechanisms. Distrust in the financial markets lead to bond sales and the interest rates increase. Liquidity is withdrawn from the markets and governments are unable to rollover debt. They are forced to introduce austerity and thereby intensify recession and increase the debt.
168 ibid.
generally become effective only in the long run. It was the ECB with its unconventional monetary policy and the European Stability Mechanism to tackle immediately severe economic recessions in Member States by granting credits and guarantees that is in the better position to fulfil the task of country-specific assistance.

5.2.1. European Monetary Fund

The ESM as the permanent financial assistance mechanism for the Eurozone was established outside the EU system, however keeping strong links to it. The Commission met the goal to integrate intergovernmental agreements in the field of economic governance, including the ESM Treaty into the Union framework by issuing a legislative proposal in December 2017.169 The European Stability Mechanism shall be renamed as European Monetary Fund. Instead of calling it a European Stabilisation Fund, the impression arises that an EU equivalent of the International Monetary Fund should be signalled. The latter provides financial resources through central bank reserves of its members and holds strong connections to the proper monetary authority. The European Monetary Fund, however, shall take over the financial and institutional features of the ESM. The political reasons indicated to transfer the existing mechanism under the EU roof are: unity of the European Union, the efficiency of the use of available resources and democratic accountability for decisions taken in the economic policy landscape.170 An additional reason, but not mentioned at all in the proposal, is the desired independence from the International Monetary Fund, which so far has been a strong and decisive collaborator of the ESM.171

The ESM provides financial assistance to Member States in financial distress in the form of loans and guarantees with low interest rates under strict conditionality of adjusting the economic policies.

5.2.1.1. Legal basis

The Commission based its proposal for a Council Regulation on Article 352 TFEU. The so-called flexibility clause was not used at all in the field of EMU so far. Article 352(1) TFEU is aimed for filling gaps within the EU Treaties: “If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.”

Thus, several conditions have to be met. As regards attaining one of the Treaties’ objectives, the safeguard of the financial stability of the euro area has become an explicit Treaty

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170 ibid., pp. 2-3.
171 Article 13 TESM.
objective. This concept was introduced by applying the simplified Treaty amendment procedure of Article 48 (6) TEU when adding a 3rd paragraph to Article 136 TFEU, entering into force on 1st of May 2013. Accordingly, “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole.” Such stability constitutes a “higher objective”. The Treaty rules on economic union provide for the underlying principle that Member States retain responsibility and control over economic and fiscal policy decisions. This includes the cases of financial distress. Accordingly, the Union or the Member States may not take over liabilities and commitments from any Member State, as stated in Article 125 TFEU. This shall ensure that each Member State responsible for its own budgets remains subject to the market principles, which unfold disciplining effects on the Member States’ fiscal policies. At the same time, explicitly outlined circumstances allow for options to support Member States in difficulties, such as Article 122 TFEU. In this light, it can be argued that the Treaties explicitly limit emergency support for specific cases and thereby do not allow for the creation of another emergency mechanism under the Treaty framework. In fact, the euro area Member States decided to cooperate outside the EU legal framework. Accordingly, the ESM Treaty determines its purpose to mobilise funding and provide stability support [...] if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States”. The recent EMF proposal however, sets out that stability support may be granted in the case of indispensable safeguard of the financial stability “of the euro area or of its Member States”. It is evident, that the objective set out in the Treaties as well as confirmed by the CJEU refers to the stability of the euro area as a whole, whereas the EMF proposal relates also to the single Member State’s stability. Thus, the legislative proposal implies explicitly a shift of the outlined objective of financial stability of the euro area as a whole and its member states to the stability of single Member States. Thereby, the Commission explicitly broadens the deviation scope from the principle for fiscal responsibility and discipline of the single Member States, as expressed in Article 125 TFEU.

Furthermore, the required necessity to integrate the ESM Treaty into the legal framework considering the outlined motivation, such as unity, efficiency and democratic accountability is questionable. Monti suggests direct changes of the ESM Treaty to address matters of ESM

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173 CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para. 135.
174 Ibid., para. 135.
175 Article 3 TESM.
176 Article 3 (1), (2) (a) and Article 12 (1) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund (2017). Article 3 ibid.: (1) “shall contribute to the safeguarding the financial stability of the euro area” (2) (a) “mobilise funding and provide stability support under strict policy conditions, appropriate to the financial assistance instrument chosen, to the benefit of its Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole or of its Members”
governance, transparency and legitimacy.\textsuperscript{177} As regards the main argument of democratic accountability\textsuperscript{178}, the European Parliament as well as the national parliaments are not given any decisive competence in the decision-making of the EMF, as only reporting requirements are foreseen.\textsuperscript{179} The EP has to be involved in the adoption of the proposed regulation by the requirement of giving its consent.\textsuperscript{180} In regard to the national parliaments, their attention has to be drawn on the proposal, which allows them to express their opinion.\textsuperscript{181} However, democratic control for actions by the EMF having impact on national budgets will certainly become relevant in regard to national constitutional concerns. This follows from the budgetary sovereignty, which must remain in the hands of States, in particular the national parliaments. It is up to them as democratically legitimised authorities to define the scope of delegation to an international body of such.\textsuperscript{182}

Even though the argument for preserving the unity of euro and non-euro area members within a Union is emphasised in first place, it seems that the more important element is that the EMF shall serve as a common fiscal backstop covering all Member States participating in the Banking Union. Accordingly, the Single Resolution Board, which is responsible to resolve credit institutions within the framework of the Banking Union, may make use of the financial pool of the EFM.\textsuperscript{183} Efficiency of the economic governance and use of financial means is aimed by bringing all mechanisms under the same roof and thereby ensure efficient collective action. Thereby, the cumbersome intergovernmental procedures involving national procedural rules shall be avoided and allow fast decision-making in case of need.\textsuperscript{184} All in all, the outlined arguments for the integration of the intergovernmental emergency mechanism into the EU framework are not convincing and thus questionable if fulfilling the requirement of necessity.


\textsuperscript{177} Article 5 European Commission, COM (2017)827 Proposal for a Council Regulation on the establishment of the European Monetary Fund.


\textsuperscript{179} Article 5 of the European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund; European Commission, COM (2017)827 Proposal for a Council Regulation on the establishment of the European Monetary Fund by submitting annual reports on the execution of its tasks. The European Parliament may call the Managing Director to hearings and require answers to specific questions. In addition, the regulation provides for confidential oral discussions with EMF Managing Director on progress of financial support.

\textsuperscript{180} Article 352(1) TFEU.

\textsuperscript{181} Article 352(3) TFEU.

\textsuperscript{182} See 2 BvR 1390/12 (BVerfG, 18 March 2012).


\textsuperscript{184} ibid., p. 3.
Apart from the required Treaty objective, the additional requirement for making use of the flexibility clause is that there are no respective powers already provided for in the Treaties.

In the context of establishing the European Stability Mechanism, the Court ruled that it is not concerned with the economic policy coordination competence of the Treaties, under Article 2(3) and Article 5(1) TFEU.\(^{185}\) It rather constitutes a financing mechanism being used as ultima ratio tool if indispensible for the stability of the euro area as a whole.\(^{186}\) In fact, such financing mechanisms were provided for in the existing Treaties. In particular, Article 122(2) TFEU allows the EU to grant financial assistance on a case-by-case basis to Member States being in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. A permanent stability mechanism is not to be established on this legal basis.\(^{187}\) The same goes for Article 143(2) TFEU enabling the Union as such, to grant assistance to a Member State, whose currency is not the euro in case of difficulties regarding the balance of payments.\(^{188}\) Thus, the Treaties explicitly set out the specific cases in which, support single EU Member States may receive support when being in difficulties.

**5.2.1.2. Organisation**

Members of the EMF are still the euro area Member States.\(^{189}\) The main decision-making body is the Board of Governors, consisting of the Eurogroup members.\(^{190}\) A Commission’s member and the ECB’s President shall participate as non-voting members in the Board’s meetings.\(^{191}\) With a further initiative of the Commission, the Vice Commissioner shall be appointed as chair of the Board of Governors in his/her role as a European Finance Minister.\(^{192}\) Even though, his/her role should be a neutral one, which is generally not covered by the Commission’s mandate to serve the Union’s interest, he/she would still have considerable influence on the Board of Governors’ and thus the EMF’s work, by setting the agenda.

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\(^{185}\) *CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756*, para 110. Contrary to this view: S. Griller, ‘Artikel 133’ in Grabitz/Hilf/Nettesheim (ed.), *Das Recht der Europäischen Union* (2017), para 18ff. He argues that Art 133 TFEU in combination with Art 136(1) TFEU and Art 126 (6) TFEU may serve as a legal basis, with the aim to preserve the stability of the euro area as a monetary system by coordinating the financial assistance, which involves the use of the euro as common currency; *European Parliament, European Parliament resolution of 23 March 2011 on the draft European Council decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro* (*00033/2010 – C7-0014/2011 – 2010/0821(NLE)) (2011): “9. Regrets that the European Council has not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism; considers in particular that, in the framework of the present Union competences with regard to economic and monetary union (Article 3(4) TEU) and monetary policy for Member States whose currency is the euro (Article 3(1)(c) TFEU), it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or in the alternative to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU.”

\(^{186}\) *CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756*, para. 110 and 136.

\(^{187}\) ibid., para 65.

\(^{188}\) ibid., para 66.

\(^{189}\) Article 2 European Commission, *Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund*.

\(^{190}\) Article 5 ibid.

\(^{191}\) Article 5 (3) ibid.

\(^{192}\) European Commission, *COM (2017)823 Communication on a European Minister of Economy and Finance*. 31
The Board of Governors takes the principal decisions for the EMF activities. The voting right of each member is conditional upon the subscription of the Member State’s contribution to the authorised capital stock. The proposed regulation changes several voting requirements from unanimity to reinforced qualified majority voting, requiring 85% of the votes cast and thereby transforms the former ESM voting procedure into the standard rule. This shall become a general rule for decisions on providing stability support and related policy conditions to an EMF member, the mandate for the Commission to negotiate the MoU and the change in pricing policy for the financial assistance. This implies that only bigger members, such as Germany (26.9616 %) and France (20.2471 %) and Italy (17.7917 %) would have veto powers in these fields.

The Commission speaks of the creation of a unique legal entity to be established with legal personality under EU law. It refers to the Meroni case law, which sets out the conditions for delegating tasks to regulatory agencies. Regulatory agencies have separate legal personality and may act independently from EU organs. They are assigned with specific tasks and make own decisions. However, such decision-making powers have to remain within the limits of delegated competence and may be subject to the delegating authority. Based on Article 352 TFEU, the Council as delegating institution shall approve and thus control the decisions made under the EMF roof. In this sense, the Council has to approve discretionary decisions taken by the Board of Governors and the Board of Directors by qualified majority. Article 238 (3) lit a TFEU sets out, “A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States. A blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.” The delegated governance body within the EMF, the Board of Governors, acts as an agency, while the delegating authority, the Council approves the respective acts. Both, the delegated as well as the approving organ consists of the same persons, namely the Finance Ministers of the euro area Member States. This is even more irritating as several decisions within the Board of Governors are foreseen to be taken by unanimity, while the Council would approve them only by qualified majority voting.

193 Article 2(3) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund The initial authorised capital stock of the EMF and contribution key of the Member States are calculated according to Article 11 and table 1.
194 Article 4 (4) TESM.
Thus, the Ministers in the ECOFIN Council might, by qualified minority, block unanimously adopted decisions they had taken under the EMF framework. An emergency procedure for decisions on granting EMF loans provides for the Council to adopt its decision within 24 hours of the transmission of the Board of Governor’s or Board of Director’s decision. It would need to be initiated by the Chairperson of the Board of Governors, which shall be the Vice-Commissioner.

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The decisions taken under the EMF would be EU measures. This relates also to the Memoranda of Understanding containing policy conditions as necessary prerequisite for the legality of financial assistance. Negotiated by the Commission in liaison with the ECB and in cooperation with the EMF, they would be adopted by the Board of Governors and approved by the Council. They shall be consistent with the economic policy coordination measures, covering recommendations, opinions, warnings and decisions as well as the macroeconomic adjustment programmes according to Regulation (EU) No. 472/2013. Thus, the MoUs as Council decisions cover the macroeconomic adjustment programmes as conditions for financial assistance. In fact, the non-compliance with the conditional measures may result in the decision of non-issuance of agreed credit tranches. Any respective decision adopted under the EU framework would imply the full applicability of the Charter on Fundamental Rights and the judicial review before the CJEU.

5.2.1.3. Backstop for the banking union

A new feature shall be introduced by the EMF Regulation in order to use the EMF resources as a backstop for the Single Resolution Fund (SRF). In fact, the SRF shall be filled with 55 billion euros until 2024 and replace the ECB’s activities in providing liquidity as lender of last resort.

The Five Presidents Report advocated for the power of the future ESM to also intervene as a backstop to the SRF: “[…] A backstop should therefore be implemented swiftly. This could be done through a credit line from the European Stability Mechanism to the Single Resolution Fund. This backstop should be fiscally neutral over the medium term by ensuring that public

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201 Article 3 ibid.
202 Article 3 (4) ibid.
203 Article 3(2) ibid.
204 Article 3(1) ibid. and Article 13(3) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund; Article 3(4) European Commission, COM (2017)827 Proposal for a Council Regulation on the establishment of the European Monetary Fund: Council approves by qualified majority according to Article 238(3)TFEU.
205 Article 13(3) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.
assistance is recouped by means of ex post levies on the financial industry [...]” This roots in the fact that the SRF has limited funding available, consisting of ex-ante contributions and extraordinary ex post contributions raised from the financial institutions. Thus, alternative funding should bridge the costs and allow immediate accessible and sufficient expenses to the SRB.208

In case of severe crisis, which could not be covered by the SRF means, to allow the SRB to execute its tasks towards credit institutions within the Banking Union, the EMF shall bridge financial means in form of credit lines or guarantees to the SRF. The latter provides credits to suffering banks.209 It is envisaged that these credits to the SRF should be budget neutral over the medium-term, as they have to be paid back by contributions of the credit institutions. However, the risk of long-lasting repayments remains, depending on the severity of crisis in the banking sector and related capital situations of the banks.

In fact, the ESM already provides assistance tools to financial institutions directly under certain conditions, by means of the Direct Recapitalisation Instrument, which is however limited up to € 60 billion.210 The direct recapitalisation of banks forms a key element of the Banking Union. It is the ECB, which acts as the supervisor of the assisted institution211 and draws up a restructuring plan as well as conducts stress test. Still it is upon the ESM to provide the assistance. They are linked with conditions for reforms of the national banking sector as well as an own capital of 10-20% of the home country of the bank. This is due to the fact that the risk of default is higher than the one of a sovereign state.

These would be activated before a potential use of the EMF as backstop for the SRM. Important in this regard is the fact that it is the SRM that decides on the bank resolution. The SRB would be debtor towards the EMF, which means that it holds the risk of default of banks pooled in the credit or guarantee to the SRB. Even though, the backstop would be limited initially to € 60 billion212, the EMF would not hold any competence on the substance of the SRM decisions. In addition, the decisions on the drawdown of the credit line or the provision

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208 Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (2014), preamble (13): Also the SRF in its recital clause makes clear that in the case means are not sufficient in the Fund, the Contracting Parties shall provide for bridge financing from national sources or the ESM.

209 Article 3(2) lit b and Article 22 European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.

210 European Stability Mechanism, Guideline on Financial Assistance for the direct recapitalisation of institutions (2014) based on Article 19 TESM.

211 Article 3[1] lit a European Stability Mechanism, Guideline on Financial Assistance for the direct recapitalisation of institutions. If the ECB is not yet the supervisor, it must become the supervisor of the requesting institution.

Article 33[3] Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions OJ 2013 L 287/63, which is confers specific tasks to the ECB, if the ECB was not already the supervisor of this institution.

Article 4[5] European Stability Mechanism, Guideline on Financial Assistance for the direct recapitalisation of institutions, the ECB will do so jointly with the institution and the Member State concerned and the resolution authority.

Article 7 ibid., the ECB together with the Managing Director of the ESM and the Commission shall conduct stress tests.

212 Article 22 (2) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund However, the Board of Governors may raise the capacity (Articles 22[4] and 5[6] lit f ibid. by unanimity.
of guarantees on liabilities of the SRB shall be adopted at the latest 12 hours after the receipt of a request from the SRB.\textsuperscript{213} This puts both the Board of Governors as well as the Council under decisive time pressure. In addition, national parliaments would not be able to deal with the decision. The Union budget shall not be held liable for the expenses or losses of the EMF.\textsuperscript{214}

5.2.1.4. \textbf{EMF resources}

The legislative proposal includes the possibility for the EMF to develop new financial instruments and programmes to supplement or support existing tools. The background idea is to open the option for a possible future stabilisation function for the EMU.\textsuperscript{215} Resources from the EMF may be channelled to such mechanisms.\textsuperscript{216} However, thereby, the original function of the European Stability Mechanism as an emergency mechanism would be extended to a stabilisation fund for cyclical economic developments. This however would go along with the risk to underrun the strict conditions for the provision of financial support as required for the emergency mechanism.

An important aspect in regard to the integration of the ESM into the EU framework relates to the rules on the EMF resources. According to the proposal, the initial authorised capital stock of the EMF shall be transferred from the ESM. It consists of the former ESM members’ subscribed capital according to a defined contribution key.\textsuperscript{217} In return, the Member States receive respective ESM/EMF shares. The liability of each EMF Member is limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No EMF Member may be liable, by reason of its membership, for obligations of the EMF. The obligations of EMF Members to contribute to the authorised capital stock may not be affected if any such EMF Member becomes eligible for, or is receiving, financial assistance from the EMF.\textsuperscript{218} The EU budget may not be held liable for the expenses or losses of the EMF.\textsuperscript{219} Thus, while integrating the stability mechanism under the EU umbrella to achieve a Union’s objective, the necessary financial resources shall be fully kept outside of the EU budget. This contravenes the established Treaty rules on the financial provisions of the Union. They set out that the Union shall provide itself with the means necessary to attain its

\begin{itemize}
\item Article 22(7) ibid.
\item Article 8(5) ibid.
\item European Commission, \textit{Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund}.
\item European Commission, \textit{Proposal for a Council Regulation on the establishment of the European Monetary Fund}, Article 11 TESM. The ESM capital stock is divided into paid in shares and callable shares. Paid in capital is provided by the Eurozone Member States and cannot be used to make loans but should ensure the creditworthiness of the ESM. Callable capital is subscribed but not yet paid in, but is callable at any time. Callable capital enables the ESM to issue bills and bonds issued at favourable rates to finance loans provided to beneficiary Member States. Using the ECB’s contribution key, Member States have to subscribe capital according to the quotas outlined in Annex I to the ESM Treaty for which they receive shares in the ESM in return.
\item Article 8(4) European Commission, \textit{Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund}.
\item Article 8(5) ibid.
\end{itemize}
objectives and carry through its policies. These shall be financed wholly from own
resources.\textsuperscript{220} These are specified in the Own Resources Decision, which is quasi primary law,
based on a unanimous decision in the Council, and ratified by all national parliaments.\textsuperscript{221}
Furthermore, the Treaty rules require all items of revenue and expenditure of the Union to
be included in estimates to be drawn up for each financial year and shall be shown in the
budget.\textsuperscript{222} This is reflected and specified in the financial rules outlining the principle of unity
of the budgetary system of the EU, requiring all revenue and expenditure of the Union to be
covered in one single budget.\textsuperscript{223} This contains the prohibition of creating a separate budget
within the EU system.\textsuperscript{224} Consequently, the creation of a separate pool of resources, filled by
Member States’ contributions and shares contravenes the rules on the budgetary system of
the EU.

Besides, the European Monetary Fund shall hold borrowing capacity on financial markets as
well as lending capacity to Member States. The EU Treaties and respective financial rules are
restrictive in this regard. According to Article 310(4) TFEU, the Union shall not adopt any act
which is likely to have appreciable implications for the budget without providing an
assurance that the expenditure arising from such an act is capable of being financed within
the limit of the Union’s own resources and in compliance with the multiannual financial
framework referred to in Article 312 TFEU. In this sense, Article 17(2) of the financial rules
prohibits the EU and its bodies to raise loans within the EU budget framework, which shall
safeguard the principle of equilibrium. In reality, the Union budget serves as collateral for
borrowing at the capital markets to provide loans and credit lines in the context of the
Balance of Payments Facility to non-euro area Member States\textsuperscript{225} and the EFSM in order to
provide loan facilities to EU Member States.\textsuperscript{226} Even though, they are to be paid back by the
recipient Member States and should not have direct impact on EU budget as long as
recipient MS honour their obligations, they are guaranteed by the are paid back. However,
the respective guarantee for such are to be entered into the EU budget in the form of a
budget line, specifying the purpose and ceiling of budget.\textsuperscript{227} Such function resembles the

\begin{footnotesize}
\begin{enumerate}
\item Article 311 TFEU.
\item Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union, OJ L
168/105 based on Article 311(3) TFEU.
\item Article 310(1) TFEU.
\item Article 7 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25
October 2012 on the financial rules applicable to the general budget of the Union and repealing Council
\item Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial
assistance for Member States’ balances of payments, OJ L53/1 23.2.2002 based on Article 352 TFEU.
\item Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ
L18/1,12.5.2010 based on Article 122(2) TFEU.
\item Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union, OJ L
168/105. The Own Resources Decision sets out the own resources ceiling, which are specified for each budget
line in the Multiannual Financial Framework regulation.
\end{enumerate}
\end{footnotesize}
European Investment Bank, which has lending and borrowing competences. However, all details on such are explicitly determined in the Treaties.\textsuperscript{228}

5.2.1.5. Concluding remarks
The proposal to integrate the European Stability Mechanism into the EU framework provokes several legal questions. They concern in particular the required conditions for the use of the flexibility clause of Article 352 TFEU. Furthermore, the institutional solution as well as the interference with the financial Treaty rules are crucial obstacles for the respective proposition. Furthermore, the link of the resources targeted to the situations of emergency with the achievement of a credible Banking Union adds to the problematic design of the proposed European Monetary Fund.

5.2.2. European macroeconomic stabilisation mechanism
While the general Treaty rules so far aim to prevent instability, and allow financial assistance for severe cases threatening the stability of the euro area as a whole, more far reaching and long-run proposals relate to supranational mechanisms to counter asymmetric shocks before they become severe. Shocks should primarily be addressed at national level. As soon as Member States are not able to manage the shock at national level alone, support from the Union should be provided. This is regarded necessary as countries in a currency union do not have their exchange rate mechanisms as adjustment tools to alleviate cyclical, thus temporary, imbalances.\textsuperscript{229} In order to ensure the overall stability of the euro area and prevent as well as reduce contagious effects across the euro area, common stabilisation mechanisms are discussed.\textsuperscript{230} Since the early debates about the creation of a monetary union, a common euro area fiscal instrument to work as a stabiliser during asymmetric shocks has been discussed.\textsuperscript{231} Thereby, the economic downturn due to an asymmetric shock should be addressed by an automatic mechanism and prevent contagion effects in this way. However, their creation were not viable and thus ignored when finally establishing the monetary union. In fact, stabilisation tools are common tools in fiscal federations, such as the US or Canada. The EU or euro area not being a federal state, the creation of such stabilisation tools based on a fiscal capacity was not feasible so far, even though suggested from the very beginning.\textsuperscript{232} The idea for a proper Euro-area dedicated fiscal capacity started to gain room in the debate on reforming the EMU as well as the public finances in the EU.\textsuperscript{233} Such capacity should absorb both asymmetric and symmetric shocks and bring more economic and social convergence among the euro area members. It would equilibrate the

\textsuperscript{228} Article 308f TFEU.
\textsuperscript{229} Enderlein, Bofinger, Bonne, Grauwe, Piris, Pisani-Ferry, Rodrigues, Sapir and Vitorino, Completing the Euro - A road map towards fiscal union in Europe, p. 30. Asymmetric shocks are macroeconomic shocks that affect only some of the states belonging an area or hit them differently.
\textsuperscript{230} van Rompuy, Towards a Genuine Economic and Monetary Union, p. 5.
\textsuperscript{232} ibid..
\textsuperscript{233} van Rompuy, Towards a Genuine Economic and Monetary Union, p. 5.
differences in the “business cycles of euro-area Member States stemming from structural differences or a general economic vulnerability” in case of asymmetric shocks. The same goes for symmetric shocks, which affect all national economies in the same way.  The EU institutions remained very vague on the design of such mechanism but outlined general principles to be respected in the context. They shall function rapidly and automatically and fill the gap between the general EU budget instruments for jobs, growth and investment and the financial assistance tools in extreme cases.

They should be automatic and must involve an incentive for sound fiscal policy, such as the obligation to implement national reforms. Introducing automatic functioning would require the adaption of the politicised fiscal policy coordination rules. The details should be entailed in clear rules, including the timeframes for payments and repayments as well as the size and funding mechanisms. Unidirectional or permanent transfers as well as the moral hazard risk must in any case be avoided. Exemplary for macroeconomic-stabilisation functions are unemployment benefit schemes or rainy day funds, which entered the room for debate. However, the most recent proposals to be established under the Treaty framework suggest a European investment protection scheme (EIPS), which shall be covered under the EU budget and possible future financing tools, such as the European Monetary Fund. In its proposals, the Commission focuses on EMU related mechanisms by linking them with the existing cohesion policy programmes.

5.2.2.1. European investment protection scheme and budget

One option for confronting the negative effects of severe economic downturns on growth, employment and productivity, is seen in the protection of public investment as well as further domestic demand in the event of downturn. Thereby, a general cut of investments and investment projects as a natural national reaction in the case of economic downturn should be avoided. In case a euro area Member State is not able to absorb the shock with its own existing national mechanisms, the European investment protection scheme shall step in. The changes in the unemployment rates in the Member States shall serve as a threshold to trigger the activation of the EIPS. However, as condition for access to such scheme, the Member States would be required having complied with the fiscal discipline rules of the Stability and Growth Pact over a period of two consecutive years. This shall ensure the incentive to conduct sound fiscal policies, which includes the building up of fiscal

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234 European Parliament, Report on budgetary capacity for the Eurozone (2015/2344(INI)): asymmetric shocks are “situations whereby an economic event affects one economy more than another, for instance when demand collapses in one specific Member State and not in the others following an external shock beyond the influence of a Member State”. Symmetric shocks may be introduced by variations in oil prices in the euro area countries.

235 ibid., p. 5.

236 van Rompuy, Towards A Genuine Economic And Monetary Union, p. 10.


239 Article 4 ibid.
buffer in good times and prevent the emergence of macroeconomic imbalances. In case of a downturn, Member States will first use their automatic stabilisers and discretionary fiscal policy in line with the Pact.\textsuperscript{240} Fulfilling the eligibility criteria the Member States would receive financial assistance for preserving public investments. This is aimed at promoting economic cohesion for the case of crisis by preventing deeper recession and preserving growth-friendly public investment.\textsuperscript{241} Thereby, priorities should be put in investment programmes supported already by the Union under the European Regional Development Fund, the Cohesion Fund, the European Social Fund, the European Maritime and Fisheries Fund and the European Agricultural Fund for Rural Development.\textsuperscript{242} Based on Article 175(3) TFEU, which allows specific actions beside the European Structural and Investment Funds, the EIPS shall contribute to strengthen economic cohesion among the euro area by maintaining macroeconomic stabilisation in the event of asymmetric shocks by preserving public investment levels in the Member States.\textsuperscript{243} Such mechanism shall complement the rules of the economic policy coordination, whose fulfilment constitutes the eligibility criteria for disbursement of the support.\textsuperscript{244} Accordingly, a Member State experiencing a large asymmetric shock may request the Commission once a year to receive financial support. The Commission would be empowered to assess the circumstances and decide on the provision and the detailed terms of EIPS support. The decision enters into force if no objection is expressed by the European Parliament or the Council within three months after notification. Such delegated power may be revoked at any time by the European Parliament or the Council, but does not affect the validity of any delegated acts already in force.\textsuperscript{245} The delegation of power to the Commission is explicitly foreseen and allows fast and more flexible action at EU level. However, any delegated act may be revoked by the delegating institutions, which shall safeguard the essential democratic control of any EU act.\textsuperscript{246} Financial assistance may be granted unconditionally and automatically on the basis of a fixed formula.\textsuperscript{247} Thereto, the Commission suggested the EU budget as guarantee for back-to-back loans to Member States of up to 30 billion euros.\textsuperscript{248} The EU would borrow this money on the capital markets or from financial institutions and lend it to the Member State concerned to the same conditions, thus for cheaper interest rates compared to the markets. The Member


\textsuperscript{241} European Commission, \textit{COM (2018)387 Proposal for a Regulation on the establishment of a European Investment Stabilisation Function}, p. 5. Such as the European Regional Development Fund, the Cohesion Fund, the European Social Fund, the European Maritime and Fisheries Fund and the European Agricultural Fund for Rural Development.

\textsuperscript{242} Article 3 ibid.

\textsuperscript{243} ibid., p.5.

\textsuperscript{244} ibid., p.6.

\textsuperscript{245} Article 6 ibid.


\textsuperscript{247} Articles 8, 9 European Commission, \textit{COM (2018)387 Proposal for a Regulation on the establishment of a European Investment Stabilisation Function}

State concerned would be required to pay these loans back within a specified period of time.\textsuperscript{249} So far, the EU Treaties do not allow the Union to borrow money to finance the EU budget according to Article 310(1) TFEU\textsuperscript{250}, but is only entitled to finance loans to countries under Article 122(2) TFEU and Article 143 TFEU Balance of Payment (BoP) for non-euro Member States. Thereby, the EU issues bonds on international financial markets and lends the money to Member States at the same interest rate. The amounts of guarantee are strictly limited to the margin available under the own resources ceiling for payment appropriations. It serves as protection to investors by providing coverage against unexpected default of the debtor.\textsuperscript{251} The limit for the lending facility under the EIPS is the same as for the EFSM and the BoP facility, which has as consequence the according reduction of the amount under the latter. The guarantees for borrowing-and-lending operations should be recorded in the budget.\textsuperscript{252} The Commission proposed Article 213 TFEU as the basis for the proposal for financial rules in 2016.\textsuperscript{253} Considered as relatively small amount of resources\textsuperscript{254}, the loans should be coupled with a grant component, not deriving from and bearing on the EU budget, but established as externally assigned revenue.\textsuperscript{255} The costs of the interest shall be subsidised of up to € 600 million, financed by euro area Member States based on their equivalent to a share of monetary income, so called seignorage profits from the Eurosystem.\textsuperscript{256} The participating

\textsuperscript{249} Article 7 European Commission, COM (2018)387 Proposal for a Regulation on the establishment of a European Investment Stabilisation Function
\textsuperscript{250} Articles 310, 323 TFEU: “The European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties.”
\textsuperscript{254} Claeyts Grégory, New EMU stabilisation tool within the MFF will have minimal impact without deeper EU budget reform, Bruegel Blog (2018).
\textsuperscript{256} European Commission, COM (2018)98 Communication A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020: “Seignorage is the term used to describe the revenue which central banks and governments accrue from issuing money. Since monetary income of the European Central Bank for the issuance of the euro is directly linked to the Economic and Monetary Union, it could be considered as a possible new Own Resource. An amount corresponding to a share of the net profits arising from national central banks’ shares in euro area monetary income paid out to national treasuries, could be made available for the EU budget as a form of national contribution. A similar logic was applied in respect of the income generated by the European Central Bank and the national central banks from accumulated Greek
Member States shall transfer the specified percentage of the share of their national banks allocated in the monetary income of the Eurosystem voluntarily to a Stabilisation Support Fund outside EU law at the end of every financial year as to be concluded by an intergovernmental agreement. Member States receiving or requesting financial assistance or EIPS support are exempted from the obligation. These national contributions shall be assigned to the financing of specific items of expenditure and transferred automatically, in this case the financial support for investment stabilisation. Such revenue, not used to balance the general budget of the Union and thus not limited by the ceilings set by the MFF, may be considered to finance exclusively a specific purpose.

The Commission would administer the Fund by adopting delegated acts. Such function can be regarded as a nucleus of rainy day fund for the EMU to cushion recession triggered by shocks of economic downswings. Thereby, a component of risk-sharing is included in the suggested stabilisation mechanism. Exemplary in that regard is the European Development Fund, which is set up by the Member States outside the Union budget with its own financial regulation. Its expenditure is assumed by the Member States, not the Union. According to the CJEU, the Member States are empowered to set up a fund outside the general Union budget as long as no exclusive competence and shared competence is exercised.

The limited resources available shall be complemented in future by other financial pools, such as the ESM or the future EMF may also contribute to the stabilisation function by financing precautionary loans to deliver short-term liquidity support. In order to avoid differentiation non-euro area Member states may participate if contributing according to the ECB capital subscription key.

**5.2.2.2. European Rainy Day Fund as insurance mechanism**

The grant component of the European Investment Protection Scheme, which is financed by national contributions in form of seignorage can be regarded as a nucleus of a rainy day fund for the EMU to cushion recession triggered by shocks of economic downswings. From an economic point of view, a true rainy day fund would require much higher resources than Government bonds when in 2012 Eurogroup Ministers agreed on a transfer of the equivalent of the income generated by the Eurosystem holding (European Central Bank and national central banks) of Greek government bonds to Greece. Depending on the percentage applied, estimated revenues from seignorage could range between EUR 10.5 billion (10%) and EUR 56 billion (50%) over seven years.” The use of the seignorage for a stabilising fund was already suggested by F. Breuss, ‘Flexibility, fiscal policy and stability and growth pact’ in ECSA (ed.), Fourth ECSA-World Conference – The European Union and the EURO: economic, institutional and international aspects (2000), pp. 98–126.


CJEU, case UK v Com C-106/96, ECLI:EU:C:1998:218: “any Community expenditure requires a dual legal basis, entry in the budget and, as a general rule, prior adoption of an act of secondary legislation authorising the expenditure in question”.

suggested by the Commission for the Investment Protection Scheme. According to an IMF experiment such fund would have brought a high level of stabilisation during the crisis.\textsuperscript{263} Such mechanism may be established by the Member States outside the EU framework, just as the ESM, and would accumulate revenues from euro area members regularly in good times and make transfers to countries when they experience negative shocks.\textsuperscript{264} If such a rainy day fund would work as an insurance mechanism and relate directly to the Member States’ contributions.\textsuperscript{265} The advantage of rainy-day accounts is that it does not add to the federal deficit because they are funded through savings in good times and/or new taxes.\textsuperscript{266} According to the example of the European Development Fund, the Member States are empowered to set up a fund outside the general Union budget, as long as no exclusive or shared competences are exercised at the Union level.\textsuperscript{267} However, the Treaties so far only allow the creation of a stability mechanism in very limited space, as clarified just for the ESM. The envisaged stabilisation mechanisms shall be activated already before the financial stability of the euro area as a whole is at stake and which the ESM is established for.\textsuperscript{268} And even with the assumption that such Fund may be considered indispensable for the safeguard of the stability of the euro area as a whole\textsuperscript{269}, the additional requirements established by the CJEU must be fulfilled. This relates in particular to the respect the Article 125 TFEU provision, setting out that Member States and the EU shall not be liable for or assume commitments of other Member States. The rationale is that Member States are solely responsible for sound budgetary policies and in that to reduce so far as possible the risk of public debt crises.\textsuperscript{270} Financial assistance to Member States may be legitimate as long as the incentive of the recipient Member states to conduct a sound budgetary policy must not diminished by granting financial assistance.\textsuperscript{271} Accordingly, respective conditions are to be attached, as is done under the ESM framework.\textsuperscript{272}

\textsuperscript{263} F. Bornhorst, E. Perez-Ruiz, J. Bluedorn, D. Fuceri, F. Jaumotte, F. Ohnsorge, T. Poghosyan and A. Zdzieńicka, Toward a Fiscal Union for the Euro Area: Technical Background Notes (2013), p. 13: “From 1999 until 2007, most of euro area countries would have been net contributors to the fund, with annual contributions of about 1 ½ to 2 ½ per cent of GDP, and net recipients during the crisis. As a result, no permanent transfers would be entailed as the average net contribution by each Member State would have been close to zero.”


\textsuperscript{265} European Parliament, Report on budgetary capacity for the Eurozone (2015/2344(INI)).

\textsuperscript{266} L. Bruce, Disaster Relief Funding and Emergency Supplemental Appropriations (DIANE Publishing, 2011), p. 24.


\textsuperscript{268} CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 136.


\textsuperscript{270} CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 59.

\textsuperscript{271} ibid., 136.

\textsuperscript{272} ibid., para. 130,136.
European unemployment insurance scheme for the euro area

A European Unemployment Benefit Scheme was considered as automatic stabilisation mechanism to tackle the high levels of short-term unemployment caused by a crisis. Short-term unemployment is considered as directly connected to cyclical shocks. The very first idea for a Community Unemployment Benefit Fund was raised by the Marjolin Report in 1975 and developed further by Dullien and others. These ideas relate to a fully-fledged European Basic Unemployment Benefit Scheme focusing on the micro-economic level directly linked to the labour market developments. A European Fund, outside the EU budget would be filled by monthly social security contributions and pay out individual benefits according to the EUBS law. Short-term unemployed should receive support directly from an EU Fund. This would entail to complement or partially substitute the national unemployment insurance systems. However, the EU has only competence to support and complement the activities of the Member States in specifically outlined fields of social policy, including social security and social protection of workers. To this end, the European Parliament and the Council may adopt minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such scheme requiring at least partial harmonisation of the national social security systems may not be established under the EU competence to support and complement the activities of the Member States in the field of social security and social protection of workers by means of directives. As an instrument of the Union’s cohesion policy, it may serve to promote economic, social and territorial cohesion across the EU. Apart from the actions taken under the Structural Funds, specific actions outside these Funds may be adopted under the ordinary legislative procedure and within the framework of the other Union policies. Following the example of the European Globalisation Adjustment Fund, which provides direct support for workers affected by the global and financial crisis upon request, a genuine European Unemployment Benefit Scheme would add to mitigating the social risk of being unemployed and thereby

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278 Article 153 (1) lit c TFEU.
279 Article 153 (2) lit b TFEU.
280 Article 153 (a) lit c TFEU and Article 153 (2) lit b TFEU.
281 Article 174 TFEU.
282 Article 175(3) TFEU.
contribute to the social cohesion in the field of social security. However, other policy rules under the Treaties, such as for the social security policies must not be circumvented. This is mostly relevant for the rules in the field of social security and social protection of workers, as outlined above.\textsuperscript{283}

The more recent approach focused on the macro-economic level by referring to an automatic shock absorption mechanism in the form of a reinsurance-type system. Thereby, temporary financial transfers to Member States affected by economic negative shocks shall support the national unemployment systems to tackle cyclical short-term unemployment caused by economic recession with major effects on the national labour markets. It would function as an emergency instrument with the aim to help euro area countries emerge from the crisis faster and stronger.\textsuperscript{284}

In fact, Article 122(2) TFEU foresees the legal option for financial assistance by the EU to Member States. However, this may only be provided in case of exceptional occurrence. Such occurrence has to be unforeseeable and only temporary\textsuperscript{285} must be beyond control of Member States. This implies that all other options for fighting the economic shock must be exhausted or unable to cushion the shock.\textsuperscript{286} In addition, for being compatible with Article 125 TFEU, the financial support is to be attached with certain conditions, which shall ensure national incentives to conduct sound fiscal policies. Even though such conditions are not defined, it is assumed that the financial assistance should be used for correcting policies that led to economic shock\textsuperscript{287}. Under the European Financial Stabilisation Mechanism this involved the policy reforms as defined in economic and financial adjustment programmes. Accordingly, the trigger of a Reinsurance Scheme would need to be accompanied by conditions attached. Finally, what impedes the automaticity of such a scheme is that it is the Council to adopt on a discretionary basis a decision to grant EU financial assistance.\textsuperscript{288} In addition, if based on this provision, the support would be financed from the EU budget, which is limited in size and would need to be increased to facilitate the reinsurance scheme.

An unemployment reinsurance scheme may be considered to be created on the legal base of Article 175(3) TFEU. Thereby, a respective reinsurance fund would transfer a lump sum to the national unemployment schemes in the event of a cyclical shock hitting the specified short-term unemployment levels. Thus, the foundations of the national unemployment schemes would not be touched upon. In fact, similar mechanisms were created in the form of the European Globalisation Adjustment Fund\textsuperscript{289} and the European Union Solidarity

\begin{footnotesize}
\textsuperscript{283} Article 153 (2) TFEU.
\textsuperscript{288} Repasi, \textit{Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme}, p. 36.
\end{footnotesize}
These allow prompt financial support from the EU budget for people affected by the global and financial crisis or major natural disasters. Unlike EU Structural and Investment Funds’ programmes, these flexible Funds provide financial support for counter-measures in situations of urgency and unexpected circumstances upon request by the Member States to individuals for a short and clearly defined period of time. The mobilisation of funds would however not be automatic but taken by a decision of the Council and the European Parliament. Thereby, the required automatism of the European scheme would be impeded. In addition, resources under the EU budget are limited and would be required to be raised in order to meet the aimed objective of stabilising effect.

5.2.2.4. Euro area fiscal capacity

The suggested convergence tools as well as stabilisation mechanisms for the Economic and Monetary Union lead to the crucial question of financing. The financial resources under the EU budget and related budgetary instruments played an increased role in achieving stability, growth and convergence in the EU during and after the crisis. Thereby, the five European Structural and Investment Funds, and in particular the European Fund for Strategic Investments, so-called Juncker Plan channelled EU funding to specific projects in the Member States. Beside the EU budgetary means, the euro area Member States established the important ESM framework outside the EU framework, providing for additional resources serving the objective of the stability of the euro area as such.

With the various submitted reform proposals, the claim for the establishment of a proper fiscal capacity of the EMU emerged. Such resources should be dedicated to structural reform assistance, building on the Commission's Structural Reform Support Programme, a stabilisation function, a backstop for the Banking Union, and a convergence instrument to give pre-accession assistance to Member States on their way to joining the euro. In fact, economically, the origin of financial means is not relevant. Politically and legally it certainly is.

5.2.2.4.1. EU budget

The EU was equipped with its proper financing system. The Treaties set out that “The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.” Moreover, the budget shall be financed wholly from own resources, however

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294 van Rompuy, Towards a Genuine Economic and Monetary Union, p.5.
295 European Commission, COM (2017)822 Communication on new budgetary instruments for a stable euro area within the Union framework.
without prejudice to other revenue.\textsuperscript{296} So far, the Commission included the financial matters for the economic and monetary union in its proposal for the next Multiannual Financial Framework under the cohesion and values section.\textsuperscript{297} Thereby, specified budget lines shall be linked to expenditure for the objectives of the EMU. This is in line with Commission’s President Juncker support a dedicated euro area budget line within the EU budget\textsuperscript{298}, rather than a euro area budget as such, as claimed.\textsuperscript{299} However, the EU’s principle financing instrument, its proper EU budget, is limited in size. This may create an important obstacle as regards the financing aspects of the previously outlined stabilisation schemes. Debates on the raise of contributions\textsuperscript{300} as well as the introduction of new possible resources are ongoing.\textsuperscript{301} However, the difficulty for respective adaption of the Union’s own resource system lies in the requirement of unanimous decision after consultation of the European Parliament and ratification in accordance with respective constitutional requirements and may be changed by this special procedure.\textsuperscript{302}

The limited means of the EU budget led, already in the past, to the establishment of resource pools outside the EU budget as well as outside the EU framework, dedicated to the attainment of Union’s objectives. The outstanding example is the European Stability Mechanism, and its predecessor the European Financial Stability Facility, funded by direct Member State’s contributions. Within the Banking Union, the Single Resolution Fund, established by a Union regulation is funded by contributions from financial institutions. Within the Banking Union, the Single Resolution Fund, established by a Union regulation is also funded by contributions from financial institutions. Accordingly, the Fund is based on an

\textsuperscript{296} Article 311 (1),(2) TFEU.
\textsuperscript{298} President of the Commission, State of the Union address (2017); European Commission, COM (2017)822 Communication on new budgetary instruments for a stable euro area within the Union framework; Monti, Daianu, Fuest, Georgieva, Kalfin, Lamassoure, Moscovici, Simonyté, Timmermans and Verhofstadt, Future Financing of the EU included the discussion of a Eurozone budget. It is suggested to include public finances for a Eurozone capacity for the next MFF.
\textsuperscript{299} Enderlein, Bofinger, Bonne, Grauwe, Piris, Pisani-Ferry, Rodrigues, Sapir and Vitorino, Completing the Euro - A road map towards fiscal union in Europe, p. 31. Financial resources from the national budgets or national social insurance schemes to a euro area fund, outside the EU budget. Independently administered by representatives of national finance ministers, not EU institutions, under control of national parliaments. It should be applied automatically. A fund means resources for certain extraordinary events, coming rather from a fee or a contribution from national budgets.
\textsuperscript{300} M. P. Maduro, A New Governance for the European Union and the Euro: Democracy and Justice (2012) Robert Schuman Centre for Advanced Studies Policy Paper No. 2012/11, p. 11: An increase of at least 3% of GDP of the EU budget would provide sufficient means to address the asymmetries affecting the well-functioning of the monetary union.
\textsuperscript{301} Monti, Daianu, Fuest, Georgieva, Kalfin, Lamassoure, Moscovici, Simonyté, Timmermans and Verhofstadt, Future Financing of the EU, p.8: possible new own resources may be levied by reforming the VAT-own resource (replacing the existing one), an EU corporate income tax, financial transaction tax and other financial activities’ tax. Other proposals relate to the Energy Union and could involve the European emission trade system, an electricity tax, a motor fuel levy (or excise duties on fossil fuels in general), and indirect taxation of imported goods produced in third countries with high emissions.
\textsuperscript{302} Article 311(3) TFEU; Article 2 Decision 2014/335/EU, Euratom of 26 May 2014 on the system of own resources of the European Union, OJ L 168/105.
intergovernmental agreement. This is, according to the CJEU, in principle compatible with EU law, as long as no exclusive competence of the Union exists and the shared competence is not yet exercised.\(^{303}\)

In this regard, the proposal to include the ESM into the EU framework leads to the question of legality to establish resource pools under the EU framework but outside the EU budget. It is suggested to classify these resources as other revenues according to Article 311(2) TFEU. They are not defined in the Treaties or respective secondary law. The inclusion of such into the financial Treaty provisions underlines that the EU may have further revenues to be used for budget financing. However, they shall result from the exercise of the Union’s tasks and policies, must be based on secondary legal act and are not primarily intended to finance the Union’s general budget, in comparison to the own resources.\(^{304}\) In fact, they may not substitute the latter, but only contribute to the financing of the Union’s policies. Thus, they would constitute only a marginal part of the overall finances of the EU. Exemplary are those listed in Article 21 of the financial rules.\(^{305}\) This is also in line with the prohibition to set up a separate budget next to the EU budget, which is covered by the principle of unity. Accordingly, all items of revenue and expenditure must be covered by one single EU budget.\(^{306}\) In addition, as for the principle of universality, Union’s revenues may not be earmarked for specific items to guarantee the fulfilment of priorities of EU policies and thereby revenues and expenditures are legally treated separately.\(^{307}\) Exceptions are explicitly outlined in the financial rules. Accordingly, a list of earmarked revenues and the option for further assigned revenues to be grounded in a basic act.\(^{308}\) The Commission proposed the inclusion of financial contributions from Member States, third countries and bodies not set up under the TFEU to certain actions or programmes financed by the Unions as well as to supplementary research and technological development programmes.\(^{309}\)


\(^{305}\) R. Bieber, ‘Article 310’ in H. von der Groeben, J. Schwarze and A. Hatje (eds.), *Europäisches Unionsrecht: Vertrag über die Europäische Union ; Vertrag über die Arbeitsweise der Europäischen Union ; Charta der Grundrechte der Europäischen Union* (Baden-Baden: Nomos, 2015), para. 41: e.g. revenues and incomes from sales, lettings, fines, insurance payments, capital yields, and financial contributions from foundations, subsidies, gifts and bequests. In addition, taxes of EU employees.


Exceptions to these rules are the budgets of European offices established under the Treaties. Administrative structures set up by one or more institutions to perform specific cross-cutting tasks, with own legal personality. However, even though they are detached from the general budget and funded at least partly with own revenues, they still work to the expense and under the rules for the general budget.  

This option shall be chosen for the European Monetary Fund. Created as autonomous legal entity it would be fed by its own financial resources, which consist of the Member States’ contributions outside the EU budgetary framework, which count up to 700 billion euros of authorised capital of which 80 billion euros would be paid-in capital. To be based on Article 352 TFEU, such mechanism is aimed to fill a gap for meeting the Union’s objectives. However, by introducing such mechanism for achieving the Union’s objectives, the financial Treaty provisions are circumvented and contravene to the respective principles as outlined above.

5.2.2.4.2. Borrowing capacity of the EU

The possibility of the EU to borrow at the markets and pursue lending activities to Member States is debated to acquire additional financing opportunities. However, in principle, such tools are not foreseen in the Treaties or the Own resources decision. For the adoption of such option as own resource the strict procedures of Article 311 TFEU must be complied with. For the safeguard of the principle of equilibrium, foreseeing that the revenue and expenditure shown in the budget shall be in balance, the financial rules providing for a prohibition for the Union and its bodies to raise loans within the framework of the budget. Some exceptions thereto exist and find explicit foundation in the Treaties. The most prominent example is the competence of the European Investment Bank, which for the most part borrows money at the markets to finance investment projects in Member States by providing favourable credits, which have to be fully paid back. Furthermore, the Treaties foresee such options under specifically outlined legal provisions, Article 122(2) and Article 143 TFEU, with respective consideration in the EU budget. The latter sets explicit limits of the EU budgetary resources to serve as guarantees for respective lending activities.

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financial contributions from Member States, third countries and bodies not set up under the TFEU and the Euratom Treaty to certain actions or programmes financed by the Union as well as to supplementary research and technological development programmes, and managed by the Commission on their behalf.


Important in this regard is the obligation to record the guarantees for borrowing-and-lending operations entered into by the Union to ensure the principle of unity and accuracy.\textsuperscript{313} The Commission’s proposal on new financial rules outlines the option for borrowing of the Union on the capital markets or from financial institutions to provide financial assistance to Member States.\textsuperscript{314}

In fact, Article 310 (4) TFEU outlines that no act shall be adopted being likely to have appreciable implications for the budget without providing assurance in the budget and the multiannual financial framework. This shall guarantee the equilibrium of the EU budgetary framework. In particular Article 310 TFEU lays down that the revenue and expenditure shown in the budget shall be in balance. Article 312(1) TFEU on the MFF ensures that the Union expenditure develops in an orderly manner and within the limits of own resources. The budgetary amount of guarantee for borrowing- and lending operations entered by the Union shall be recorded in the budget.\textsuperscript{315} Thereby, the risks of respective loss have to be accurately outlined and guarantee the principle of unity and accuracy. Articles 310(1) and 314(10) TFEU aim for the clarity and completeness of the budget by one budgetary plan comprising all revenues and expenditures.\textsuperscript{316} Thus, any further function of the EU budget as guarantee for investments implies the necessary change of the MFF regulation by unanimity.

5.2.3. Concluding remarks

Focus on structural reforms already set by the rescue mechanisms during the crisis was adopted for further moves for the economic union and was put at the center of recent reform proposals. The principal aim is to bring economic convergence and resilience of the Member States. Due to the limited effect of the rules under the SGP, new tools to incentive Member States to undertake reforms are developed. Apart from technical support provided for by the Commission, the Member States shall be rewarded financially for respective policy actions. A carrot-stick-approach enters as new enforcement mechanism for economic and fiscal policy action at the national level. While in the emergency situation during the economic crisis, structural reforms were set as conditions for the receipt of financial support by the emergency mechanisms, this approach shall find its way into the EU framework. Due to the limited competences at EU level to instruct and enforce national polices on structural reforms, the existing policy mechanisms as well as new tools shall enhance the implementation of the economic policy advice by the Community. The support programs of the cohesion and investment policy shall be used to achieve the findings of the European

\textsuperscript{313} Article 7 and Article 49 (1) lit d ibid.
\textsuperscript{316} Articles 310 (1) and 314(10) TFEU.
In the long run, such carrot-sticks-approach shall receive its proper budgetary item. It seems that due to the legal limits of coordination of economic policies, innovative attempts to circumvent the rules, by to enforce structural reforms. The fundamental challenge of the EMU is defined by the cyclical divergences in the euro area. The EMU Treaty rules are limited to prevent financial distress of national Member States. The absorption of macroeconomic shocks is fully under the responsibility of the Member States. They have stabilization mechanisms ad their disposal. However, the crisis demonstrated that the monetary union is not prepared to address sever asymmetric shocks in the Eurozone. Accordingly, in reaction to the economic and sovereign crisis, the decisive rescue mechanism was created outside the legal framework of the Union. The integration of such under the EU roof has become one major objective. This however, does not come without crucial legal hurdles. In fact, ideas and proposals direct to the creation of a proper stabilization mechanism for the euro area to counter asymmetric shocks in the Eurozone before they become severe. However, as outlined the introduction of such would imply the adaption of the EMU framework and thus political consensus.

Consequently, the Commission concentrated on the exploitation of the existing legal options. Thereby, the social and cohesion policy, in the form of a European investment protection scheme, shall serve as the core instrument to confront the negative effects of severe economic downturns. It must be noted that the limits of the EU budget and financial rules, which would require burdensome change, will require strong support by the Member States. In this light, the other debated mechanisms, such as unemployment insurance mechanism or a rainy day fund, or even a proper fiscal capacity with appropriate competences require consensus.

6. Financial Union
The integration of financial markets is considered essential for the functioning of the EMU. One important aspect is that the financial markets can function as an insurance mechanism of the private-sector facilitating adjustment to asymmetric shocks. In this sense, as a reaction to the financial crisis a deepening of the financial integration was deemed necessary to ensure the effectiveness and stability of the EMU. This was considered key as financial markets price the risk of default and set the rate for borrowing money to sovereigns. One principal ambition was to break the link between banking crises and sovereign debt and related spill-over effects by setting out common rules and a supervisory mechanism at EU level. Most progress of reforms was made in this field and further reforms are underway. At the same time, the strengthening of the economies and the stimulation of investment gained importance in the agenda for facilitating economic recovery. One related element is the enhancement of the capital markets union.

De Grauwe, Economics of monetary union, p.243.
Both the Capital Markets Union, as well as the completed Banking Union is deemed to contribute essentially to “build the stable and integrated financial system that citizens and businesses need.”

The Capital Markets Union shall address the strong reliance of the EMU on the banking system, which is associated with higher systemic risks and low economic growth. In addition, financial fragmentation of the markets shall be reduced by further integration and diversification of the European capital markets in the long run. Furthermore, the risks of market failure and consumer protection have to be regulated.

6.1. Capital Markets Union

The Capital Markets Union is considered as an important shock-absorber by private financial actors in the Economic and Monetary Union and contributes to a more resilient financial system. It shall provide and ensure capital flows and investments, necessary for the real economy, including households and businesses in the whole EU and in particular in the euro area. Accordingly a regulatory and supervisory framework shall promote the integration of the financial system by reducing the dependence on bank financing. The free flow of capital across borders shall allow easier connection of finance to the real economic. This includes both regulatory and non-regulatory measures to connect savings to investments by providing financing tools in order to boost European investment and the creation of jobs and growth.

Resorting to Art 114 TFEU, several initiatives touch upon various areas, such as securisations, venture capital, tax and insolvency law, to increase the access to venture capital or equity financing for households and businesses. Several reforms for the completion of the CMU are still pending, such as proposals to for capital market supervision, business restructuring and new saving opportunities for consumers. The

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321 European Commission, COM (2015) 468 Communication on Action Plan on Building a Capital Markets Union (2015): Objectives: Financing for innovation, start-ups and non-listed companies; Making it easier for companies to enter and raise capital on public markets; Investing for long term, infrastructure and sustainable investment; Fostering retail investment; Strengthening banking capacity to support the wider economy; Strengthening the capacity of EU capital markets; Facilitating cross-border investment.


European Commission, COM(2017)537 Proposal for a directive amending directives 2014/65/EU (MiFID II) and 2009/138/EC (Solvency II) (2017);
investment funds market shall be promoted by reducing national barriers for cross border actions of collective investment funds.\(^{325}\) The Commission also proposed new rules for ensuring legal certainty for cross-border dispute.\(^{326}\)

New initiatives were proposed, including the most recent proposals relating to common rules for covered bonds\(^{327}\), which are considered as particularly safe and a key instrument to channel funds to the property market and public sector entities.\(^{328}\) The Brexit is considered as essential for the Capital Market Union agenda, because of the strong concentration of the EU capital markets in the UK.\(^{329}\)

### 6.2. Banking Union

Since 2012, institutional and regulatory elements for a Banking Union were put in place with the aim to reduce the risks in the banking sector and enhance its robustness. In addition, the numerous and intense links between banks and Member States, which reinforce each other

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325 European Commission, COM(2018) 93 Proposal for a Regulation on the issue of covered bonds and covered bond public supervision and amending Directive 2009/65/EC and Directive 2014/59/EU (2018): ‘covered bond’ means a debt obligation issued by a credit institution and secured by a cover pool of assets which covered bond investors have direct recourse to as preferred creditors. If the issuer fails, the bondholder has a direct and preferential claim against certain earmarked assets and an ordinary claim against the issuer’s remaining assets.
in times of financial distress, shall be tackled. This relates to the harmonised prudential rules for credit institutions in the EU in the form of the Single Rulebook. Respectively, the supervision of all banks in the EU Member States is based on the same standards. The most significant banks in the euro area are directly supervised by the ECB within the framework of the Single Supervisory Mechanism (SSM). What is more is the creation of a Single Resolution Mechanism (SRM), backed by a Single Resolution Fund (SRF), which lays down uniform rules and a uniform procedure for the resolution of credit institutions without recourse to taxpayers’ money for their recapitalisation.\footnote{Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225/1.} In this way banks can be resolved centrally. Beside these measures, asset-quality reviews, stress tests and recapitalisation test were carried out for participating banks throughout 2014.

The main outstanding reforms with risk sharing components are the creation of a common fiscal backstop for the already agreed Single Resolution Fund and a European Deposit Insurance Scheme. The Single Resolution Mechanism is accompanied by the Single Resolution Fund to ensure that the resolution of insolvent banks can be financed and the financial stability is safeguarded. It is to be filled by contributions of the banking industry of Member States participating in the SSM and SRM, in particular by banks’ shareholders and creditors, and thus shall avoid costs for taxpayers. Thus, the EU and national budgets may not be held liable. Thereto, the ECOFIN ministers agreed on progressive mutualisation of risks outside the EU framework, in the form of the Intergovernmental Agreement. The envisaged target level of the SRF is at least 1% of the amount of covered deposits of all credit institutions authorised in all participating Member States, which counts about 55 billion euros. By June 2017, the SRF filled by contributions holds the total amount of 17.4 billion euros. In case of insufficient available resources for the resolution of banks, liquidity shall be ensured by a common backstop. Accordingly, all Member States have signed the harmonised Loan Facility Agreement to bridge financing for the SRF in case of possible funding shortfalls following resolution cases of banks of the Member State concerned. In this sense, they provide a national individual credit line to the SRB in order to back its national compartment following resolution cases. The latest Commission’s proposal suggests enhancing the financial capacity of the Single Resolution Fund by using the financial means under the proposed EMF, the integrated successor of the ESM, as a fiscal backstop to the Single Resolution Board/Fund. By means of credit lines or guarantees to the SRF the banking union shall be equipped with credibility to deal with a systematic banking crisis by offering a last-resort financial safety net and be promptly available in case of need. The Single Resolution Board, as the competent body to decide on the access of financial facility,


336 Article 67(2) ibid.

337 Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund.


may request support for the SRF to the EMF, if the SRF resources are not sufficient. In this sense, the EMF Board of Governors, consisting of national government members, shall decide by unanimity on the financial terms and conditions as well as the ceilings of the guarantees thereto. Decisions on the deployment of the backstop shall be taken by a reinforced qualified majority of 85% of the votes, instead of the general applicable rule of unanimous decision. The financial means would be recovered from the SRF via the reimbursements of the banking industry and thus be fiscally neutral in the medium-term. In fact, the ESM, and with the envisaged adoption of the EMF regulation, the EMF already provides assistance tools to financial institutions directly under strict policy conditions, by means of the Direct Recapitalisation Instrument. Such financial assistance is for the benefit of a euro area Member State, experiencing, or being threatened by severe financing problems in order to safeguard the banking system. It is however limited up to € 60 billion. The direct recapitalisation of banks forms a key element of the Banking Union. It is the ECB, which acts as the supervisor of the assisted institution and draws up a restructuring plan as well as conducts stress test. Still it is upon the ESM to provide the assistance. They are linked with conditions for reforms of the national banking sector as well as an own capital of 10-20% of the home country of the bank. This is due to the fact that the risk of default is higher than the one of a sovereign state. Important in regard to a fiscal backstop for the SRF by means of the EMF is the fact that it is the SRM that decides on the bank resolution. The SRB would be debtor towards the EMF, which means that it holds the risk of default of banks pooled in the credit or guarantee to the SRB. This implies that the envisaged break of the sovereign-bank nexus is suspended and is contrary to the underlying objective of the Banking Union’s measures.

343 Article 3 European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.
345 European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.
346 European Stability Mechanism, Guideline on Financial Assistance for the direct recapitalisation of institutions.
347 Article 3(1) lit a ibid.; If the ECB is not yet the supervisor, it must become the supervisor of the requesting institution; Article 33(3) Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; OJ L287763, 29.10.2013 (2013); Article 4(5) European Stability Mechanism, Guideline on Financial Assistance for the direct recapitalisation of institutions: The ECB will do so jointly with the institution and the Member State concerned and the resolution authority; Article 7 ESM ibid.: The ECB together with the Managing Director of the ESM and the Commission shall conduct stress tests.
With the aim to help making the resilience against future crises alongside the supervision and resolution mechanisms, a common deposit insurance scheme should reduce the bank depositor’s vulnerability to large local shocks. The deposits in banks are guaranteed by the national Deposit Guarantee schemes, which the EU has adopted harmonised rules for to protect bank deposits in the case of a bank failure. Thereafter, the coverage of deposits should be up to 100,000 € and have to be funded ex ante. The system shall be strengthened by a joint Deposit Insurance Scheme, which should ensure to compensate depositors of a failed bank irrespective of the geographical location in the Banking Union. Thereby, the resilience against future crisis shall be enhanced by a larger pool of finances and more widely spread risks. The introduction of the European Deposit Insurance Scheme (EDIS) as a re-insurance system at EU level, originally envisaged by 2019, is still outstanding and discussed in the Council, in particular relating to the design of it. It should be directly filled by credit institutions through risk-adjusted contributions and managed by the SRB. The Commission proposed a gradual introduction of such. Within the first phase, the national Deposit Guarantee Schemes (DGS) may have access to EDIS as soon as all its own resources are exhausted. In the second phase the EDIS funds would contribute a share of the costs to the activated DGS. In the long run, envisaged by 2024, the EDIS shall fully insure the national systems. The Fund would function as a form of risk-sharing, which is accompanied by the debate of moral hazard, being common to all insurance systems. This is addressed by the parallel measures to minimise risks as discussed above. Persisting resistance roots mainly in the existing risks of non-performing loans and legacy assets and the nexus to of sovereigns with national banks, which hold a large amount of national governments’ sovereign bonds in their portfolios. Thus, a compromise proposal foresees a gradual introduction of such scheme in two phases, instead of three. Thereby, at first the EDIS may only provide temporary liquidity coverage to the national DGS and thus serve as reinsurance fund, but not cover the loss. In this sense, the national Deposit Guarantee Schemes would be required to pay back the support. Only in the second phase and under the condition of the progress on reducing risks, coinsurance by the national and European Schemes may cover the losses.

6.3. Concluding remarks

The most difficult elements of the full realisation of the banking union are the aspects of financing resource pools for the resolution of failing banks and for protection of depositors. They should be financed by the credit institutions active in the euro area and complemented by a credible public backstop. These pools of national contributions with gradual

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348 Five Presidents’ Report, Completing Europe’s Economic and Monetary Union, p. 11.
351 Article 2(24)-(41) ibid.
352 Article 2(10) ibid.
353 European Commission, COM(2017) 592 Communication on completing the Banking Union.
mutualisation of their usage create tensions in regard to national budgetary sovereignty and were subsequently created by an intergovernmental treaty and not under EU law.

7. Political Union

The current EMU governance architecture involves numerous actors. Whereas for the exclusive EU competence in monetary policy the ECB was created, the economic policies remained in the hands and responsibility of the Member States. Instead of creating a proper euro area institution, the Commission and the Eurogroup, consisting of the national ministers of economy and finance, are the decisive actors within the EMU framework.\(^\text{354}\) The European Parliament has only a minor role in economic governance.

The development of the political union must go hand in hand with the suggested reforms to ensure the legitimacy of such. This may involve respective transfer of competences to the EU, involving necessary Treaty changes and thus strong political will among the Member States.

The Five Presidents’ report emphasised the need to more efficiency and transparency of EMU governance and in regard to the interdependence of respective actors. This concerns the cooperation with parliaments, in particular by dialogues with the EMU actors. A stronger role of the euro area by strengthening the Eurogroup and its Presidency, the integration of the intergovernmental treaties into the EU framework as well as the formalisation of the collective decision-making for the Fiscal Union, by the establishment of a Euro area Treasury was promoted.\(^\text{355}\) The Reflection paper criticised the complex and non-transparent system of institutions and tools.\(^\text{356}\) As for the short-run until 2019, increased dialogue with national parliaments, social partners, National Productivity Boards and other stakeholders was envisaged.\(^\text{357}\) Furthermore, the euro area should institutionally be enhanced by the strengthening of the Eurogroup with a full-time Eurogroup chair and fully unified external representation of the euro area.\(^\text{358}\) This may be achieved by the instalment of a European Minister of Economy and Finance.\(^\text{359}\)

7.1. European Central Bank

The EMU monetary central bank system is based on a very narrow model with its guiding objective of price stability only. The EU rules on economic policy coordination and fiscal discipline should prevent risks for the functioning of the common monetary policy. In the times of crisis, the lack of common economic and fiscal means and actions made the Eurosystem becoming a powerful and decisive actor in addressing the difficulties. The ECB has undergone essential changes, however without any change of the formal legal basis in


\(^{355}\) Five Presidents' Report, Completing Europe's Economic and Monetary Union, pp. 17-18.


\(^{357}\) ibid., p.25.

\(^{358}\) ibid., p. 31.

\(^{359}\) ibid., p.27-28.
the Treaties. However, the new role must be covered by the Treaties. It is claimed that the ECB should act as a lender of last resort by the ability to buy the different sovereigns’ debt in times of crisis. Since 2012, the ECB took this step by the Outright Monetary Transaction (OMT) and successive programmes with spectacular effects by taking out the fear factor at the markets. In essence, the ECB increased its refinancing operations for financial institutions to keep the financial sector functioning. The so-called unconventional monetary policy tools covered increased and emergency liquidity assistance to financial institutions. In addition, the Eurosystem started purchasing government bonds of troubled euro area Member States with the central bank money. With its first Securities Markets Programme the Eurosystem became creditor of some Member States by purchasing their sovereign bonds and thereby influenced their solvency at the market. The announced OMT Programme would allow the purchase of unlimited amounts of government bonds by the Eurosystem. The Public Sector Purchase Programme, considered as Quantitative Easing, foresees the purchase of high amount public sector assets with risk-sharing of 20% among the national central banks and 80% at the risk of the Member Stats in proportion to the amount of its share in ECB capital. Undisputedly, the effect of such measures supporting the general economic policies in the Union results from the fact that a full disconnection of monetary policy from economic policy is not possible. According to Article 127 TFEU, the Eurosystem shall support the general economic policies in the Union. In its OMT preliminary ruling, the CJEU approved the OMT as a legitimate instrument, in the form of securities purchases, and necessary to achieve the Eurosystem’s monetary policy objective of price stability, accepting side effects on the fiscal and economic policy fields. Such argumentation opened the door for any future measure of the ECB in the field. With these programmes, the Eurosystem has become the largest creditor to Member States including the respective liability structure. Becoming the largest creditor and the concomitant strong influence on national fiscal policy arguably interferes with its status as an independent actor. According to Article 130 TFEU, Article 282(3) TFEU and Article 7 of the ESCB Statute, the ECB is guaranteed full independence in the exercise of the powers conferred to it by the Treaties. This shall guarantee its achievement to its primary aim to

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369 Tuori, ‘Is Euro area Monetary Policy a Hidden Transfer Mechanism?’: According to Article 130 TFEU, Article 282(3) TFEU and Article 7 of the ESCB Statute, the ECB is guaranteed full independence in the exercise of the powers conferred to it by the Treaties. This shall guarantee its achievement to its primary aim to achieve price stability on the long term without political intervention causing short term decisions.
achieve price stability on the long term without political intervention causing short term decisions.

7.2. European Minister of Economy and Finance

An economic and fiscal counterpart to the ECB was urged from the beginning, but not feasible. With the emerging differentiation among euro and non-euro Member States and given the relative number of euro area members to the rest, the interests of the Eurozone should be represented more strongly. The Eurogroup, established as an informal discussion body has gained decisive powers in the economic governance of the Eurozone, in particular during the economic crisis.\(^{370}\) In fact, the same persons form the key decision-making forum, the ECOFIN Council, for economic policy coordination and the enforcement of the EU fiscal rules among the euro area members. The vision to equip the Eurogroup with decision-making powers and transform it into a Council configuration would bring changes in the institutional set-up under the Treaties and thus would require respective Treaty changes.\(^{371}\)

A less far reaching proposal relates to the introduction of a full time Eurogroup President. It is suggested that a European Minister of Economy and Finance should take over such function. With the December package of 2017, the creation of a European minister for economy and finance was set on the EMU integration agenda. It followed several initiatives on establishing or assigning an EU body with the economic governance agenda were raised in the last decade.\(^{372}\) The Commission issued a non-legislative communication on an Economy and Finance Minister for the European Union.\(^{373}\) It is envisaged to set it up in the course of the appointment of the next Commission in 2019. The principal motivation is to...

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\(^{372}\) European Parliament, *European Parliament resolution of 20 October 2010 on the role of minimum income in combating poverty and promoting an inclusive society in Europe (2010/2039(INI))*, (2010) para 83: “Proposes that responsibility for economic and monetary affairs at the Commission should be given to one of its vice-presidents; proposes that that person be tasked with ensuring that EU economic activity is consistent, with overseeing how the Commission exercises its economic, monetary and financial-market-related responsibilities and with coordinating other aspects of the Union’s economic activity; also suggests that he or she should participate in the work of the European Council, chair the Ecofin Council and the Eurogroup and represent the EU on relevant international bodies; President Jean-Claude Juncker’s State of the Union Address 2017, 13 September 2017.”;

President of the Commission, *State of the Union address*: Commission’s President Jean-Claude Juncker added the scenario to create European Minister of Economy and Finance. “Commissioner for economic and financial affairs – ideally also a Vice-President – should assume the role of Economy and Finance Minister. He or she should also preside the Eurogroup.”;

E. Macron, *Le programme d’Emmanuel Macron pour l’Europe: Une Europe qui protège les Européens*. https://en-marche.fr/emmanuel-macron/le-programme/europe (31 August 2018): The French stance supports an EEFM as “EMU manager” with discretionary power for the euro area with access on a euro area fiscal capacity in form of a common euro area treasury and thus able to allocate a certain amount of EMU resources. The EU manager would have a say in allocation of funding for investments and labour market policy. He/She would be accountable to the EP.; The German stance developed under former Finance Minister Schäuble in 2012 supported the idea of an “EMU supervisor” focusing on compliance with EU’s fiscal rules and even veto member states’ budgets. See H. Enderlein and J. Haas, *What would a European Finance Minister do? A Proposal* (2015).

add to a more coherent, effective and accountable economic governance of the European Union.

7.2.1. Envisaged tasks
The EU Finance Minister should strengthen the coordination of economic, fiscal and financial policy rules, pronounce the adequate fiscal policy for the euro area, oversee and coordinate the common budgetary instruments in regard to the convergence code and represent the euro area in international financial institutions and conferences, in particular in the IMF. In leading the coordination of the economic, fiscal and financial rules, the EMEF should set a focus on the implementation of the recommended reforms in the Member States, which are identified in the European Semester. The EMEF would pursue close bilateral and multilateral dialogue with national authorities and provide technical assistance under the Commission’s structural reform support service as well as other EU initiatives to tackling specific economic issues, such as youth unemployment, fight against tax evasion, European Pillar of Social Rights. Thus, substantively the EMEF would carry out those functions, which the Commission as such performs already. Apart from a different naming of the institution, it is not clear how the EMEF would strengthen the coordination. The same goes for the EMEF’s envisaged task to pronounce the adequate fiscal policy for the euro area. By balancing the fiscal interests of the euro area Member States and the euro area as a whole the EMEF should contribute to strengthening the voice for the euro area level in the context of the Excessive Deficit Procedure, the Macroeconomic Imbalance Procedure and other findings under the European Semester. Most importantly in this regard is that the EMEF would build on the views of the European Fiscal Board. Important to mention is that such euro area fiscal stances may not have substantial influence on the Member States economic and fiscal policies, as they are not of any legally binding nature.

A further key function of the EMEF would be its power to oversee and coordinate the use of EU budget and other EU and euro area budgetary instruments, such as the European Structural and Investment Funds, the European Investment Bank and the European Stability Mechanism. Aiming for more convergence among the Member States, the EMEF would ensure the link between the European Semester findings with investments to support for structural reforms, macroeconomic stabilisation and convergence. In the long run, this would involve that the suggested Euro area Treasury may be placed under the responsibility of an EU Minister of Economy and Finance. Thereby, the EU Finance Minister would steer economic and fiscal surveillance of the euro area and its Member States, the management of the macroeconomic stabilisation function and the coordination of issuing a possible European safe asset. In addition, she or he would be responsible for the European Stability Mechanism/European Monetary Fund. The Eurogroup would take relevant decisions. Parliamentary control should remain with the national parliaments. Thereby, existing and

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374 Ibid., p. 4.
future competences and services in the field of economic, fiscal and financial policies would be unified under a single institution and advancing at the same time the parliamentary control of related policies. 377 Such Treasury should be built on the European Stability Mechanism. 378 The only really newly assigned competence to an EMEF would be his/her competence to represent the Union and euro area economy at global level. He/She would represent the euro area in the international financial institutions, in particular the International Monetary Fund. 379 Thereto, the Treaty rules foresee that for monetary matters, the ECB holding the exclusive competence, including the representation in international fora, is equipped with observer status in the directorate and executive board of the IMF and the Member States are obliged to act in the interest of the Union. 380 This follows from the IMF Statute, which allows only Member States being contracting parties to the IMF. 381 A unified representation of economic policy coordinated standpoints is still pending and so far carried out by several actors, such as the Commission, the Eurogroup and the Eurosummit. The Lisbon Treaty introduced Article 138 (2) TFEU allowing the Council based on a proposal from the Commission to adopt measures by qualified majority for a unified representation within the international financial institutions and conferences for the particular interests of the euro. In consideration of the ECB’s competence to ensure price stability and the Member States’ competences for defining the economic policies as well as concluding international agreements only a limited space for action is given to the Council. 382

In line with the Five Presidents’ report and the Reflection Paper, the Commission’s legislative proposal tabled, the Eurogroup President should exercise such function in the International Monetary Fund. 383 Naturally, the Eurogroup President as representative of the forum of Eurozone Finance Ministers would be the spokesperson to the external world. The recent Commission’s attempt, however, is to equip the proposed EMEF, the Vice-Commissioner as Eurogroup President, with the competence to act as representative of the euro to address the fragmentation of representation. As outlined, such representation would be strictly limited to the common position on EMU matters to be adopted by the Council.

381 Article 2 International Monetary Fund, Agreement of the International Monetary Fund (2016).
7.2.2. Institutional set-up

More decisive in the communication of the Commission is the institutional set-up as such. The Commission suggests equipping the EMEF with a double hatted function. The EMEF would combine the functions as a member of the Commission as well as the President of the Eurogroup. Thereby, all functions of EMU governance should be streamlined and strengthened. The EMEF as Vice-President of the Commission would steer and coordinate the work of several policy portfolios and services across the Commission. 384 In addition, the EMEF would preside the informal Eurogroup forum, consisting of the Euro area national Finance Ministers debating informally euro area questions.

The Commission suggests accomplishing such move without any Treaty revisions. Based on Art 2 of Protocol No 14 on the Eurogroup, “the Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States”. Such election should occur for two consecutive terms in order to adapt the period to the timeframe of five years for the Commission. However, there is not Treaty obligation to do so, which implies a risk of continuity. 385 It adds that the only necessity would be to adapt the Eurogroup Working Methods, requiring simple majority, which provide for the President holding the position of a national minister of finance. 386 However, such merging of EU institutions, formal and informal, provokes questions on legality under the existing EU Treaties.

First of all, Protocol No 14 on the Eurogroup sets out that the Eurogroup consists of the Ministers of the euro area Member States only with the objective to develop ever-closer coordination of economic policies within the euro area. Thereto, the need for special provisions for enhanced dialogue between the Member States whose currency is the euro is acknowledged. The Commission shall only take part in such meetings without a specific dedicated role. “The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission.” 387

In view of the Commission’s Communication, the EMEF should unite two important EMU players, representing however opposite interests. On the one hand, the Commission is obliged to represent the Union’s interest and monitor, assess and intervene as well as

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384 The Commission’s Vice Presidents are generally charged with coordinating numerous portfolios. The current Vice President for the Euro and Social Dialogue is Vladis Dombrovskis, also in charge of Financial Stability, Financial Services and Capital Markets Union.


387 Article 1 of the Protocol No 14 on the Eurogroup.
propose for decisions in the ECOFIN Council on the compliance with EMU law.\(^\text{388}\) Its independence in the performance of its designated functions is explicitly foreseen in the Treaties.\(^\text{389}\) Important to note in this regard is that the Commission exercises a flexible and thus political approach regarding the application of the SGP rules.\(^\text{390}\)

In contrast, the Eurogroup President heads a Council formation consisting of the Euro area national Finance Ministers deliberating informally the national interests in EMU. The Eurogroup defines the economic policy strategy for the euro area as a whole, identifies common challenges and formulates and agrees on common approaches. These are then covered by the ECOFIN Council, which is the formal decision-making institution for economic and fiscal policy decisions at EU level.

Even though, the Commission argues that it is already entitled to participate in the Eurogroup’s meetings\(^\text{391}\), it is crucial to differentiate between taking part in a meeting and presiding it. The post of the Eurogroup President includes power by having an essential bearing on the Eurogroup meetings. He/She sets the agenda and discussions for each Eurogroup meeting, draws up a longer-term work programme for the Eurogroup, presents the meetings’ outcomes and represents it externally.\(^\text{392}\)

The combination of these EU institutions interferes with the principle of institutional balance. According to the CJEU, set out in Art 13 TEU refers to “a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.”\(^\text{393}\) This principle shall ensure the different interests of public authority within the EU polity represented in different institutions.\(^\text{394}\) Thus, it has to apply also to the informal formation of the Council, which represents the interests of the Euro area member states.

Furthermore, as regards the administrative support for the Eurogroup meetings and deliberations, the permanent Eurogroup Working Group, a sub-group of the Economic and Financial Committee, provides the statistical and technical background information. It consists of administrative members of the euro area Member States, members of Commission and the ECB.\(^\text{395}\) In contrast to this, the Commission, acting independently from Member States, draws on information of its proper administrative body within the

\(^{388}\) In the EMU field it monitors and assesses the compliance of the Member States with the EU economic and fiscal legal framework and decisions and recommendations. In this context it issues proposals and recommendations for decisions under Articles 121 and 126 TFEU for the ECOFIN Council to decide.

\(^{389}\) Article 17(3) 2\(^{\text{nd}}\) sentence TFEU.


\(^{391}\) Article 1 Prot. 14 on the Euro Group.

\(^{392}\) Eurogroup, Working methods of the Eurogroup.

\(^{393}\) CJEU, case EP v Council C-316/91, ECLI:EU:C:1994:76, para. 11.


\(^{395}\) Article 134 TFEU.
Commission. The configuration of the underlying services is crucial for the related tasks and also raises questions on the institutional balance of interests in the field.\textsuperscript{396}

There exists a comparable double-hatted institution under the EU legal framework. The Member States agreed to establish a common High Representative for Foreign Affairs and Security Policy, who chairs the Foreign Affairs and Security Council and serves as Vice-President of the Commission with the aim to bring consistency of the Union’s external actions. Important to note is that dealing with the highly sensitive area of external and security policy the double role of the High Representative was explicitly embedded and defined in the Treaties.\textsuperscript{397} Envisaging a comparable post for the economic and fiscal policy field touching upon the prerogatives of the Member States should be negotiated and based in specific Treaty rules.

Presiding the Eurogroup would also include to take over the role of the chair of the Board of Governors of the former ESM, the EMF.\textsuperscript{398} The Commission already carries out the negotiations and signs on behalf of the ESM on the macroeconomic conditionality for financial assistance under the ESM. As the head of the decision-making body, it “would exercise a neutral role, taking into account the interests of the shareholder of the European Monetary Fund in a balanced manner”.\textsuperscript{399} In fact, such neutrality is not covered by the Commission’s mandate to serve the Union’s interest.\textsuperscript{400}

The Commission emphasises the increased accountability aspect as the main argument for creating an EMEF.\textsuperscript{401} As part of the Commission’s college, the EFM’s appointment as part of the Commission would require the consent of the European Council.\textsuperscript{402} As institutional practice, the appointment of the Commission as a whole precedes a hearing before the EP. Furthermore, according to the existing Treaty rules, the national Finance Ministers of the Eurogroup would elect by majority the EMEF. Thus, two diverse appointment procedures would apply and may conflict in particular in view of the different office periods.

In regard to the Commission’s activities, the European Parliament may use its rights of control. Thereby, it may exercise its right to query, which would consequently also concern the Vice-Commissioner in his/her function as chair of the Eurogroup and within its activities in the EMF.\textsuperscript{403} This is not provided for in the Treaties and would apart from the extended rights of the EP in economic and fiscal matters, the formal standing of the Commission would certainly impact on the status of the Eurogroup as an informal institution and would be contrary to the Treaties.

\textsuperscript{397} Article 18 TEU.
\textsuperscript{398} European Commission, \textit{COM (2017)823 Communication – A European Minister of Economy and Finance}.
\textsuperscript{399} ibid., p. 7.
\textsuperscript{400} Article 17 TEU.
\textsuperscript{401} European Commission, \textit{COM (2017)823 Communication on a European Minister of Economy and Finance}, p.5f.
\textsuperscript{402} ibid., p.7.
\textsuperscript{403} Article 230(2) TFEU.
The Treaties also foresee the EP’s power to table a motion of censure, which may result in the resignation of the Commission as a whole.404 Thus, it is not possible to bring a motion of censure against a single Commissioner, in this case against the EFM as such. Only the interinstitutional agreement foresees that the President of the Commission has to seriously consider the withdrawal of confidence in an individual Member of the Commission if the Parliament asks so.405

7.2.3. Concluding remarks
The choice of naming the proposed institution Minister for Economy and Finance may provoke wrong expectations as well as resistance. However, it could also be interpreted as a clear announcement on the intended future design of the EMU. Thus, invoking the resemblance to the general concept of a Finance Minister, whose position is to oversee a treasury and involve government finance, fiscal policy and financial regulation, might be on purpose. It might even include elements of taxation control and spending.

The current Commission’s communication on the creation of a European Finance Minister, however, does not specify such substantial changes to the existing EMU governance architecture. This might be due to the fact that the Treaties limit the competences in economic and fiscal policies to coordination only and leave the definition of national economic and fiscal policies in the hands of the Member States. These rules would, according to the proposal, not be changed. Against this background, the new institution would not simplify the complex framework of economic and fiscal coordination.406 This obviously stretches to the creation or development of institutional set-up in EMU matters. The Commission’s Communication thus does not foresee any additional authority at the EU level. Proposals going any further in regard to transferring respective power would require a Treaty reform.

However as for the institutional solution, the double hatting of the EMEF by merging function of a Commission’s member and the chair of the Eurogroup touches upon Treaty limits. This prompts crucial legal question on the institutional balance established by the EU Treaties for the EU and EMU system.

7.3. European Parliament and national parliaments
The construction of the EMU currently does not provide for a strong role of the European Parliament.407 While it is involved in the legislative process for adoption of secondary law408, article 234 TFEU.

404 Article 234 TFEU.  
408 In the legislative action, the Lisbon Treaty enhanced the European Parliament’s role by authorising it with a co-decision power for adopting new rules for the multilateral surveillance procedures of Article 121(6) TFEU. For legislation referring to the implementation of the excessive deficit procedure under Article 126(14) TFEU, the European Parliament acts is consulted only.  

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it only has a consultative or informative role in the economic governance. Decisions in the excessive deficit procedure or on the macroeconomic imbalance procedure are taken without direct involvement of the European Parliament. Nevertheless, decisions of economic and fiscal policy coordination at EU level are taken by the Council, the European Parliament as well as the national parliaments may only be included on a voluntary and informative basis. This remains the case with the introduction of the so-called economic dialogue. Thereby, the European Parliament as well as national parliaments are invited to contribute in the discussions on economic policy issues and measures with the Council and the Eurogroup. All in all, national parliaments remain the key legitimising institutions for economic and fiscal policies. They decide on the domestically financed budgets and their spending. The European Parliament is involved in the legislative process for adoption of secondary law, which was enhanced by the Lisbon Treaty. The EMU reform initiatives aim consistently for strengthening the accountability mechanisms. This should be achieved by making sure that both national parliaments and the European Parliament have sufficient powers of oversight on the management of the EU’s economic governance. The Commission urged in its Reflection Paper of 2017, to formalise the economic dialogue and adopt an agreement among the Commission, the EP and other institutions and bodies taking decisions on or acting on behalf of the euro area on democratic accountability. Such agreement may be introduced into the Treaties in the long run. The tool of dialogue remains a soft instrument of accountability check and suffers from the diversities of national parliaments’ competences in regard to EU matters. In the past, various proposals for institutionalising more democratisation of the economic governance were put on the table. A subcommittee for the Eurozone within the European Parliament or a proper Euro Area Parliament are suggested. The latter would involve

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409 The EP was consulted in the amendment procedure of Article 136 TFEU. European Parliament, European Parliament resolution of 23 March 2011 on the draft European Council decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (00033/2010 – C7-0014/2011 – 2010/0821(NLE)).
410 Article 121 (2) TFEU, The Council has to inform the EP on BEPGs recommendations.
national parliaments by creating a joint committee with representatives of the EP and national parliaments. It would be empowered to control the EU-MF spending on investment. Furthermore, direct control over the EMF. However, they bring questions in regard to the Treaty rule of Article 10 TEU, which sets out that the Union citizens, covering the Eurozone and non-Eurozone citizens, are directly represented in the European Parliament. Thus, a differentiation may contravene to the unity of the role and rights of the MEPs.

All in all, deeper integration of the EMU will require concomitant development of the political union and in particular the democratic legitimation of new mechanisms and functions. This relates to the parliamentary control for decision-making in the euro area policy fields and beyond. This relates to possible further moves towards common fiscal and economic policies and the creation of stabilisation mechanisms possibly based on common resources.

7.4. Concluding remarks
The EMU has undergone decisive changes in the course of the crisis and its aftermath. Due to the lack of crisis mechanisms under the EU economic and fiscal framework, the ECB evolved to the principal EU institution active to keep the economic and financial system functioning. With its unconventional monetary policy programmes it stretched its narrow competence of pursuing its prime objective of price stability. In fact, the ECB’s role adapted to safeguard the functioning of the EMU. However, respective formal legal adaption or respective reform proposals are missing, but its actions were sanctioned by the CJEU.

In fact, the lack of respective competence at EU level, institutional changes in the economic and fiscal field require Treaty changes. Enhancing the system with a supranational institution for the economic and fiscal union, including decision-making powers must go hand in hand with reforms to ensure the democratic legitimacy of such. The recent communication on the creation of a European Minister for Economy and Finance can be regarded as a significant message in this direction. So far, the EMEF’s tasks would substantially not expand the existing powers of the EU in the field. However, the institutional architecture of such would undergo crucial changes, certainly requiring respective legal adaption in the Treaty framework.

Finally, the relatively weak role of the European Parliament in economic governance was and shall be enhanced in the near future. So far, such empowerment shall happen by the conduct of economic dialogues, which include all decisive stakeholders in the field.

8. Conclusion
Consensus exists regarding the necessity to reform the economic and monetary union, reflected in the numerous proposals and initiatives in legal, political and economic literature,

as well as political think tanks and organisations. The EU institutions fuelled the debate by issuing pertinent initiatives and proposals. In this light, this report provides an overview and a legal assessment of relevant proposals against the background of the European Union’s Treaty framework.

Fiscal discipline and its implementation certainly have been the leading mantra during the crisis and in the aftermath. Thereby, the plans and measures for the EU fiscal governance regime aim at combining a decentralised and centralised approach. On the one hand, national ownership for fiscal discipline and planning is enhanced by the creation of independent national fiscal institutions and increased interlinkage of national rules with EU framework. With the new Commission in power, a more flexible and thus politicised use of the Stability and Growth Pact rules gained room in the spirit of less fiscal constraints depending on the country-specific economic situation. The Union pushes for more unity of the euro area Member States by promoting a Fiscal Union. So far, this covers the promotion of a euro area fiscal stance as well as the creation of bodies dedicated to the euro area’s economic and fiscal policy field, such as European Fiscal Board or a European Minister of Economy and Finance. Certainly, options for even more sovereignty sharing in the field of fiscal policies did not find their way into official considerations. They touch upon sensitive fields of national sovereignty and are only viable by adapting the EU and national constitutional frameworks. Currently, proposals to that end appear to be cautiously avoided.

The solvency problems of various Member States led to measures and mechanisms adopted to confront their severe financing problems. Discussions on the establishment of a statutory mechanism for insolvent States however faded away. Such rule-based and comprehensive procedures for tackling the unsustainable debt problem may be at stake again one day, and might even create a pioneer example in the international arena. Currently, instead, what is proposed is entering the path towards a proper euro area fiscal capacity providing for tools and resources to tackle temporary macroeconomic shocks in the euro area. The design and scope of respective competence-sharing at supranational level for fiscal policies is most controversial. The same is true for a joint issuance or guarantee of governmental debt to tackle the high debt levels in some euro area Member States, which was removed from the official agenda due to the lack of political support. Related proposals touch upon the delicate Union’s principle of national responsibility for fiscal and economic performance and the no bail-out, which includes the reactions, both positive and negative, of the financial markets.

However, while the common rules point to fiscal responsibility of the Member States, the reform initiatives brought a new dimension of sharing resources to support national efforts in reforming their economic systems. Apart from technical advice, structural reforms have become key for the economic and fiscal surveillance procedures at EU level and gained importance by the application of the emergency rescue mechanisms, such as the ESM. In fact, conducting structural reforms remains subject to political decisions at national level. Due to the limited competence and effect of the existing tools at EU level, the attempt is to shift from a sanction-based approach, which lacks effectivity, to a reward-based system.
Accordingly, several measures by using the EU budget for cohesion policy are in the legislative pipeline. Those measures, their scope being limited by the existing Treaty system, will not meet the necessities required for a truly functioning economic and monetary union. This is somehow committed already by the overall agenda adopted by the EU institutions’ Presidents in the aftermath of the crisis. In particular the creation of European mechanisms for confronting the cyclical divergences caused by asymmetric and symmetric macroeconomic shocks are invoked. This concerns the integration of the intergovernmental European Stability Mechanism as emergency mechanism into the EU framework as well as the establishment of a macroeconomic stabilisation mechanism able to react before they become severe. The legislative proposal on the European Monetary Fund exceeds the limits of the EU Treaties. The stabilisation functions may take various forms. As for a proper EU rainy-day fund or a European Unemployment Benefit Scheme, legal as well as procedural limits lower the probability of their introduction. A – politically attractive – exit strategy thereto may again be the sidestepping to intergovernmental agreements. The only promising policy field for creative and yet legally within the existing Treaties a defendable solution is again the cohesion policy, which the Commission based its proposal for a European Investment Protection Scheme on. However, a crucial obstacle for its proper functioning is the limited fiscal capacity, which will be challenging for any other macroeconomic stabilisation tool. The change of the latter is certainly the most difficult to achieve in the near future due to the high procedural barriers to be surmounted.

Such measures and mechanisms touch strongly upon the original principle that each Member State responsible for its own budgetary decisions remains subject to the market principles, which are supposed to unfold disciplining effects on the Member States’ fiscal policies. Accordingly, the Treaty rules set out that the Union or the Member States may not take over liabilities and commitments from any Member State. Exceptions to this rule already exist under the Treaties and were even enhanced and sanctioned by the CJEU after the crisis. At the same time, the credibility of this concept is still challenged. Respective adaption and clarification should go hand in hand with further developments in this regard.

For the Financial Union, and in particular the Banking Union being considered key for the functioning of the euro area, decisive elements are still pending for adoption. This concerns in principle the agreement on the fiscal backstops provided for by the governments, and involving risk sharing elements. The proposed link of the Single Resolution Fund with the European Monetary Fund sets out a new attempt to enhance the credibility of the Banking Union.

The institutional set-up is characterised by essential changes in EU economic governance by the past legislative and political reforms, which were introduced without any Treaty amendments. The planned short and long-term reforms enhance the strengthening of the EU institutions’ powers, in particular that of the Commission. In fact, the ECB became the principle actor in the events of the crisis. There are claims that its new role and position should be reflected in the adaption of its underlying Treaty basis. The most far reaching
initiative relates to the creation of a counterpart for the economic fields to the ECB in the function of a European Minister of Economy and Finance. As for the competences, the actual initiative for combining the role of Vice-President of the Commission with the role of the Eurogroup’s President is mainly a strong symbolic step into the direction of centralisation of economic and fiscal policy matters. Furthermore, it impacts heavily on the institutional architecture within the European Union by stretching the Treaties’ boundaries. Further reaching ideas for the EMU, such as the creation of a Euro area Treasury and an Economic and Finance Minister with political power in economic and fiscal matters still would need to be elaborated in detail. Thereto, one most challenging aspect relates to the guarantee of democratic legitimacy and accountability, covered so far mainly by the national parliaments and only to a limited degree by the European Parliament. In this light, several proposals from academia and think-tanks were raised and partly imply essential changes in the institutional legal order.

All in all, it must be noted, that far reaching metamorphosis or mutation\textsuperscript{418} of the EMU Treaty framework took already place by stretching the legal fundaments to their utmost boundaries.\textsuperscript{419} The push towards centralisation of the economic and fiscal matters is obvious. This tendency continues with the pertinent EMU reform proposals. So far, the CJEU upheld and supported critical developments in what might result in a truly EU economic governance, and national constitutional courts followed this approach. Further centralisation will however not be possible without the respective adjustment of the underlying constitutional EU law framework – not to talk about the necessity for changes that the national constitutional level.

Eventual changes of the EU Treaties require the unanimous consent of all EU Member States. Evidently, the resulting veto power for each and every Member State is the biggest obstacle to a substantive reform. At the same time, it is this extremely high hurdle for any change that provokes the temptation to water down, mutate or even circumvent the existing limits.

Time might be ripe to reconsider the scope of the constitutional principle of unanimity for the realm of EMU. Alternatives have already been under discussion and include the transfer of primary law provisions into secondary legislation (de-constitutionalisation of EMU law)\textsuperscript{420} as well as a cautious design of Treaty amendments by qualified majority.\textsuperscript{421}

\textsuperscript{418} B. de Witte, ‘EuroCrisis Response and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?’, Eu Const 2015, 434–57; K. Tuori and K. Tuori, The Eurozone crisis: A constitutional analysis (2014)
\textsuperscript{419} Lentsch, Report on the institutional consequences of fiscal and economic integration measures, 2017
\textsuperscript{420} Which could be modelled according to the far-reaching capacity to enact secondary legislation in the field of internal market law.
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