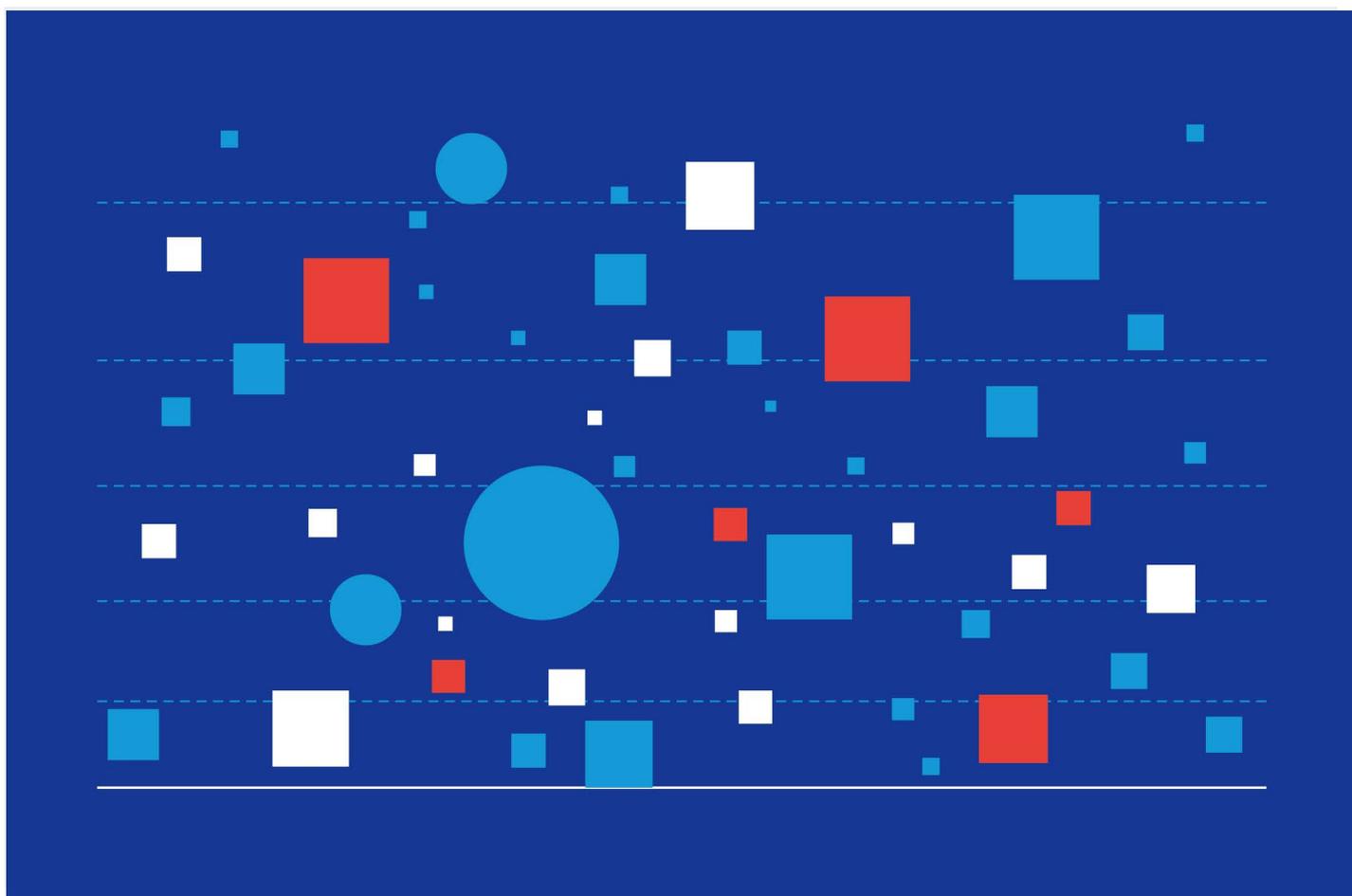


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Report on impact of EU law and CJEU's jurisdiction on Member States' preferences towards fiscal and economic integration

by Elisabeth Lentsch



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Report on impact of EU law and CJEU's jurisdiction on Member States' preferences towards fiscal and economic integration¹

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I. Introduction

The economic and financial crisis brought essential changes to the Economic and Monetary Union regime. In fact, the relationship between the EU and Member States was strongly influenced by the economic and financial crisis. Related measures shaped and constrain to a certain extent the framework of preference formation by national actors in the field of economic and fiscal policies.

The Member States agreed on reinforced fiscal rules and respective monitoring and surveillance procedures with far reaching impact on the national economic, budgetary and budgetary rules and frameworks. The Treaty limits and restricted EU financial resources led to the adoption of intergovernmental agreements, but pursuing and enhancing EMU objectives.

While the Member States' original approach towards the Economic and Monetary Union was a rather positive and open one, the reform measures, both inside and outside the EU level, triggered tensions in various Member States, not only at political level. National constitutional laws, mainly the national budgetary autonomy as well as core national constitutional principles, such as social state or the federal structure, were put at stake. Many constitutional review proceedings were activated to clarify the compliance with the EMU crisis measures with the national and EU constitution and led to further development and declaration on the national identity concept in the context of EMU and related integration.

II. The Maastricht Framework

The Member States decided to create an economic and monetary union, which should be based on the objective "to promote throughout the Community a harmonious and balanced

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development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”² An ‘ever closer union’ was meant to be achieved by the unifying force of a monetary union with a common currency.³ Accordingly, the Member States agreed on conferring the competence over their monetary policy to the supranational level and create the euro as their common currency. However, they could not agree to transfer respective competence for decisions in economic and fiscal policies to the supranational level. For entering the euro area a set of convergence criteria were to be fulfilled.⁴ In this sense, the Member States agreed on Treaty rules for the ‘economic union’ setting out the obligation for the Member States to pursue their economic and fiscal policies in “common interest”.⁵ Accordingly, economic policy as such still resting within the domain of the Member States shall be coordinated in the form of legally non-binding recommendations and guidelines at supranational level and respect supranationally defined deficit and debt limits.

This became most relevant when the EU and in particular the Eurozone Member States were hit hard by the financial and debt crisis. The Member States’ economies were threatened and due to the strong interconnection of their economies in the monetary union the risk of contagion for other Member States increased. The turbulences on the financial markets and the consequent severe budgetary situation of some Member States revealed the weakness of the EMU set up, consisting of a centralised monetary policy and loose coordination instruments for economic policies. It was at that point that the stability of the euro area came at the forefront of the crisis management. This led to far reaching decisions and agreements both at EU and intergovernmental level strongly impacting on the national systems.

² Art 2 TEC Consolidated Version of the Treaty establishing the European Community [1992] of Maastricht, OJ C 224/1.

³ For an overview on the historical background and development of monetary cooperation and integration see Lastra, R. M., Legal foundations of international monetary stability, 2006, pp. 177ff.

⁴ Art 140 TFEU and Protocol (no 13) on convergence criteria covering price stability, sound public finances, sustainable public finances, durability of convergence, exchange rate stability, adaption of national laws.

⁵ Art 121 TFEU.

III. Crisis management measures within EU framework

Existing EMU rules, which are contained directly in the EU Treaties and in more detail in the Stability and Growth Pact (SGP), were reformed. The respective reforms of the economic governance framework under the SGP of 2011⁶ and 2013⁷ brought essential novelties and considerable alignment impacting essentially on the national economic and fiscal systems. The strengthened SGP involved the limitation of Member States' action space by activating the excessive public debt limits for triggering the excessive deficit procedure. Furthermore, increasing obligations for submission of detailed information on the national budgets and economic policies were established. Exemplary to this is the newly created macroeconomic imbalance procedure, which provides for extensive reporting obligations on their macroeconomic developments to the Member States according a scoreboard of various factors, which the Commission defines and monitors.⁸ The euro area Member States even have to give deep insights into their national budgetary plans to the Commission, which monitors them and may even ask to revise them.⁹ In this respect, another focus was set on increased dialogue and cooperation among the Member States and the Commission, including the latter's missions on site.¹⁰¹¹

⁶ Council Directive No 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area OJ 2011 L 306/1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area OJ 2011 L 306/8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies OJ 2011 L 306/11; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances OJ 2011 L 306/25; 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.

⁷ Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area OJ 2013 L 140/1; Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability OJ 2013 L 140/11.

⁸ Regulation (EU) No 1176/2011. The scoreboard covers internal and external imbalances, competitiveness, asset process, and internal and external debts. According to Article 3 Regulation (EU) No 1174/2011: The Council may impose an interest-bearing deposit or fine by reversed qualified majority voting of up to 0,1% GDP, in case that the Member State concerned has not taken the corrective action recommended by the Council.

⁹ Articles 6, 7 Regulation (EU) No 473/2013.

¹⁰ Article 11 Regulation (EU) No 1175/2011; including on-site monitoring, eventual publication of findings Commission may issue warning in case of significant deviation from adjustment path.

¹¹ Article 10a Regulation (EU) No 1176/2011.

Furthermore, the rules to streamline the compliance with the EU economic and fiscal rules led to the alignment of the national fiscal frameworks and fiscal rules. In order to implement the reformed SGP rules, the Member States amended, and some even newly introduced, new budgetary rules and institutions. This includes the implementation of numerical fiscal expenditure rules and a binding medium-term budgetary framework in national law.

Furthermore, Member States adapted to the comprehensive planning cycle for macroeconomic and fiscal policy surveillance and the coordination of economic and employment policies, the European Semester.¹² The Member States had to implement new rules on quality standards, such as the quality of statistical data and economic forecasts, as well as the creation of independent fiscal bodies with the task to ensure the compliance with the supranational rules were adopted.¹³ The latter shall function as a form of watch-dogs on actions and decisions of governments with fiscal consequences. Thereby, they may function as support of the national parliamentary control over the executive branch in the fiscal field.¹⁴ They are coordinated and cooperate within the European Fiscal Board, which was established in 2015 and shall provide a platform of exchange of best practices and facilitating common understanding on matters related to the Union fiscal framework, such as a Euro area fiscal stance.¹⁵

National parliaments are the key legitimising institutions for economic and fiscal policies. They decide on the domestically financed budgets and their spending. The SGP reforms introduced mechanisms for increased economic dialogue with the parliaments. Thereby, they are invited to contribute in the discussions on economic policy issues and measures with the Council and the Eurogroup.¹⁶ It provides a platform of debate and exchange on economic governance and budgetary policy in the EU and shall contribute to the democratic accountability of EMU matters. Such involvement however remains a voluntary and

¹² Article 2a Regulation (EU) No 1175/2011: comprehensive economic and fiscal policy planning cycle including the formulation and surveillance of economic policy and employment guidelines, the convergence programmes, national reform programmes, and prevention and correction of macroeconomic imbalances.

¹³ Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L 306/41.

¹⁴ Fasone, C., Fromage, D., Fiscal Councils: Threat or Opportunity for Democracy in the Post-Crisis Economic and Monetary Union?, in: Daniele, L., Simone, P.-L., Cisotta, R.(eds), Democracy in the EMU in the Aftermath of the Crisis, 2017, pp. 161-178.

¹⁵ Article 2 European Commission, *Decision (EU) 2015/1937 of 21 October 2015 establishing an independent advisory European Fiscal Board* OJ 2015 L 282/37 and European Commission, *Decision (EU) 2016/221 of 12 February 2016 amending Decision (EU) 2015/1937 establishing an independent advisory European Fiscal Board* OJ 2016 L 40/15.

¹⁶ Regulation (EU) No 1175/2011; Regulation (EU) No 472/2013 , Article 13 TSCG.

informative basis only. The Commission urged in its Reflection Paper of 2017, to formalise the economic dialogue and adopt an agreement among the Commission, the European Parliament 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.¹⁷ The tool of dialogue still remains a soft instrument of accountability check and suffers from the diversities of national parliaments' competences in regard to EU matters.

Enhanced surveillance and obligations of the economic and fiscal policies of the Member States and have considerable effect on the national autonomy in the economic and fiscal policy field at large. This concerns in particular the situations when Member States suffer from financial difficulties or even receive financial assistance, when they are set under enhanced surveillance.¹⁸

All these measures impacted strongly on the existing national fiscal systems and laws and introduced various new aspects, such national fiscal councils or reinforced fiscal discipline rules. In particular before the background of the financial difficulties during the crisis, several Member States' governments approved and reinforced the budgetary rules according to the supranational lines to confront such without raising particular concerns on interference with national sovereignty and identity.¹⁹

IV. Crisis management measures escaping the EU framework

Most legal turmoil caused the EMU-related measures taken outside the EU legal order causing legal contestation against the yardstick of EU law as well as national constitutions. Member States and in particular, the Eurogroup, cooperated outside the EU legal framework. In 2010, it started with coordinated bilateral loans to Greece by euro area member states together with the International Monetary Fund.²⁰ The European Financial

¹⁷ European Commission, COM (2017)291 Reflection paper on the deepening of the economic and monetary union (2017), pp.27-28.

¹⁸ Regulation (EU) No 472/2013.

¹⁹ Exemplary is Italy, where the Internal Stability Pact, which reinforces the SGP, impacted strongly on the financial autonomy of Italian regional and local bodies, bringing increased centralisation at national level to ensure that every regional and local Government respects the SGP constraints. See: Bonnini, M. , Ninatti, S., 'Italy', in: Griller, S., Lentsch, E., EMU Integration and National Constitutions, 2019 forthcoming.

²⁰ Statement of 25 March 2010 of the Heads of State or Government of the euro area and Eurogroup meeting, doc. 9417/10; Merino, A.G. 'Legal developments in the economic and monetary union during the debt crisis: The mechanisms of financial assistance', *Common Market Law Review* 49(5) (2012), pp.1613-

Stability Facility (EFSF) was set up by the Euro area governments. This was followed by the Treaty on a permanent European Stability Mechanism (ESM) among Eurozone members in 2012. The same year, all EU Member States, except the UK and Czech Republic signed the Treaty on Stability, Coordination and Governance (TSCG). And finally in 2014, the Agreement on the Single Resolution Fund for the Banking Union was signed by all Member States, except the UK and Sweden. The reasons and motivation for “sidestepping” of the EU legal framework are diverse.²¹ Arguably, the limits and rigid EMU Treaty rules pushed the willing Member States to act outside the EU frame, but for the achievement of Union objectives and with strong institutional linkage with the EU level.²² Instead of adapting the EU Treaty rules, which is committedly a burdensome endeavour, such a “semi-intergovernmental method for the euro area”²³ was chosen. Thereby, EU objectives and the use of EU institutions were central of the agreements and the consistency with the EU legal framework was considered essential and reflected explicitly in the agreements.²⁴ The only formal Treaty amendment since the outbreak of the crisis concerned the introduction of the Eurozone stability concept. In applying the simplified Treaty amendment procedure of Art 48 (6) TEU a 3rd paragraph was added in Art 136 TFEU, entering into force on 1st of May 2013.²⁵ “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. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.

A. Treaty on Stability, Coordination and Governance

The conclusion of the Treaty on Stability, Coordination and Governance captured further commitment by EU Member States to adopt rules for enhancing more fiscal discipline in the

1645.; Ruffert, M., ‘The European debt crisis and European Union law’, *Common Market Law Review*, 2011, Vol.48(6), pp. 1777-1806.

²¹ See details de Witte, B., ‘Using International Law in the Euro Crisis: Causes and Consequences’, *ARENA Working Papers* 2013 (2013), pp. 3ff; Merino, G. A., ‘Legal developments in the economic and monetary union during the debt crisis: The mechanisms of financial assistance’, *Common Market Law Review*, 2012, Vol.49(5), pp. 1613-1646.

²² Merino, A.G. ‘Legal developments in the economic and monetary union during the debt crisis: The mechanisms of financial assistance’, *Common Market Law Review* 49(5) (2012), pp.1613-1645.

²³ Keppenne, J.-P., Institutional Report, in; Neergard, U., Jacqueson, C., Hartig Danielsen, J., *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU*, Fide Congress report, 2014, pp. 203f.

²⁴ Article 4 (1),(2) of the Greek loan Facility intercreditor agreement and recital (6) of the preamble to the Greek loan agreement; Article 2 (1) of the EFSF Agreement; Article 13 (3) ESM Treaty.

²⁵ Recital 2 Preamble European Council Decision No 2011/199, OJ 2011 L 91/1.

Member States. Due to the UK's veto position and the political commitment for adoption of a Treaty, the then 25 Member States, except the UK and the Czech Republic, went instead of secondary legislation²⁶ for the intergovernmental route and concluded the TSCG.²⁷ The core of the Treaty aims to improve the governance of the Eurozone and most importantly to foster budgetary discipline of the signatory states. It is geared towards stricter supranational budgetary limitations than those covered under the EU Six Pack legislation²⁸— most importantly a lower limit of the annual structural deficit of 0,5% of the GDP at market prices. It included an obligation to implement those limits “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes”.²⁹ All participating Member States implemented this agreement³⁰, but for partly political, partly constitutional reasons, only a few Member States actually included the balanced budget rule as “golden rule” in constitutional rank. This is the case for Germany, Spain, Italy and Slovenia. However, it was only the latter that introduced the golden rule to comply with the TSCG signature. The others had it in their constitutions already before. Others provided it a higher hierarchical status than ordinary law, such as Estonia, Finland, Lithuania, Latvia and Portugal. Austria and Belgium adopted national provision with a superior legal status than ordinary law.³¹ In most Member States the balanced budget rule did not raise any legal or constitutional concerns, and in some Member States it was already covered by their budgetary laws. In others the adoption as well as the implementation of the TSCG, and in particular the balanced budget rule raised essential legal concerns and constitutional controversies evident by several motions for constitutional review before national review bodies.³² The main arguments concerned the respective restriction of the fiscal room of manoeuvre of national parliaments, arguably curtailing their budgetary sovereignty as guaranteed in the national constitutions. These cases, even though either dismissed or approved by the constitutional

²⁶ Article 126 (14) subpara 2 TFEU and Article 121 (6) TFEU.

²⁷ Craig, P. 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism', *European Law Review*, 2012, Vol. 37, p. 233.

²⁸ Art 2a Council Regulation (EC) No 1466/1997 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies OJ 1997 L 209/1.

²⁹ Article 3(2) TSCG.

³⁰ European Commission, Report presented under Article 8 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, C(2017) 1201, Brussels, 22.2.2017.

³¹ European Commission, Commission Communication on the Fiscal Compact: Taking Stock, C(2017) 1200 final, Brussels, 22.2.2017.

³² See on the details of the cases: Saurugger, S., Fontan, C., 'Courts as political actors: Resistance to the EU's new economic governance mechanisms at the domestic level'. Halshs-01628964, 2017.

review bodies, led to further declarations and interpretation on the options and limits of the budgetary prerogatives of national parliaments.³³

What is more, the fiscal rules had decisive impact on those Member States with Social State Models, such as in Greece, Italy, Portugal and Spain where the constitutions explicitly³⁴ or indirectly³⁵ refer to social State. In particular, in the course of the crisis management measures, Member States facing financial difficulties and being under surveillance and with the enhanced principle of a balanced budget, adopted respective reforms to confront deficits and thereby accepted tensions with their social welfare models.

Finally, the balanced budget rule affected also the federal organisation of some Member States by reinforcing the centralisation of respective powers.

In Italy, for instance, the fear of sovereign default led the government to invest and accept most measures to confront such in the years 2011 until 2014. This included the constitutional amendment to include the Fiscal Compact in the constitution. The amendment of Article 81 ItC in 2012 by including the Equilibrium-Budget Rule had significant impact on the Italian financial order and the social welfare expenditures, which until then had been financed through deficit spending.³⁶ The issuance of State public bonds was limited (with some exceptions) only for renewing already existing or at short maturity ones.

Furthermore, the financial autonomy of regional and local governments was restricted, in particular by the Internal Stability Pact³⁷, as they must respect the economic, financial and fiscal policies of the national government. These EMU induced rules interfering with the principles of welfare and solidarity as well as regional democracy arguably put at stake the counter-limits doctrine, which safeguards fundamental principles and/or human rights against any limitations of sovereignty.³⁸

Similar political and legal commitment to budgetary stability was signalled in Spain. The balanced budget rule was included in the Constitution before the TSCG signature, in

³³ See Lentsch, E., National constitutional law as manifold steepchase for fiscal integration, forthcoming in Puntischer-Riekmann, S., Wasserfallen, F., How Member States Cope with the Eurozone Crisis: Perceptions, Preferences, Negotiations, and Reform Outcomes, 2019.

³⁴ Articles 9.2 and 33.2 Spanish Constitution, Articles 21, 25.1, and 106.1 Greek Constitution.

³⁵ Articles 2 and 9.d) Portuguese Constitution, Articles 3 and 42 Italian Constitution.

³⁶ Boggetti G., 'Costituzione e bilancio dello Stato. Il problema delle spese in deficit (note ispirate dalla lettura di un libro di G. Rivosecchi)', 2006, pp. 17-74.

³⁷ Adopted for the first time with Statute Law no° 220/2010 (i.e. the '2011-2013 Stability Statute Law').

³⁸ Bonnini, M., Ninatti, S., 'Italy', *EMU integration and national constitutions*, 2019 forthcoming.

September 2011. As in the case of Italy, the constitutional principles of welfare state and political decentralisation became pertinent. Severe cuts in public spending in order to meet the constitutionalised public debt and deficit constraints affected the state's autonomy to develop social policies and basic social rights, such as education and healthcare.³⁹ Moreover, the balanced budget rule in Art 135 Spanish Constitution had an impact upon the principle of territorial decentralisation by strengthening the central government in monitoring public spending and fiscal discipline of the autonomous communities.⁴⁰

B. Financial assistance mechanisms

The Member States decided to construct the economic and fiscal policy field in a decentralised way. Accordingly, the competence for decisions and control on economic and fiscal policies remains at national level. In this sense, the so-called no bail-out clause precludes that the Union or the Member States take over liabilities and commitments from any Member State. This shall ensure that each Member State remains responsible for its own budgets and thus subject to the market principles, which unfold disciplining effects on the Member States' fiscal policies.⁴¹

The turbulences on the financial markets led to enormous increases in national debts of some euro area Member States and arguably put the financial stability of EU Member States and the Eurozone in particular at risk. This prompted a wave of financial solidarity among Member States suffering of solvency and liquidity problems.⁴²

It started with the euro area Member States declaring their intention together with the International Monetary Fund (IMF) to provide assistance first to Greece in form coordinated bilateral loans in 2010.⁴³ According to the so-called "solidarity clause" of Art 122(2) TFEU the

³⁹ González Pascual, M., 'Austerity Measures and Welfare Rights: The Spanish Constitutional System under Stress', *European Journal of Social Law*, 2014, Vol. 1, pp. 116-127, Martínez Lago, M.A., 'Crisis fiscal, estabilidad presupuestaria y reforma de la Constitución', *El Cronista*, 2011, Vol. 24, pp. 17.

⁴⁰ Guerrero, M.M., 'El Estado autonómico en tiempos de disciplina fiscal', *Revista Española de Derecho Constitucional*, 2012, Vol. 98, pp. 109-147; Janini, T.D.L.Q.S., 'La incidencia de la reforma del artículo 135 de la Constitución sobre el Estado autonómico', *Informe Comunidades Autónomas*, 2017, 2016, pp. 77-110; Pascual, M.I.G., 'Constitución española y gobernanza económica europea; desnudez y crisis del Estado constitucional', *Revista Vasca de Administración Pública*, 2017, Vol. 109, pp. 21-40.

⁴¹ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para. 135.

⁴² European Council Conclusions of 28 and 29 October 2010, Brussels.

⁴³ Statement of 25 March 2010 of the Heads of State or Government of the euro area and Eurogroup meeting, doc. 9417/10; de Gregorio Merino, A., 'Legal developments in the economic and monetary union during the debt crisis: The mechanisms of financial assistance', *Common Market Law Review*, 2012, Vol. 49(5), pp.1613-1646, Ruffert, M., 'The European debt crisis and European Union law', *Common Market Law Review*, 2011, Vol.48(6), pp.1777-1806.

Union, but not the Member States, may adopt measures, including financial help, for a Member State being in difficulties or seriously threatened of such by extraordinary circumstances. Accordingly, the European Financial Stability Mechanism (EFSM) was created in 2010.⁴⁴ However, this EU instrument may serve as temporary assistance mechanism only and is subject to the EU financial limits.⁴⁵ As mentioned, under the EU support mechanism financial resources under the EU regime are strongly limited. The EU's principle financing instrument, its proper EU budget, is limited in size. Debates on the raise of contributions⁴⁶ as well as the introduction of new possible resources are ongoing.⁴⁷ However, most 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.⁴⁸

Further financial support instruments were based on intergovernmental agreements based on funding by the Member States in form of the European Financial Stability Facility (EFSF)⁴⁹, and finally the permanent European Stability Mechanism (ESM)⁵⁰. The underlying aim, as explicitly determined in the ESM Treaty is "to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the

⁴⁴ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism- the Commission borrows up to a total of 60 billion euro in the financial markets, and is then able to make a loan to the beneficially Member State OJ 2010 L 118/1; It was activated for Ireland in autumn 2010 and Portugal (46.8 bn) in spring 2011. See Tuori, K., Tuori, K., *The Eurozone crisis: A constitutional analysis*, 2014, p. 138.

⁴⁵ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 131; see: Louis, J.V., 'Guest editorial: The no-bailout clause and rescue packages', *Common Market Law Review*, 2010, Vol.47(4), p. 983.

⁴⁶ Maduro, M. P., 'A New Governance for the European Union and the Euro: Democracy and Justice', Robert Schuman Centre for Advanced Studies Policy Paper No. 2012/11, 2012, 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.

⁴⁷ Monti, M., Daianu, D., Fuest, C., Georgieva, K., Kalfin, I., Lamassoure, A., Moscovici, P., Simonytė, I., Timmermans, F. and Verhofstadt, G., 'Future Financing of the EU: Final report and recommendations of the High Level Group on Own Resources', 2016, 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.

⁴⁸ 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 2014 L 168/105.

⁴⁹ Decision of 10 May 2010 of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union establishing the European Financial Stability Facility, doc. 9610/10; EFSF Framework Agreement of 7 Jun. 2010 between the participating Member States.

⁵⁰ The Treaty Establishing the European Stability Mechanism (ESM Treaty) was first concluded on 11 July 2011 and a revised version was agreed on 2 Feb. 2012. It entered into force on 27 September 2012.

benefit of ESM 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 and of its Member States.”⁵¹

The ESM is filled with an authorised capital stock of about €700 billion, according to a contribution key based on each country’s respective share of the EU total population and gross domestic product.⁵² The amount of subscription of the Member State’s contribution to the authorised capital stock defines the weight of the voting right of each Member State in the Board of Governors decisions, which consists of a representative of the ministries of Finance of the Eurozone Member States. In fact so far each Member State has veto power for the principal decisions, such as the raise of authorised capital stock, stability support or the Memoranda of Understanding or the pricing policy for the financial assistance, which have to be taken unanimously.⁵³

These solidarity mechanisms, not being covered by the EU framework, impact strongly upon the national legal decision-making systems.⁵⁴ The decisions on the allocation of national financial resources within the financial assistance mechanism touch upon the core prerogatives of national parliaments, the budgetary power. This triggered several claims of unconstitutionality as reflected in various national judicial proceedings.⁵⁵

The Irish Court initiated the decisive preliminary ruling before the CJEU in the Pringle case on the ESM Treaty.⁵⁶ It subsequently held that the ESM Treaty did not constitute an unconstitutional delegation of sovereignty in the sense of the Irish court’s case *Crotty v An Taoiseach*⁵⁷, which would diminish budgetary, fiscal or economic sovereignty of Ireland and would have required a positive referendum.⁵⁸ The Pringle case led to a revised interpretation of Article 5 of the Constitution, which provides that Ireland is a ‘sovereign, independent, democratic state’.⁵⁹ It was the *Crotty* judgment in the context of the ratification of Title III of

⁵¹ Article 3 ESM Treaty.

⁵² Article 8 ESM Treaty.

⁵³ Article 5 (6) ESM Treaty.

⁵⁴ Höing, O., 'Asymmetric Influence: National Parliaments in the European StabilityMechanism'. Dissertation, Universität zu Köln(2015), Moschella, M., 'When Some Are More Equal than Others: National Parliaments and Intergovernmental Bailout Negotiations in the Eurozone', *Government and Opposition*, Volume 52, Special Issue 2 (Democracy without Solidarity: Political Dysfunction in Hard Times, 2017, pp. 239-265.

⁵⁵ This was the case in Austria, Belgium, Estonia, Finland, Germany, Ireland. See

⁵⁶ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756.

⁵⁷ *Crotty v An Taoiseach* [1987] IR 713.

⁵⁸ High Court of Ireland 17.07.2012, [2012] IEHC 296 (2012 3772P).

⁵⁹ [2012] IESC 47

the Single European Act, in which the Supreme Court emphasised the central plank of Ireland being a “sovereign” state. Accordingly, “the State’s right to conduct its external relations is part of what is inalienable and indefeasible in what is described in Article 5. It follows that “any attempt by the government to make a binding commitment to alienate in whole or in part to other States the conduct of foreign relations would be inconsistent with the government’s duty to conduct those relations in accordance with the Constitution.”⁶⁰ It then outlined “the limit on the discretion which the Government holds arises where the relevant treaty involves Ireland in committing itself to undefined policies not specified in the treaty and in circumstances where those policies, which Ireland will be required to support, are to be determined not by the Government but by institutions or bodies specified in the treaty. It is an abdication, alienation or subordination of policy formation and adoption which is not permitted. A transference of the means of implementing a policy agreed by the Government, and specified in the treaty concerned, to an appropriate implementation institution or body may be permitted provided that it does not go so far as to amount, in substance, to an abdication, alienation or subordination of the role of government under the Constitution.”⁶¹ The European Stability Mechanism Treaty challenged in *Pringle* was thus an exercise in sovereignty rather than an abdication or transfer of it.⁶² Thus, no unconstitutionality was involved in the Treaty’s ratification (and therefore no referendum to facilitate it needed).⁶³

In Austria, the euro crisis, namely the ESM, triggered a constitutional amendment by introducing information/participation rights of the National Council in ESM affairs.⁶⁴ This was done rather as political than for legal motivation, to ensure the approval of Article 136 para 3 TFEU, which was done under a simplified Treaty amendment procedure requiring a constitutional majority in both the National Council and the Federal Council.⁶⁵ The then governing parties lacking this constitutional majority needed support from the opposition. As political price for this support, the governing parties consented to the introduction of

⁶⁰ [1987] IR 713 at 787.

⁶¹ Para. 4.25 of the ruling of Clarke J. Emphasis added.

⁶² Para. 8.13 of the ruling of Clarke J.

⁶³ See Barret, G., ‘Ireland’, in: Griller, S., Lentsch, E., *EMU Integration and National Constitutions*, forthcoming, 2019.

⁶⁴ Articles 50a-d B-VG

⁶⁵ See Article 50 para 4 B-VG.

rights of the National Council with regard to the ESM comparable to those of the German Bundestag.⁶⁶⁶⁷

In Germany, the Federal Constitutional Court advanced the doctrine of the German parliament's 'overall budgetary responsibility' in its jurisprudence on the EFSF and the ESM. Already in its judgment dealing with the so-called Integrationsverantwortung, the Court emphasised that the only institution democratically fully legitimated by the German citizens is the Bundestag, which must ensure that democratic representation and accountability is guaranteed for the German people. This includes that any transfer of powers does not undermine its own powers in a way that it no longer controls the powers executed over the citizens.⁶⁸ For the EFSF, it considered the related laws in line with the parliament's budgetary responsibility as they do not result in unforeseeable burdens or undermine the principle of permanent budget autonomy.⁶⁹ As regards Germany's capital contributions to the ESM "the budgetary autonomy of the German Bundestag is sufficiently safeguarded. However, arrangements under budgetary law must be made to ensure that possible capital calls pursuant to the ESM Treaty can be met fully and in time within the agreed-upon upper limits, so that a suspension of Germany's voting rights in the ESM bodies is reliably excluded".⁷⁰ This derives from the principle of democracy, with the Bundestag at its centre which must remain in control of fundamental budgetary decisions. The Court argues that the principle of democracy would only be violated if Germany became liable "to such an extent that budgetary autonomy would not only be constrained, but would in fact cease to exist, at least for a considerable period of time".⁷¹ Germany must not lose its de-facto veto position and has to make sure it does not forfeit its voting rights in the board of governors of the ESM.⁷² Accordingly, "the principle of democracy requires that the German Bundestag remains the place where autonomous decisions on revenue and expenditure are made,

⁶⁶ Konrath, C., Murer, I., Die Mitwirkung des Nationalrates in Angelegenheiten des Europäischen Stabilitätsmechanismus, in Baumgartner (ed.), *Öffentliches Recht: Jahrbuch 2013* (2013) 351 (368).

⁶⁷ Palmstorfer, R., 'Austria', in: Grillner, S., Lentsch, E., *EMU Integration and National Constitutions*, forthcoming, 2019.

⁶⁸ ECLI:DE:BVerfG:2009:es20090630.2bve000208.

⁶⁹ ECLI:DE:BVerfG:2011:rs20110907.2bvr098710, para. 135.

⁷⁰ <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-023.html>.

⁷¹ German constitutional court ruling on 18/03/2014, see also Federal Constitutional Court Press Release No. 67/2012 of 12 September 2012, 2, see also BVerfG 12.09.2012, 2 BvR 1390/12- 2 BvR 1421/12- 2 BvR 1438/12- 2 BvR 1439/12- 2BvR 1440/12- 2 BvE 6/12, para 111; Federal Constitutional Court Press Release No. 67/2012 of 12 September 2012, 5.

⁷² ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, par. 191 and 199.

including those with regard to international and European liabilities.⁷³ Such doctrine must not be misunderstood as an absolute and ultimate limit to further integration, but the fostering of budgetary choices for the parliament as essential.⁷⁴ The mentioned limit and the timeframe of a “considerable period of time” remain undefined and seem to make a violation of constitutional rules improbable, if not impossible.⁷⁵

Finland generally accepted its sovereignty in state finances being de facto exercised to a certain extent within the EMU system and stability mechanisms. This was based on the principle of active and loyal cooperation within the integrated EU framework. Accordingly, active participation of the Member States in these systems is essential for securing a genuine financial and budgetary competence of the Member States. However, the Finnish original stance of a rather theoretically relevant option of preventing EU-level decision-making changed considerably with the EMU reforms and in particular with the creation of stability mechanisms. The considerations of the Constitutional Law Committee in particular on the unanimity requirements within the stability mechanisms reflected a ‘constitutional fixation’ of the safeguard of national sovereignty and budget autonomy.⁷⁶

A similar picture can be seen in Estonia. The fast developing EMU-related law led to rulings of the Estonian Supreme Court, emphasising on the relationship between EU and related law and national constitutional law.⁷⁷ This involved the warnings on further delegation of national competences to the EU level, which would require a referendum to adapt the Constitution. Still, the Estonian Supreme Court declared the ‘unconditional primacy of EU law’ in its ruling on the ESM Treaty. Accordingly, the economic and financial sustainability of the euro area and thus the stability of such forms part of the constitutional values of Estonia,

⁷³ Id., par. 162. Following areas of legislation imperatively fall under the responsibilities of the *Bundestag*: fundamental fiscal decisions on public revenue and public expenditure, the latter being motivated, *inter alia*, by social policy considerations.

⁷⁴ ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, par. 163. “the larger the financial amount of the liability commitments or of commitment appropriations, the more effectively structured the German *Bundestag*’s rights to approve and to refuse and its right to monitor must be.”

⁷⁵ Korioth, S., Marx, J., ‘Germany’, in: Griller, S., Lentsch, E., EMU Integration and National Constitutions, forthcoming, 2019.

⁷⁶ Ojanen, T., ‘Finland’, in: Griller, S., Lentsch, E., EMU Integration and National Constitutions, forthcoming 2019.

⁷⁷ Estonian Supreme Court Opinion 3-4-1-6-12, Tupits, A., ‘Estonia’, in: Griller, S., Lentsch, E., EMU Integration and National Constitutions, 2019 forthcoming.

due to the adoption of the euro. Accordingly, interference with the parliamentary financial competence is legitimate and proportionate.⁷⁸

All in all, the Member States, in particular the creditor states, even though after considerable constitutional claims decisions to fund financial support mechanisms, accepted the EMU related solidarity tools as constitutional. At the same time, the question of national identity and the parliamentary budgetary autonomy concept was partly emphasised and partly further outlined.

C. Memoranda of Understanding

Several Member States received financial assistances, such as Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Romania, and Spain. All support instruments are linked to strict conditionality, which relates mainly to the obligation to implement structural reform measures in the field of fiscal and economic governance. Such conditionality, inspired by the IMF practice, was considered as an essential requirement for the compatibility of financial support with EU law, and in particular with the rules on fiscal discipline and the no-bail out clause, as ruled in the Pringle case.⁷⁹ In fact, this ruling arguably led to far reaching reinterpretation of the so-called no bail-out clause, which precludes that the Union or the Member States take over liabilities and commitments from any Member State. 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.⁸⁰ The conditionality concept was explicitly included into Treaty law with the amendment of Article 136 TFEU.⁸¹ As effect, these new instruments for emergency cases entail that the markets usually enforcing fiscal discipline are substituted by the contents of the agreed conditions to be complied with for receiving financial assistance tranches.⁸²

The aim of the provision is to encourage Member States to prudent budgetary policy. It argued that this concept is ensured as long as they remain responsible to their creditors and

⁷⁸ Estonian Supreme Court Opinion 3-4-1-3-06, Tupits, A., 'Estonia', in: Griller, S., Lentsch, E., EMU Integration and National Constitutions, 2019 forthcoming.

⁷⁹ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 137; CJEU, case Gauweiler C-62/14 ECLI:EU:C:2015:400, para 121.

⁸⁰ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 135.

⁸¹ European Council Decision 2011/199/EU of 25 March 2011 amending Art 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro, OJ 2011, L 91/1.

⁸² Ioannidis, M., 'Europe's new Transformations: How the EU economic constitution changed during the Eurozone crisis', Common Market Law Review 2016, 1237–1282.

strict conditionality is linked to the loans. In addition, such assistance is only legal if a risk for the stability of the euro area as a whole exists.⁸³

The conditions for financial assistance tools were legally determined in Memoranda of Understanding and made the receiving Member State's compliance with such a requirement for disbursement of the instalments of the financial assistance.⁸⁴ In fact, the economic adjustment programmes contain the conditions for financial aid and the governments have to adopt them, which considerably restrict the margin of national decision in these areas.⁸⁵ Most relevant is the legal quality of loan conditionality are considered as "non-law or not legally binding, because Member States are requesting loans and agree on loan conditions – establishing contractual relations".⁸⁶ The definition of their content was legally left to wide discretion of the parties involved, namely the receiving Member States and the creditors, involving the IMF and the euro area Member States.⁸⁷ However, national control over the final decisions by the debtor state remained rather weak by either accepting or rejecting the deals due to the reasons of urgency.⁸⁸ Furthermore, it is EU institutions, which negotiate as well as monitor the implementation of the agreed economic policy conditions. The so-called Troika, the IMF, the Commission and the ECB received the power in particular when it comes to the basic assessment of the circumstances for the issuance of loan tranches.⁸⁹ In fact thereby the EU institutions have at their hands a "powerful instrument for pressing reforms in recipient countries' economies, healthcare and pension systems, education and research as well as national defence".⁹⁰

The national judiciaries in Cyprus, Greece, Portugal, Spain and Romania, Hungary, and Latvia were challenged to strike a balance between the effective protection of the fundamental rights of the citizens, in particular social rights and the financial survival of the State.⁹¹ While

⁸³ CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 135-147.

⁸⁴ See on Greek financial assistance M. Meng-Papantoni, 'Legal Aspects of the Memoranda of Understanding in the Greek Debt Crisis', ZEuS (2015), 3–26.

⁸⁵ Martinez Sierra, J., Ferrer, C., 'EMU Governance and decision making impact on Member States and EU constitutional systems', Workshop paper 12: Constitutions and financial crisis, 2013, pp.9f.

⁸⁶ Kilpatrick, C., 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', European Constitutional Law Review 10 (2014), pp. 393–421.

⁸⁷ See for details *ibid.*, p. 415.

⁸⁸ Crum, B., 'Saving the Euro at the cost of democracy?' Journal of common Market Studies (2013), p. 622.

⁸⁹ Arts. 2(1), 3(1) EFSF Framework Agreement, Art. 3(3)b Regulation 407/2010, Arts. 13(3), 13(7) ESM Treaty, Arts. 6, 7(1), 7(5) Regulation 472/2013. See in detail Beukers, T., 'The new ECB and its relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', Common Market Law Review, 2013, Vol 50(6), pp. 1588 ff.

⁹⁰ See Ioannidis, M., 'EU Financial Assistance Conditionality after "Two Pack"', ZaöRV 74(2014), p. 62.

⁹¹ See Griller, S., Lentsch, E., EMU integration and national constitutions, forthcoming 2019.

most of them deemed the austerity measures national, the cases before the Portuguese and Romanian Constitutional Court led to tensions between the European and international commitments and the national constitutional defence. They called upon the CJEU to assess the legality of national measures adopted pursuant to Memoranda of Understandings with EU law. As for the legal quality of the, the Court ruled that Member States are implementing acts of the Memoranda of Understanding, but not EU law and thus the Charter of Fundamental Rights and Freedoms is not applicable.⁹²

It declared the application for preliminary references inadmissible, claiming the lack of a link to EU law.⁹³

However, in this context, it must be noted that the related agreements on economic and financial reforms captured in the form of macro-economic adjustment programmes were concurrently even adopted by Council Decisions.⁹⁴ Thus, the argument of the missing link to EU law in relation to the Memoranda of Understandings induced national reforms under the financial assistance frameworks⁹⁵ is not convincing. Explicit EU secondary law on a regulative

⁹² CJEU, case Pringle C-370/12 ECLI:EU:C:2012:756, para 179.

⁹³ In the Romanian cases, Romania had signed a Memorandum of Understanding in order to receive BoP assistance together with IMF and World Bank assistance: Cases C-434/11 *Corpul National al Politistilor*, order of 14 December 2011; C-134/12 *Corpul National al Politistilor*, order of 10 May 2012; C-369/12 *Corpul National al Politistilor* order of 15 November 2012.

In the Portuguese cases, Portugal had negotiated an Memorandum of Understanding in order to receive EFSF and EFSM (together with IMF) assistance: C-128/12 *Sindicato dos Bancarios do Norte and Others*, order of 7 March 2013; C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, order of 26 June 2014; C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins*, order of 21 October 2014.

Also the General Court has been asked to consider the validity of Council measures concerning Greece' excessive deficit and statements from the Eurogroup regarding Cyprus' bail-in and bank deposits. All actions so far have been declared inadmissible: Cases T-541/10 and T-215/11 *ADEDY and others v Council*, Orders of 27 November 2012; T-327/13 *Mallis and Malli v European Commission and European Central Bank*, Order of 16 October 2014. On Cyprus, see also Cases T-289/13 *Ledra Advertising Ltd v European Commission and ECB*, Order of 10 November 2014 and pending cases T-149/14 to T-152/14.

⁹⁴ Recital 2 of the Preamble to the EFSF Framework Agreement; Recital 7 of the Preamble of the Regulation (EU) 407/2010 of the Council of 11 May 2010 establishing a European Financial Stabilisation Mechanism, OJ 2010, L118/1; Art 3 and Art 12 ESM Treaty; Art 7(1) Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability OJ 2013, L 140/1.

⁹⁵ In the **Romanian cases**, Romania had signed a Memorandum of Understanding in order to receive BoP assistance together with IMF and World Bank assistance: Cases C-434/11 *Corpul National al Politistilor*, order of 14 December 2011; C-134/12 *Corpul National al Politistilor*, order of 10 May 2012; C-369/12 *Corpul National al Politistilor* order of 15 November 2012.

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framework for drafting conditionality and the respective surveillance for euro area Member was introduced by the Two-pack Regulation (EU) 472/2013.⁹⁶

Thus, the Member States actually when implementing the Council Decisions are subject to the obligations of the Charter. Furthermore, the labelling of Memoranda of Understandings as non EU law acts, but as Eurozone contractual agreements should not be dissociated from the rule of law principle, which provides that “that poor framing cannot be dissociated from the legality Rule of Law issues with these sources: their complexity, inaccessibility and incomprehensibility”.⁹⁷

Furthermore, in this respect the active role of EU institutions involved in EMU-related intergovernmental instruments plays an essential matter. An essential effect of acting outside the EU framework concerns lacking protection of fundamental rights as intergovernmental agreements as such are not covered by the Charter of Fundamental Rights of the European Union. This plays a role when the EFSF and the ESM Treaty borrowed the Commission and the ECB for the implementation and monitoring of the agreed economic adjustment programmes and the conditions set out therein.⁹⁸ Such involvement was criticised for being beyond the institutions’ competence to act, as provided for in the Treaties.⁹⁹ However, the approving decisions are taken by the ESM Board of Governors, consisting of the Finance Ministers of the euro area Member States, the Eurogroup.¹⁰⁰ The CJEU is given jurisprudence in cases of disputes among the Signatory States on the implementation of the duties.¹⁰¹ This led to controversial discussions on the legality of

Also the General Court has been asked to consider the validity of Council measures concerning Greece’ excessive deficit and statements from the Eurogroup regarding Cyprus’ bail-in and bank deposits. All actions so far have been declared inadmissible: Cases T-541/10 and T-215/11 *ADEDY and others v Council*, Orders of 27 November 2012; T-327/13 *Mallis and Malli v European Commission and European Central Bank*, Order of 16 October 2014. On Cyprus, see also Cases T-289/13 *Ledra Advertising Ltd v European Commission and ECB*, Order of 10 November 2014 and pending cases T-149/14 to T-152/14.

⁹⁶ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

⁹⁷ Kilpatrick, C., *Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?*, *EUConst* 2014, 393 (395).

⁹⁸ Artt 2(1), 3(1) EFSF Framework Agreement, Art 4(4), Art 5(3), Art 6 (2), Art 13(1),(3),(7) TESM.

⁹⁹ Beukers, T., *The new ECB and its relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, *Common Market Law Review*, 2013, Vol 50(6), 1579–620, p.1590.

¹⁰⁰ Art 13 TESM and Art 7 Regulation (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

¹⁰¹ Article 8 TSCG and Article 37 TESM.

such.¹⁰² The principal argument against the allocation of tasks to EU institutions in the context of intergovernmental agreements is that the EU Treaties explicitly allow only the exercise of powers within the limits of the powers given to them under the EU Treaties.¹⁰³ In the case *Pringle*, the Court clarified that the EU institutions may be entrusted tasks from outside the Union's legal order. The only condition is that the tasks "do not fall under the exclusive competence of the Union" and that they "do not alter the essential character of the powers conferred on those institutions by the Treaties".¹⁰⁴ Such approach lacks of the safeguard of an accountability guarantee by the European Parliament and judicial control by the CJEU for the EU institutions actions under the ESM and TSCG, which is provided only for measures under EU law.¹⁰⁵ In addition, the CJEU did not rule on the application of the Charter in the context of borrowing EU institutions in intergovernmental mechanisms. However, it must be noted that EU institutions when used for action outside the framework of the EU Treaties, they arguably still remain part of the EU system and thus are bound to European Union law.¹⁰⁶ It is argued that it is crucial that EU institutions cannot circumvent the constraints of the Charter simply by changing the forum in which they carry out their activities.¹⁰⁷

D. Single Resolution Fund

Single Resolution Mechanism is based on a Regulation under the internal market competence of Art 114 TFEU, rules and procedures for the resolution of credit institutions established within the euro area were defined.¹⁰⁸ Due to the prohibition under Art 125 (1) TFEU, the financing for resolution of banks covered by the Single Resolution Fund was created in form of an Intergovernmental Agreement, signed by all EU Member States except

¹⁰² Peers, S., 'Towards a new form of EU law?: The use of EU institutions outside the EU legal framework', *European Constitutional Law Review*, Vol.9(1), 2013, pp.37-72.

¹⁰³ Art 5 (2) and 13 (2) TEU, see P. Craig, 'Pringle and use of EU institutions outside the EU legal framework: Foundations, procedure and substance', *European Constitutional Law Review*, 2013, Vol 9(2), 263–84

¹⁰⁴ CJEU, case *Pringle* C-370/12 ECLI:EU:C:2012:756, para 158

¹⁰⁵ Craig, P., 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism', p.242; Dimopoulos, A., 'The Use of international Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity' in: Adams, M.,(ed.), *The constitutionalization of European budgetary constraints*, *Modern studies in European law*, 2014, p.50.

¹⁰⁶ View of AG Kokott 26.10.2012, C-370/12, para 176.

¹⁰⁷ Peers, S., *Towards a new form of EU law?: The use of EU institutions outside the EU legal framework*, *EuConst* 2013, 37 (53) , p.51ff.

¹⁰⁸ 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.

Sweden and the UK (IGA). It regulates the levy of financial contributions from banks and the transfer and mutualisation of such within the Single Resolution Fund.¹⁰⁹ This roots in the fact that EU rules cannot impose financial obligations upon Member States.¹¹⁰ Current proposals on the European Monetary Fund, which should be part of the EU framework, suggest linking its resources as backstops for the Single Resolution Fund.

V. Conclusions and Outlook

A. General remarks

The EU Member States legal systems were traditionally characterised by openness towards the EU framework, in particular partly by including respective Europe enabling clauses in their constitutions. In the events of the crisis, the motivation of Member States was reflected in the adoption and implementation of EU measures with rather strong impact on the existing national fiscal systems and laws and introduced various new aspects, such national fiscal councils or reinforced fiscal discipline rules. Thereby, the implications by EU measures on the national organisation and control of economic governance are considerable.

The rigid EU Treaty framework and the lack of resources at EU level as well as the emergency situation pushed the Member States to agree on mechanisms for pooling a great amount of resources outside the EU legal order. Even though established as intergovernmental mechanisms, they provided a strong linkage with EU level economic and monetary union. The financial solidarity mechanisms and related national actions triggered most controversies on reforms within the Member States, which is reflected in the number of constitutional revisions. The respective measures had great impact on the budgetary prerogative of national parliaments and limitations by TSCG debt brake or the ESM contribution and decision-making mechanisms. Even though all measures finally passed the constitutionality check, the constitutional review bodies advanced the doctrine of the principle of democracy in relation to the budgetary autonomy of parliaments. The general positive attitude towards the supranational order, which included in some Member States

¹⁰⁹ Intergovernmental Agreement No 8457/14 on the transfer and mutualisation of contributions to the Single Resolution Fund of 21 May 2014.

¹¹⁰ Fabbrini, F., 'On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context', 21 Maastricht Journal of European & International Law, 2014, p.446.

also the EMU related law outside the EU framework, was put at stake. In particular in reaction to the crisis, the concept of national identity and related limits in this field have become central in the debate and may become pertinent for preference formation in particular by the current creditor states and negotiation in terms of future integrative steps in EMU.¹¹¹ The EMU induced national measures adopted in the course of the crisis had decisive impact on some underlying state principles, such as social welfare or internal federalism. In particular the debtor states or those being exposed to the risk of sovereign default or financial illiquidity were ready to approve EMU induced measures, even accepting the curtailment of these constitutional principles.

B. Impact of sidestepping of the EU system

Certainly, the emergency situation in times of crisis led to the increased use of intergovernmental agreements as they were procedurally easier to get adopted. This form of sidestepping from the Union Method implied the side-lining of the checks and balances guaranteed in the institutional set up of the Community Method, involving the European Parliament, the Council and the Commission and respective accountability and legitimization processes.¹¹² The trend for recurrence to intergovernmental level, excludes the democratic legitimization by the European Parliament.¹¹³ Furthermore, the rule on the equality of power of vote among the Member States under Union law does not apply in the intergovernmental setting.¹¹⁴ Furthermore, the democratic and judicial control and the safeguard of the general interest of the Union are left out. The intergovernmental treaties are democratically legitimised by the national parliaments being involved in the ratification process. However, according to the treaties the national parliaments are not included in the substantive decisions.¹¹⁵ In fact, the national control over financial assistance decisions depends de facto

¹¹¹ Schorkopf, F., 'Nationale Verfassungsidentität und europäische Solidarität', in: Callies, C. (ed.) *Europäische Solidarität und nationale Identität – Überlegungen im Kontext der Krise im Euroraum*, 2013.

¹¹² Dawson, M., Witte, F. 'Constitutional Balance in the EU after the Euro-Crisis', *The Modern Law Review*, 2013, Vol. 76(5), p. 830; Keppenne, J.-P., 'Institutional Report', in: Neergard, U., Jacqueson, C., Hartig Danielsen, J., *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU*, Fide Congress report, 2014, p.219 f.

¹¹³ Fabbrini, S., 'Intergovernmentalism and its limits: Assessing the European Union's answer to the euro crisis', *Comparative political studies*, 2013, pp. 1003–1029; Chiti, E., Teixeira, P.-G., 'The constitutional implications of the european responses to the financial and public debt crisis', *Common Market Law Review*, 2013, Vol.50(3), p.689, Witte, 'Treaty Games - Law as instrument and as Constraint in the Euro Crisis Policy', pp. 139–160.

¹¹⁴ Closa Montero, C., 'Moving Away from Unanimity. Ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union', *RECON Online Working Paper 2011/38*, 2011.

¹¹⁵ Beukers, T., 'The Eurozone Crisis and the Legitimacy of Differentiated Integration', *EUI Working Paper MWP 2013/36*, p.13., Curtin, D., 'Challenging Executive Dominance in European Democracy', *The Modern Law*

on the status of being a creditor or debtor state.¹¹⁶ This is most relevant in the case of the emergency voting procedure under the ESM, which is suggested to be the standard rule under the EMF proposal, which only the three financially strongest Member States, namely Germany, France and Italy, an effective veto power in the applicable 85% majority rule.¹¹⁷ On the other side of the mechanism, it could be noted that national control over the final decisions by the debtor state remained rather weak by either accepting or rejecting the deals due to the reasons of urgency.¹¹⁸ Thus, at both sides of the coin, in this context the parliaments do not have effective control power.

While the TSCG introduces at least the option for national parliaments and the European Parliament to participate in an inter-parliamentary conference¹¹⁹, the ESM Treaty lacks of respective option and leaves restricted room for national parliaments to decide on their core area, budgetary decisions. In particular the TESM arrangements, such as decisions on conditionality for financial assistance is blamed for being not transparent and democratically legitimised.¹²⁰ The integration of the ESM into the Treaty framework as foreseen in the European Monetary Fund proposal aims for strengthening the accountability mechanisms. However, as regards the main argument of democratic accountability¹²¹, the European Parliament as well as the national parliaments are not given any decisive competence in the

Review, 2013, Vol.76(5), pp.817-844; Simone, P., Respecting the Democratic Principle in ESM Activities Related to the Context of the Economic and Financial Crisis, in: pp.195-214.

¹¹⁶ Chiti, E., Teixeira, P.-G., 'The constitutional implications of the European responses to the financial and public debt crisis', *Common Market Law Review*, (2013), pp.683-708, p.701.

¹¹⁷ Article 4(4) ESM Treaty. 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 Memorandum of Understanding and the change in pricing policy for the financial assistance. See Article 5(7) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.

¹¹⁸ Crum, B., 'Saving the Euro at the cost of democracy?' *Journal of common Market Studies* (2013), p. 622, Morlino, L., Sottolotta, C.-E., 'Southern Europe and the Eurozone Crisis Negotiations: Preference Formation and Contested Issues', *South European Society and Politics* (2019), pp.1-28.

¹¹⁹ Article 13 TSCG.

¹²⁰ Ruffert, M., 'The European debt crisis and European Union law', *Common Market Law Review* (2011), p. 1789 Witte, B. de, 'Treaty Games - Law as instrument and as Constraint in the Euro Crisis Policy' in: Allen, F. Carletti, E., Simonelli, S. (eds.), *Governance for the Eurozone: Integration or Disintegration?* (FIC Press, 2012), pp. 139–60.', p. 154; Salomon, M., 'Of austerity, human rights and international institutions', *LSE Working Paper N 2*, pp.1-29.

¹²¹ European Commission, *COM (2017)821 Communication on further steps towards completing Europe's economic and monetary union: a roadmap*, p.2-3, European Commission, *COM (2017)826 Proposal for a Regulation amending (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006* (2017), p. 3.

decision-making of the EMF, as only reporting requirements are foreseen.¹²² The European Parliament has to be involved in the adoption of the proposed regulation by the requirement of giving its consent.¹²³ In regard to the national parliaments, their attention has to be drawn on the proposal, which allows them to express their opinion.¹²⁴ 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.¹²⁵

Furthermore, despite the options of participation by non-Euro area Member States is provided for, the cooperation of only a group of EU Member States outside the EU framework increases differentiation among them. This relates mostly to the so-called Euro-filière approach, which reinforces the Eurozone evolution.¹²⁶ It further undermines the incentives for Member States to use the existing EU tool of enhanced cooperation to develop further the Union's objectives and thus overcome potential vetoes by unwilling Member States.¹²⁷

C. Outlook

Certainly, history shows that intergovernmental action for Union objectives is not a new matter, however in reaction to the crisis the increase of use of agreements outside the EU legal order can be noted.

¹²² Article 5 of the European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund (2017); European Commission, COM (2017)827 Proposal for a Council Regulation on the establishment of the European Monetary Fund (2017) 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.

¹²³ Article 352(1) TFEU.

¹²⁴ Article 352(3) TFEU.

¹²⁵ See 2 BvR 1390/12 (BVerfG, 18 March 2012).

¹²⁶ Keppenne, J.-P., 'Institutional Report', in: Neergard, U., Jacqueson, C., Hartig Danielsen, J., The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU, Fide Congress report, 2014, p.207.

¹²⁷ Article 20 TEU and Articles 326-334 TFEU Lisbon. See Schwarz, M., 'A memorandum of misunderstanding - the doomed road of the European stability mechanism and a possible way out: Enhanced cooperation', Common Market Law Review, 2014, Vol.51(2), pp. 389; Hafner, G., 'Bemerkungen zur Völkerrechtssubjektivität der EU- 20 Jahre Ungewissheit', in: Griller, S., Kahl, A., Kneihls, B., Obwexer, W. (eds.), 20 Jahre EU-Mitgliedschaft Österreichs, 2015, p.37.

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. Thereby, the Union pushes for more unity of the euro area Member States and all EU Member States in the long run by promoting a Fiscal Union. 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. However, a crucial obstacle for its proper functioning is the EU's limited fiscal capacity. 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 for the adaption of the EU budget and respective rules. There is a risk of further circumventing the hurdles set by the Treaties by choosing the path of intergovernmental agreements with all related legal and accountability effects, as can be seen with the proposal on the European investment protection scheme and Stabilisation Support Fund.¹²⁸

As concerns the proposed integration of the ESM into the EU framework, it must be noted that essential novelties are intended to be introduced touching on the national budgetary autonomy. The proposed regulation changes several voting requirements for principal

¹²⁸ European Commission, *COM (2018)387 Proposal for a Regulation on the establishment of a European Investment Stabilisation Function*, Articles 17ff., European Commission, *Proposal for an Agreement on the Transfer of Contributions to the Stabilisation Support Fund* (2018); 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 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 Breuss, F., '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.

decisions for the EMF activities from unanimity to reinforced qualified majority voting in the Board of Governors and thereby transforms the former ESM voting procedure into the standard rule.¹²⁹ 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 Memoranda of Understanding and the change in pricing policy for the financial assistance.¹³⁰ This implies that only bigger members, such as Germany, France and Italy would have veto powers in these fields.

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.¹³¹ 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.¹³² Certainly, these options provide for more room of engagement of national parliaments in the debate, however 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.

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.

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

¹²⁹ Article 4(4) *TESM*.

¹³⁰ Article 5 (7) European Commission, Annex to Proposal for a Council Regulation on the establishment of the European Monetary Fund.

¹³¹ European Commission, COM (2017)821 Communication on further steps towards completing Europe's economic and monetary union: a roadmap, pp.2-3.

¹³² European Commission, COM (2017)291 Reflection paper on the deepening of the economic and monetary union, pp. 27-28.

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.

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