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THE EUROPEAN FINANCIAL CRISIS –  
CONSTITUTIONAL ASPECTS AND IMPLICATIONS

Kaarlo Tuori



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
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## **Abstract**

With its provisions on the EMU, the Maastricht Treaty introduced a new, 'macroeconomic' layer into the European economic constitution. The Maastricht layer of the European economic constitution was based on the following principles: exclusive competence of the EU in monetary policy in the euro area; price stability as the primary objective of Europeanized monetary policy; independence of the ECB and national central banks; Member State sovereignty in fiscal and economic policy with the Union accomplishing a mere coordinating task; Member State fiscal liability as the reverse of their fiscal sovereignty; and primacy of price stability pursued by Europeanized monetary policy over national fiscal-policy objectives. The ongoing euro-area crisis is a constitutional crisis, too. The European responses to the crisis include, on the one hand, emergency measures and stability mechanisms, and, on the other hand, strengthening European economic governance. As a consequence of these responses, the central Maastricht principles of the European economic constitution are teetering. However, the present constitutional crisis should not merely be conceived in economic terms. It extends to the political and social dimensions; it also affects democracy and transparency, as well as social values and rights.

## **Keywords**

Fiscal Crisis, Economic Constitution, Maastricht Principles, Inter-Governmentalism, Democratic Deficit, Social Constitution

## **Author Contact Details**

Kaarlo Tuori,  
University of Helsinki and Academy of Finland,  
PO Box 4,  
FIN-00014 Helsinki University,  
Kaarlo.Tuori@Helsinki.Fi

# THE EUROPEAN FINANCIAL CRISIS – CONSTITUTIONAL ASPECTS AND IMPLICATIONS

*Kaarlo Tuori\**

## **I Background**

### *The Issues*

The ongoing crisis in the EU and especially the euro area possesses many aspects. It is not only an economic or financial crisis<sup>1</sup> but a constitutional crisis as well. As I shall argue, it has shaken the foundations of what I shall term the second layer of the EU economic constitution. At issue are the Maastricht principles of the economic constitution. However, the present crisis has constitutional implications not only at the transnational, European, level but also in the Member States. This is not surprising: the European constitution should always be examined in its interaction with its Member-State counterparts. In this paper, I shall address both levels, although my primary focus will be on the European economic constitution. Of course, the repercussions at the Member-State level display some variance, depending on the variance of the constitutional provisions in force. Examples are needed, and here I shall rely on my participant's knowledge of the Finnish constitutional situation and compare it with German developments.

At the European level, the constitutional issues can be roughly divided into two groups. First, the measures undertaken to combat the crisis can be examined in the light of individual Treaty provisions, such as the emergency provision in Art 122(2) Treaty on the Functioning of the European Union (TFEU), the prohibition of central-bank financing in Art 123 TFEU, the no-bailout clause in Art 125(1) TFEU or the provisions on mutual surveillance procedure in Art 121 TFEU and excessive deficit procedure in Art 126 TFEU. These important issues will be discussed in Section III of the paper, after a summarizing presentation of European responses to the crisis in Section II. But even more pertinent are questions of a more principal nature which these responses also raise. These relate to, e.g., the character and locus of and interplay between monetary and fiscal policy; the respective competences of the EU and the Member States; the horizontal relations among the Member States with regard to Member States' fiscal liability and mutual solidarity; the rise of 'new intergovernmentalism'; the increasing legal, institutional and territorial fragmentation of the EU; the fate of the social constitution; and, last but not least, the democratic legitimacy of both the EU and its Member State polities. Section IV of the paper focuses on such issues of constitutional principles.

Before addressing recent events, I shall briefly sketch the historical development of the European economic constitution (Section I). Two distinct phases can be discerned, with the Maastricht Treaty and introduction of the EMU as the watershed. The second phase has continued all the way through the Lisbon Treaty to the eruption of the present crisis. Now, with the emergence of 'new European economic governance', we appear to stand at the threshold of a new, third phase.

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<sup>1</sup> 'Financial crisis' is used here as an umbrella concept which covers the crisis in financial markets, erupting in autumn 2008 after the collapse of Lehmann Brothers, as well as the fiscal and sovereign debt crisis in the EU and, more particularly, the euro area (the EMU).

The historical foray is premised on an understanding of the specificity of the European, transnational, constitution which I have presented in previous papers. I have argued that the European constitution must be analysed as a multi-dimensional and multi-phased process of constitutionalisation, where a specific dimension always determines the pace and induces development in other dimensions.<sup>2</sup> The ongoing ‘constitutional mutation’<sup>3</sup> is not restricted to the economic aspect. One of my central conclusions will be that developments in the economic dimension of the European constitution have significant repercussions in the fields of the political and social constitution. The financial crisis appears to have catapulted the economic constitution back to the pace-maker position it occupied in the initial phase of European constitutionalisation, i.e., after the entry into force of the Treaty of Rome. The present constitutional crisis should not merely be conceived in economic terms. It extends to the political and social dimensions; it also affects democracy and transparency, as well as social values and rights.

### ***European Economic Constitution: Economic Policy Competences before Maastricht***

Much has been made of the influence of the German *ordoliberal* school on the European economic constitution, especially in the pre-Maastricht period. Indeed, even the very term ‘economic constitution’ is of ordoliberal origin. Ordoliberals deserve credit, if not for anything else, then at least for explicitly spelling out the economic doctrine which informs their reading of the European economic constitution. Central to the European economic constitution was – and, according to present-day ordoliberals, still is – a *Gesamtscheidung* in favour of a free market economy, based on undistorted competition. Accordingly, in the Rome Treaty, the crux of the economic constitution consisted of the fundamental market freedoms and competition law. The principles of direct effect and primacy as confirmed in such ECJ landmark cases as *Van Gend en Loos* and *Costa v Enel* ensured that the European economic constitution was respected in national legal systems as well.<sup>4</sup>

What was the position of monetary and fiscal policy in the European economic constitution, particularly in its ordoliberal reading? Undoubtedly, *price stability* is part of the *ordo*, the formal foundational framework, which the economic constitution and the *Ordnungspolitik* securing its realisation are supposed to guarantee. In the ordoliberal view, a well-functioning price mechanism is as essential for a *free market based on undistorted competition* as it is in Friedrich Hayek’s version of neo-liberalism; only a stable price mechanism is capable of accomplishing its informational and incentive functions. Consequently, monetary policy aiming at price stability formed a central part of the constitutional framework which was to support the European economy. In his *Grundsätze der Wirtschaftspolitik*, Walter Eucken – the leading ordoliberal economist – elevates a functioning price system of complete competition<sup>5</sup> to an essential criterion of all measures of economic policy and, by the same token, to the basic principle of economic constitutional law.<sup>6</sup> Furthermore, primacy of monetary policy heads his list of the constitutive principles of the system of competition.<sup>7</sup> This is

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<sup>2</sup> K Tuori, ‘The Many Constitutions of Europe’ in Tuori and S Sankari (eds), *The Many Constitutions of Europe* (Ashgate, London 2011), 3-30; K Tuori, ‘La Constitution Economique Parmi les Constitutions Européennes’ (2011) 4 *Revue Internationale de Droit Economique* 559.

<sup>3</sup> E Chiti, AJ Menéndez and PG Teixeira, ‘The European Rescue of the European Union’ in Chiti, Menéndez and Teixeira (eds), *The European Rescue of the European Union* (ARENA Centre for European Studies, Oslo 2012) 418 ff.

<sup>4</sup> Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1; Case C-6/64 *Flaminio Costa v Enel* [1964] ECR 585.

<sup>5</sup> ‘Die Herstellung eines funktionsfähigen Preissystems vollständiger Konkurrenz.’

<sup>6</sup> W Eucken, *Grundsätze der Wirtschaftspolitik* (JCB Mohr, Tübingen 1952), 254.

<sup>7</sup> ‘Die konstituierenden Prinzipien der Wettbewerbsordnung.’



followed by the principles of open market, private property, freedom of contract, liability (*Haftung*) and stability of economic policy.<sup>8</sup>

A *European* economic constitution focusing on fundamental market freedoms and competition law builds on support from *Member State* constitutions and *Ordnungspolitik*. The *ordo*, facilitating a common free market based on undistorted competition, is produced partly by transnational and partly by national arrangements. The fundamental rights indispensable for a market economy are guaranteed by national constitutions and not by European Treaty law. These rights comprise private property and freedom of contract, included in Eucken's constitutive principles, and freedom of trade, which for Franz Böhm – the leading legal scholar among first-generation ordoliberal – forms the foundation of the economic constitution.<sup>9</sup>

In the original European economic constitution, guaranteeing price stability and primacy of monetary policy was a task, not for the centralised European level, but for the decentralised Member-State level. In Germany, the powerful *Deutsche Bundesbank* consequently pursued its successful anti-inflationary monetary policy with stability of prices and currency as its overriding objective. Art 104(1) of the Rome Treaty evoked such aims of exchange-rate and monetary policy as the equilibrium of overall balance of payments, and maintenance of confidence in the currency and price stability, but these were defined as objectives for the Member States. They were not the only objectives the Treaty expected Member States to pursue. Provisions on economic policy were a compromise between ordoliberal and more dirigist views – represented by, first of all French negotiators – and, as a concession to the latter, ensuring a high level of employment was invoked as well, and even conjunctural policy received a mention.<sup>10</sup>

Monetary and economic policy fell to Member States, but these were supposed to coordinate their policies in order to facilitate attaining the objectives laid down in Art 104 of the Treaty.<sup>11</sup> The most far-going Community competences concerned Member States' exchange-rate policy and their balance of payments, where the Treaty went beyond soft methods of coordination. Art 107(2) granted the Commission the power to react and to authorise the other Member States to take necessary counter-measures in case a Member State made an alteration in its rate of exchange which was inconsistent with the objectives set out in Art 104 and which seriously distorted conditions of competition. Where a Member State was in difficulties with regard to its balance of payments or was seriously threatened with such difficulties, and these were liable to jeopardise the functioning of the common market or the progressive implementation of the common commercial policy, the available Community measures comprised granting mutual assistance. Art 108, providing for such assistance, is a predecessor to Art

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<sup>8</sup> Eucken (n 7), 255 ff.

<sup>9</sup> F Böhm, *Wettbewerb und Monopolkampf* (Carl Heymanns Verlag, Berlin 1933).

<sup>10</sup> According to Art 103(1), Member States were supposed to regard their conjunctural policies as a matter of common concern and to consult each other and the Commission on the measures to be taken in the light of the prevailing circumstances. The Common Agricultural Policy was, of course, the most conspicuous example in the Treaty of the influence of (French) dirigist views.

<sup>11</sup> The introductory Arts of the Treaty contained some vague and largely programmatic provisions on horizontal coordination. Art 2 referred to progressive approximation of the economic policies of the Member States: 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.' In turn, Art 3 laid down that the activities of the Community included 'the application of procedures by which the economic policies of Member States can be coordinated and disequilibria in their balances of payments remedied'. Furthermore, Art 6(1) provided that 'Member States shall, in close cooperation with the institutions of the Community, coordinate their respective economic policies to the extent necessary to attain the objectives of this Treaty'. Art 105 provided for a Monetary Committee, composed of representatives of Member States and the Commission, which was expected to fulfil coordinating tasks but which had a merely advisory status.

143 TFEU for mutual assistance to non-euro Member States facing difficulties in their balance of payments.<sup>12</sup>

In sum, the European economic constitution introduced by the Treaty of Rome implied monetary policy aiming at price stability but, in the division of competences between the Community and the Member States, assigned this task, alongside fiscal and economic policy, to the latter. Community institutions, such as the Commission and the Monetary Committee,<sup>13</sup> were to play a merely coordinating role. Subsequently, the ECJ assumed a vital role in supervising that Member States exercised their sovereignty in economic policy within the limits of the core principles of the European economic constitution. The Court employed fundamental market freedoms and competition law, furnished with direct effect and primacy, to strike down Member State legislation which contradicted its reading of the economic constitution.

On the road from Rome to Maastricht, the major results in coordinating Member State policy were achieved in exchange-rate policy. However, abandoning formally fixed exchange rates in the early 1970s, after the collapse of the Bretton Woods system, hampered full realisation of the proposals put forth by the Werner Committee in 1970.<sup>14</sup> Nevertheless, an effort was made to retain the floating of Member State currencies within the so-called snake. The most important attempts to coordinate exchange rates and achieve monetary stability were the establishment of the European Monetary System (EMS) in 1978 as well as subsequent introduction of the Exchange Rate Mechanism (ERM) and the European Currency Unit (ECU). Yet, these steps could not prevent the currency crisis which hit some Member States in 1992-1993.

### ***The Maastricht Principles***

With its provisions on Economic and Monetary Union (EMU), the Treaty of Maastricht added a new layer to the European economic constitution, while leaving intact the constitutional foundation of fundamental market freedoms and competition law. While the first layer of the European economic constitution focuses on the basic principles of microeconomics, the second layer addresses issues of macroeconomics. The Maastricht principles of the European economic constitution must be read with due attention to the Stability and Growth Pact. This Pact, while only dating from 1997 and not possessing formal constitutional status, is based on these principles, and acts out some of their implications. The Maastricht Treaty launched a bifurcation of the economic constitution which shows no signs of being dissolved, indeed rather the contrary: the economic constitution of the euro area is not identical to that applicable to non-euro Member States. In the following, my primary focus will be on the euro area. References will be to the Founding Treaties such as they are after the Lisbon Treaty. Although some amendments were introduced in Lisbon, they were not of a decisive character.

The major change brought about by the Maastricht Treaty was the *Europeanization of monetary policy*: as is laid down in Art 3(1)(c) TFEU, the Union has exclusive competence in ‘monetary policy for the Member States whose currency is the euro’. Initially, scepticism about the EMU and the common currency was quite common among German ordoliberals. Their doubts were shared by many

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<sup>12</sup> Unilateral protective measures were also allowed, either as a precaution or, on the Commission’s authorisation, where the Council had not granted mutual assistance or it had proven insufficient.

<sup>13</sup> Art 105(2) of the Rome Treaty established a Monetary Committee with advisory status ‘in order to promote co-ordination of the policies of Member States in the monetary field to the full extent needed for the functioning of the common market’. It was supposed ‘to keep under review the monetary and financial situation of the Member States and of the Community and the general payments system of the Member States and to report regularly thereon to the Council and to the Commission’. In addition, it was expected to deliver opinions to the Council and the Commission at the request of these institutions or on its own initiative. The Member States and the Commission each appointed two members of the Committee.

<sup>14</sup> Report to the Council and the Commission on the Realisation by Stages of Economic and Monetary Union in the Community (Werner Report), Werner Committee, in Bulletin of the European Communities, 7 (1970) (supplement).

other adherents to the neoliberal monetarist trend, who since the late 1970s seemed to have gained the upper hand over their Keynesian rivals. However, monetarists had a clear impact on the definition of monetary-policy objectives and the institutional position of the European Central Bank (ECB) and the national central banks, forming the European System of Central Banks (ESCB). Even initially recalcitrant German ordoliberals gradually made their peace with the loss of the *Deutsche Mark* and the independent *Deutsche Bank* as the guarantor of its stability. Arts 119(2) and 127(1) TFEU elevate *price stability* to the primary objective of monetary and exchange-rate policy; general economic policies may only be supported if this can be done without prejudice to price stability. Arts 119(2) and 127(1) also relate monetary policy to the basic principles of the first layer of the European economic constitution: open market economy and free competition. The institutional provisions, in turn, aim to secure the enhanced *independence of both the ECB and national central banks*, not only in euro states but in other Member States, too.<sup>15</sup>

Contrary to monetary policy, the Maastricht Treaty retained *Member States' sovereignty in fiscal and economic policy*. This produced what has often been characterised as the Maastricht asymmetry: a combination of transnational, European monetary policy with national fiscal and economy policy.<sup>16</sup> And it is this very asymmetry which many observers tend to blame for present-day difficulties. As an integral corollary of Member State fiscal sovereignty, the Union does not possess any power of taxation.<sup>17</sup> However, Member State sovereignty in fiscal and economic policy is not absolute but conditioned by specific constraints.

In general economic policy, the Treaties now as before impose on Member States an obligation of coordination and on the Union the task of facilitating this coordination.<sup>18</sup> Art 5(1) TFEU invokes broad guidelines, adopted by the Council, as a central vehicle for fulfilling this task. In turn, Art 121 TFEU inserts these guidelines in the larger framework of the mutual surveillance procedure. While fiscal policy also remains in the province of Member States, here the European constraints are tighter than in economic policy in general. The checks reflect the ordoliberal (and monetarist) tenets of the *primacy of monetary over fiscal policy*: distinct fiscal and economic policy objectives can only be achieved under conditions of guaranteed price stability. Thus, the Treaties purport to perform the intricate task of guaranteeing at Member-State level the fiscal discipline which European monetary policy prioritizing price stability presupposes.

The 'basic safeguards against fiscal profligacy'<sup>19</sup> include the no-bailout clause precluding sharing of liability for government debt across Member States or by the Union (Art 125(1) TFEU). The no-

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<sup>15</sup> The basic provision is in Art 130 TFEU: 'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.' Art 131 obliges each Member State to 'ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB'.

<sup>16</sup> See, e.g., Chiti et. al. (n 3), 397-400.

<sup>17</sup> Even the EU's competence of harmonizing Member-State taxation legislation concerns merely indirect taxes 'to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition' (Art 113 TFEU).

<sup>18</sup> The basic provision is in Art 2(3) TFEU: 'The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.' Art 5(1) TFEU repeats the Member States' obligation to coordinate their economic policies within the Union and adds that 'to this end, the Council shall adopt measures, in particular broad guidelines for these policies'. It also lays down that 'specific provisions shall apply to those Member States whose currency is the euro'.

<sup>19</sup> L Schuknecht and others, 'The Stability and Growth Pact – Crisis and Reform', No 129 (September 2011), Occasional Paper Series, ECB.

bailout clause gives expression to *Member States' fiscal liability*; a constitutional principle which is the reverse of Member States' fiscal sovereignty. Furthermore, sound public finances are aimed at through provisions which prohibit central-bank financing of government spending (Art 123(1) TFEU); privileged access to financial institutions by the public sector (Art 124 TFEU); as well as excessive budget deficits and government debt (Art 126 TFEU). The convergence criteria which have to be met before a Member State is eligible for the euro were also designed with a view to securing sound public finances. The criteria refer to price stability, budget deficit, stability of exchange rate and the long-term interest rate level (Art 140(2) TFEU). Finally, Treaty provisions (Arts 121 and 126 TFEU) on continuous monitoring by the Commission and the Council were expected to curb – and in case of failure – keep track of and put a stop to Member States' deviating from the path of prudent fiscal policy. These provisions were added new thrust through the *Stability and Growth Pact*, concluded in 1997 in anticipation of the approaching third stage in implementation of the EMU.

In its original shape, the Stability and Growth Pact consisted of a legally non-binding, political Resolution adopted by the European Council 17 June 1997, and two Council Regulations, translating the political guidelines into legal language.<sup>20</sup> The Resolution made clear the primacy of monetary policy, aiming at price stability, with regard to fiscal policy. The European Council underlined 'the importance of safeguarding sound government finances as a means to strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation', and declared it 'necessary to ensure that national budgetary policies support stability oriented monetary policies'.

The Stability and Growth Pact includes both a preventive and a corrective arm. Art 121 TFEU provides the Treaty basis for the *mutual surveillance procedure* which constitutes the core of the preventive arm and Art 126 TFEU for the corrective arm, centred around the excessive deficit procedure.<sup>21</sup> According to Art 121 TFEU, the multilateral surveillance procedure is supposed to follow economic developments in each of the Member States and in the Union, and assess the consistency of economic policies with the broad economic guidelines.<sup>22</sup> The Stability and Growth Pact shifted the focus of the procedure to fiscal policy and budgetary discipline.

Regulation on strengthening surveillance of budgetary positions and surveillance and coordination of economic policies (Regulation 1466/97) introduced medium-term programmes which Member States are required to submit to the Council and the Commission and which are supposed to contain the information necessary for the purpose of multilateral surveillance. The *stability programmes* of the Member States participating in the EMU include the *medium-term objective* for the budgetary position of close to balance or in surplus and the adjustment path towards this objective for the general government surplus/deficit and the expected path of the general government debt ratio; the main assumptions about expected economic developments and important economic variables which are relevant to the realization of the stability programme; as well as a description of budgetary and other economic policy measures being taken and/or proposed to achieve the objectives of the programme.

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<sup>20</sup> The term 'Stability and Growth Pact' is misleading in the sense that no legal intergovernmental agreement exists. Resolution on the Stability and Growth Pact of Amsterdam OJ [1997] C236/1; Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, [1997] OJ L209/1 – 21.

<sup>21</sup> The provisions of Art 126 TFEU are further specified in the Protocol on the excessive deficit procedure, already attached to the Maastricht Treaty.

<sup>22</sup> The Council adopts the guidelines on the basis of a conclusion by the European Council. The economic guidelines have been merged with the employment policy guidelines drawn up pursuant to Art 148(2) TFEU.

The Council monitors compliance with the programmes, assisted by the Commission and the Economic and Financial Committee.<sup>23</sup> The Council is expected to invite a Member State to adjust its stability programme if it considers that the objectives and contents of the programme should be strengthened. Monitoring also covers implementation of the programmes, particularly with a view to identifying actual or expected significant divergence of the budgetary position from the medium-term budgetary objective, or the adjustment path towards it. If the Council identifies significant divergence in either respect, it gives an early warning in order to prevent the occurrence of an excessive deficit and recommends the Member State concerned to take the necessary adjustment measures. If the Council in its subsequent monitoring judges that the divergence is persisting or worsening, it addresses a new recommendation to the Member State to take prompt corrective measures. As is also laid down in Art 121(4) TFEU, the Council may add to the effect of its recommendation by making it public. With its legally non-binding guidelines, peer review through the Council and likewise legally non-binding country-specific recommendations, the mutual surveillance procedure under Art 121 and Regulation 1466/97 represents an open method of coordination *avant la lettre*.

If preventive measures do not lead to expected results, the corrective arm of the Stability and Growth Pact is supposed to take over. In line with the mutual surveillance procedure, the emphasis in the *excessive deficit procedure* under Art 126 TFEU and the complementary Protocol lies on an open method of coordination, relying on peer review and soft-law instruments. However, even formal sanctions are available against delinquent states. Art 126 TFEU assigns the Commission the task of monitoring development of the budgetary situation and the stock of government debt in the Member States with a view to identifying gross errors. In particular, it is expected to examine compliance with budgetary discipline, employing criteria based on the *reference values of government deficit and debt*, which the Protocol has fixed at 3 and 60 % of gross domestic product, respectively.

Subsequent measures set out by Art 126 TFEU target budgetary deficits. If the Commission considers that an excessive deficit exists or may occur, it addresses an opinion to the Member State concerned. It also informs the Council. When the Council, in an overall assessment, decides that an excessive deficit exists, it adopts recommendations addressed to the Member State with a view to bringing that situation to an end within a given period. Where it establishes that no effective action has been taken in response to its recommendations within the period laid down, the Council may make its recommendations public. If a Member State persists in failing to put into practice the Council's recommendations, the Council may decide to give notice to the Member State to take, within a specified time limit, measures which the Council deems necessary for reducing the deficit. As long as a Member State fails to comply with the Council's decision, the Council may apply specific sanctions, such as a non-interest-bearing deposit and fines of appropriate size. The Council takes its decisions on a recommendation from the Commission and without taking into account the vote of the member of the Council representing the Member State concerned.<sup>24</sup>

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<sup>23</sup> The Economic and Financial Committee can be considered the successor to the Monetary Committee, established by the Treaty of Rome. According to Art 134(1), this expert committee with advisory status has been established 'in order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market'. The Member States, the Commission and the ECB each appoint no more than two members of the Committee (Art 134(3)).

<sup>24</sup> Regulation 1497/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6, which was adopted as part of the Stability and Growth Pact, did not introduce new measures but complemented the already quite detailed provisions in the Treaty and the Protocol by regulating the timetable for the diverse phases and measures of the procedure and by further specifying the deposits and fines which can be imposed on a Member State failing to correct its excessive deficit. For a discussion of the Stability and Growth Pact in its original form see F Antenbrink and J de Haan, 'Economic Governance in the European Union – Fiscal Policy Discipline versus Flexibility' (2003) 40 Common Market Law Review 1057.

To sum up, the Maastricht premises of European economic constitution include the following principles:

- exclusive competence of the EU in monetary policy in the euro area
- price stability as the primary objective of Europeanized monetary policy
- independence of the ECB and national central banks
- Member State sovereignty in fiscal and economic policy with the Union accomplishing a mere coordinating task
- Member State fiscal liability as the reverse of their fiscal sovereignty
- primacy of price stability pursued by Europeanized monetary policy over national fiscal-policy objectives
- Member State fiscal discipline and prudent fiscal policy.<sup>25</sup>

Subsequent Treaty amendments, including those introduced in Lisbon, have not touched upon the Maastricht principles. The major novelties brought by the Lisbon Treaty concern the specific regime of the euro area. The general expectation in Maastricht was that after fulfilling the convergence criteria, all Member States would sooner or later join the EMU, and that the formal derogations, granted in Maastricht through specific Protocols to the UK and Denmark, would turn out to be exceptional and hopefully only temporary. The Lisbon Chapter on the euro area<sup>26</sup> reflects resignation in front of a lingering bifurcation of the Union into the euro area and non-euro Member States. The Chapter constitutionalises a separate legal and institutional framework for the euro area, by facilitating particular secondary legislation on the preventive and corrective arm of the Stability and Growth Pact, and by formalizing the Euro Group; i.e., the euro-area composition the Ecofin Council, consisting of the Member State economics and finance ministers, as well as budget ministers when budgetary issues are discussed. The Chapter signifies retreat from the *principle of European unity* which the Maastricht provisions on the EMU still manifested.<sup>27</sup>

Like constitutional principles in general, the Maastricht principles of the European economic constitution should be read through their underlying rationale: basic factual and normative assumptions concerning the functioning of the social field they are supposed to organise. I have already referred to the continuing influence of ordoliberal thinking on German positions, and Germany, as the strongest economy in the EU, was able to exercise decisive influence on the outcome of the negotiations and drafting process leading to the Maastricht Treaty. Still, German ordoliberals held no monopoly over the economic views impacting the Maastricht principles.<sup>28</sup> These views include the conception of *monetary policy as a non-political policy field*, which is expected to pursue price stability as an ‘objectively-given’ aim, arising from the framework requirements of a free market economy. Monetary policy should be a province of independent economic experts, undisturbed by democratic politics and demands of particular interests. Not only has monetary policy no need of continuously produced *democratic legitimacy* but subordinating it to the whims of democratic politics would be disastrous. Hence, according to this way of thinking, by its very nature monetary policy lent itself to Europeanization, to transfer to the care of transnational experts. In this respect, it was comparable to competition policy, one of the two limbs of the original European economic

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<sup>25</sup> As a term and as specific legal obligation, ‘prudent fiscal policy’ was introduced by Council Directive on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

<sup>26</sup> Ch 4 of Title VIII TFEU (Provisions specific to member states whose currency is the euro).

<sup>27</sup> Chiti et. al. (n 3), 423-4.

<sup>28</sup> Economic theorists, often lumped together as neo-liberals, may, though, display important variance in their views. Thus, the emphasis on the *ordo*, guaranteed by public institutions – such as courts, a competition authority and a central bank – was foreign to neo-liberals of the Hayekian or Chicago brand.

constitution, which the Treaty of Rome had assigned to the Commission, another transnational expert institution.

Fiscal policy, by contrast, was seen in different terms. Both tax and spending policy have redistributive consequences and, consequently, are in need of democratic legitimation, which they only can acquire through national political procedures. This justifies the maintenance of Member States' fiscal sovereignty. However, unbridled national fiscal policy was conceived as a threat to a transnational monetary policy aiming at price stability, and to ward off this threat, and to subordinate fiscal policy to the presuppositions of monetary policy, 'basic safeguards against fiscal profligacy' were introduced. These included the no-bailout clause, manifesting the principle of Member States' fiscal liability as the reverse of their fiscal sovereignty. The no-bailout clause also reflected confidence in the disciplining power of credit markets: states would be punished for irresponsible fiscal policy and rewarded for responsible fiscal policy through the price they have to pay for their debt.

## II European Responses to the Sovereign Debt Crisis

### *The Crisis Erupts*

Discussing the causes of the still ongoing crisis or its exact nature and appropriate designation falls outside my present purposes. Suffice to say that the crisis was a result of a combination of long- and short-term causes. The former include the asymmetries of the EMU, such as the uneasy relation between Europeanized monetary and national fiscal policy, as well as the economic differences among euro-area states which led to divergent economic consequences of a uniform interest- and exchange rate policy.<sup>29</sup> The short-term causes, in turn, comprise global turbulence in financial markets since 2008, the ensuing economic stagnation and subsequent growth-inducing measures weighing on public finances. The immediate background to the rampant growth of public debt in the worst-off euro-area states displays significant variance. In Ireland and Spain, low interest rates gave rise to a bubble in the real-estate market whose bursting strained the solvency of the banking system, while in Greece, false public accounting played its part.

The aggravation of the Greek debt crisis in early 2010 largely caught the EU and the euro states unprepared. The Maastricht economic constitution was based on the assumption that the 'basic safeguards against fiscal profligacy' in Arts 123-125 TFEU, the convergence criteria of the EMU and the Stability and Growth Pact would suffice to ensure financial stability and to impose the necessary restraint on euro-area Member States, although these still retained fiscal-policy sovereignty. Arguably, the no-bailout clause was also supposed to be taken in earnest: if the constraints could not prevent reckless fiscal policy and ensuing indebtedness, the state at issue would be left to default.

Constitutional safeguards proved powerless either to prevent or to combat the sovereign debt crisis in 2010. To make matters worse, the Stability and Growth Pact suffered from inherent weaknesses.<sup>30</sup> Art 126 TFEU and the related Protocol employ two criteria for assessing and disciplining Member State fiscal policy: government deficit and government debt. The Stability and Growth Pact put clear emphasis on the former, with the implicit expectation that shrinking the budget deficit would also reduce indebtedness. Provisions in Regulation 1466/97 on the preventive arm of the mutual surveillance procedure concentrated on budgetary targets, and the corrective arm under Regulation 1467/97 could only be triggered off in the case of a Member State exceeding the budget deficit reference value. Furthermore, in 2005 the Stability and Growth Pact was watered down by amendments to the two Regulations, while the discretion of the Commission and the Council in monitoring the mutual surveillance and excessive deficit procedures was increased.<sup>31</sup> This occurred as a reaction to application of the excessive deficit procedure to France and Germany; that is, the two biggest Member States.

The procedure was launched against Germany in November 2002 and against France in April 2003. In both cases, the Council decided, on a recommendation from the Commission, that an excessive deficit existed and in accordance with Art 104(7) EC (now 126(7) TFEU) and Art 3(4) of Regulation 1467/97, recommended the German and French governments to bring the deficit to an end. The Council also set a deadline for taking the necessary measures and ending the deficit. As the next step, the Commission sent to the Council recommendations for decisions founded on Art 104(8) EC (now 126(8) TFEU), in order for the Council to establish that the

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<sup>29</sup> FW Scharpf: 'Monetary Union, Fiscal Crisis and the Preemption of Democracy', No 36/2011, LEQS Annual Lecture Paper, London School of Economics and Political Science.

<sup>30</sup> Tellingly enough, the excessive deficit procedure has been launched for most Member States – at present the procedure is pending for 23 of them – but never has it led to the imposition of sanctions.

<sup>31</sup> Council Regulations 1055/2005 and 1056/2005, [2005] OJ L174/1-8.



respective Member States had not taken adequate action to correct the excessive deficit. The Commission also recommended the Council to decide, under Art 104(9) EC (now 126(9) TFEU), giving France and Germany notice to put an end to their excessive deficit situation by 2005 at the latest and to achieve an annual reduction in 2004 in the cyclically-adjusted budget deficit equal to 1% of gross domestic product, in the case of France, and 0.8 % in the case of Germany. In the vote in the Council, the required qualified majority was not reached for approving the Commission's recommendations under either Art 104(8) or 104(9) EC. France or Germany were not allowed to vote in their own cases but could reciprocally influence the result of the vote in each other's case. In its conclusions, the Council decided not to act on the basis of the Commission recommendation for a Council decision under Art 104(9) EC, but agreed to hold the excessive deficit procedure in abeyance.

The Commission took the cases to the ECJ. The Commission demanded that the Court should 'annul, first, the decisions of the Council not to adopt the formal instruments contained in the Commission's recommendations pursuant to Art 104(8) and (9) EC and, second, the Council's conclusions in so far as they involve holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty and modification of the recommendations decided on by the Council under Art 104(7) EC'. The Court found the action inadmissible in so far as it sought annulment of the Council's failure to adopt the formal instruments contained in the Commission's recommendations pursuant to Art 104(8) and (9) EC. With regard to the other claim, the Court found that neither Art 104 EC nor Regulation 1467/1997 provided for the possibility of deciding to hold the procedure in abeyance in the situation covered by the Council's conclusions.<sup>32</sup>

Thus, the Court's ruling manifested a partial victory for the Commission, which favoured strict observance of the excessive deficit procedure. But the events clearly showed the weakness of a procedure where states monitor each other – and not only each other but even themselves - at least when launched against larger Member States. The conclusion the Council drew from the incident was not tightening but loosening the provisions of the Regulations on the preventive and corrective arm of the Stability and Growth Pact.

Furthermore, sticking to the no-bailout clause and letting a crisis state default has not really been an option. A cynical observer would explain this by the interests of banks and other private investors, to whose lobbying the governments of larger euro states have lent a sensitive ear. A more respectable explanation invokes the threat of contagion and the need to ensure the financial stability of the euro area as whole; a viewpoint the Maastricht economic constitution downplayed.

European reactions to the crisis fall into two categories. First, rescue packages have been assembled to pull the worst-hit countries out of the most acute difficulties, and *financial stability mechanisms* have been established, not only to provide *emergency assistance* but also to avert contagion and to enhance the confidence of financial markets in the euro area's ability to cope with the situation. Secondly, emergency measures and building financial and institutional capacity to meet future crises have been flanked by efforts to *strengthen European economic governance*. The objective is to remedy the insufficiencies and inefficiencies of the Maastricht constraints on national fiscal policy which had proven unable to prevent turmoil erupting in spring 2010. In the following, I shall first outline the major developments on both fronts and then turn to their constitutional analysis in Section III.

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32 Case C-27/04 *Commission v Council* [2004] ECR I-6649.

### ***Emergency Measures and Stability Mechanisms***

When the Greek debt crisis worsened, no mechanism was in place for emergency financial assistance to a Member State overburdened with debt and threatened by insolvency. This left the field open for legal improvisation.<sup>33</sup> The *first Greek rescue package* was anchored in instruments of varying legal nature: a *sui generis* decision on 2 May by the Ecofin Council meeting in its Euro Group composition<sup>34</sup>; a *Loan Facility Agreement* between Greece and the other euro-area states, settling the availability of credits in the form of pooled bilateral loans for Greece; an *Intercreditor Agreement* among the creditor states<sup>35</sup>; and a *Memorandum of Understanding (MoU)* signed by Greece and the Commission, on behalf of the Member States belonging to the Euro Group, and spelling out the adjustment programme to which Greece committed itself as a condition for the loans.<sup>36</sup> The package introduced some distinctive features which have characterized subsequent financial stability mechanisms: reliance on intergovernmental agreements and institutional solutions outside the Treaty framework, as well as the centrality of an adjustment programme, set out in a MoU, as a condition for assistance. The Commission was assigned co-ordinating and monitoring tasks, but it was supposed to perform these outside its Treaty-based functions.

Shortly after the decision on Greek aid, mechanisms for further assistance were set up in order to preserve financial stability within the EU; these made up what in German debates was called the rescue umbrella (*Rettungsschirm*). In addition to support from the IMF, the umbrella consisted of the *European Financial Stabilisation Mechanism (EFSM)* and the *European Financial Stability Facility (EFSF)*.<sup>37</sup>

The EFSM was established on 11 May 2010 through Council Regulation 407/2010, issued under the emergency provision of Art 122(2) TFEU. It constitutes an exception to the general policy of reliance on legal and institutional frameworks outside the Treaty architecture. The Regulation defines its aim and scope in the following terms:

With a view to preserving the financial stability of the European Union, this Regulation establishes the conditions and procedures under which Union financial assistance may be granted to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control ... (Art 1).

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<sup>33</sup> The procedure for mutual assistance established by Art 108 of the Rome Treaty still exists. However, it only allows for financial assistance to non-euro states facing difficulties in their balance of payments (Art 143 TFEU).

<sup>34</sup> 'Draft Statement by the Eurogroup', 2 May 2010, Brussels, available at <[http://www.consilium.europa.eu/media/6977/100502-%20eurogroup\\_statement%20greece.pdf](http://www.consilium.europa.eu/media/6977/100502-%20eurogroup_statement%20greece.pdf)> accessed 19 October 2012. Euro-area Member States had already agreed upon the terms of financial support on 11 April 2010. This agreement was based on statements issued by the Heads of State or Government of the euro area on 11 February and 25 March, where the Euro area member states affirmed 'their willingness to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole'. (European Council, 'Statement by Heads of State and Government of the euro area', 25-26 March 2010, Brussels available at <[http://ec.europa.eu/economy\\_finance/focuson/crisis/2010-03\\_en.htm](http://ec.europa.eu/economy_finance/focuson/crisis/2010-03_en.htm)> accessed 19 October 2012)

<sup>35</sup> The English texts of these two agreements are available through the Irish Parliament website at <<http://www.oireachtas.ie/documents/bills28/bills/2010/2210/b2210d.pdf>> accessed 19 October 2012.

<sup>36</sup> The MoU has since been reviewed five times. The present MoU is available as an annex to *The Economic Adjustment Programme for Greece - Fifth Review* (European Economy Occasional Papers, Brussels 2011), available at <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2011/op82\\_en.htm](http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op82_en.htm)> accessed 19 October 2012. The main contents of the MoUs have been reiterated in Council Decisions taken in the excessive debt procedure under Art 126(9). A further element complicating legal implementation of the rescue package consisted of an Agreement between Greece and the IMF in the form of Exchange of Letters, where the Greek government undertook to fully implement the agreed measures, including the MoU.

<sup>37</sup> In its conclusions adopted on 9 May 2010, the Council also evoked the contribution of the ECB: 'We also reiterate the support of the euro area Member States to the ECB in its action to ensure the stability to the euro area.' Council of the European Union, Extraordinary Council Meeting, Economic and Financial Affairs, 9-10 May 2010 (Brussels), Press Release 9596/10 (Presse 108), 7.

The EFSM is administered by the Council and the Commission, with the ECB in a consulting role. A Member State seeking Union financial assistance should discuss its needs with the Commission, in liaison with the ECB. It must also submit a draft economic and financial adjustment programme to the Commission and the Economic and Financial Committee. The Council decides on granting financial assistance or credit-line by a qualified majority and on a proposal from the Commission. The decision should contain, *inter alia*, 'general economic policy conditions which are attached to the Union financial assistance with a view to re-establishing a sound economic or financial situation in the beneficiary Member State and to restoring its capacity to finance itself on the financial markets'. These conditions are defined by the Commission, in consultation with the ECB. Moreover, the decision should contain approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to Union financial assistance. (Art 3(1) – (4)). At regular intervals, the Commission verifies whether the economic policy of the beneficiary Member State accords with its adjustment programme and with the conditions laid down by the Council. Disbursement of the loan or release of funds depends on the results of Commission verification. (Arts 4 and 5).

The capital of the EFSM is relatively small, 60 billion euros. Consequently, it has played but a minor role in the whole of the 'rescue umbrella'. It is financed through the EU budget and bonds it issues itself; hence, no direct Member State financial liability is involved. The EFSM has been activated to provide assistance to Ireland (autumn 2010) and Portugal (spring 2011). Despite its limited financial significance, the EFSM has provided a means to involve the Council and non-euro Member States in rescue operations and decision-making on the conditionality of assistance.

Far more important has been the contribution of the EFSF, which, despite establishment of the EFSM, was designed to bear the main burden of future financial assistance. The legal anchorage of the EFSF is rather complicated. In connection with the Council meeting on 9-10 May 2010, the representatives of the euro-area state governments adopted a decision 'to commit to provide assistance through a Special Purpose Vehicle', whereas the representatives of all member state governments adopted another decision 'allowing the Commission to be tasked by the euro area member states in this context'.<sup>38</sup> The EFSF was registered as a limited liability company under Luxembourg law. Subsequently, the euro-area states and the EFSF concluded a Framework Agreement, laying down the institutional structure of the EFSF, as well as the forms and conditionality of available assistance and the grant procedure.<sup>39</sup> The exact legal nature of the agreement with regard to private law, public international law and EU law is difficult to define. I shall return to this issue.

The EFSF acquires its financial capacity from open markets 'by issuing or entering into bonds, notes, commercial paper, debt securities or other financing arrangements ... which are backed by irrevocable and unconditional guarantees ... of the euro-area Member States'. The total financial capacity of the EFSF is 440 billion euros. The guarantee commitments, which amount to a total of €780 billion, are allotted to the euro-area states in accordance with their shares in the paid-up capital of the ECB.

Assistance granted by the EFSF may take diverse forms: loan disbursements; precautionary facilities; facilities to finance recapitalization of financial institutions in a euro-area state Member State; facilities for the purchase of bonds in the secondary markets on the basis of an ECB analysis recognizing the existence of exceptional financial market circumstances and risks to financial stability; or facilities for the purchase of bonds in the primary market.<sup>40</sup> A key element in the procedure consists of a Memorandum of Understanding which the Commission is authorized to negotiate with the

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<sup>38</sup> *Ibid.*

<sup>39</sup> The consolidated version of the Framework Agreement is available on the EFSF website under legal documents (<[http://www.efsf.europa.eu/attachments/20111019\\_efsf\\_framework\\_agreement\\_en.pdf](http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf)>).

<sup>40</sup> The instruments available to the EFSF were expanded through amendments to the Framework Agreement which entered into force in the autumn of 2011.

beneficiary state in liaison with the ECB and the IMF. The Commission is also authorized to sign the MoU on behalf of the euro-area Member States, after it has been approved by the Eurogroup Working Group.<sup>41</sup> After approval of the MoU, the Commission, again in liaison with the ECB, proposes to the Eurogroup Working Group the main terms of the Financial Assistance Facility Agreement. After a decision of the Working Group, the EFSF negotiates the detailed technical terms of the Agreement. (Art 2(1a))

The first Financial Assistance to be made available to a beneficiary Member State under a Financial Assistance Facility Agreement is released or utilised following initial signature of the MoU. Each subsequent disbursement is, as a rule, preceded by a report where the Commission, again in liaison with the ECB, analyses compliance by the beneficiary state with the terms and conditions set out in the MoU and in a Council Decision. The Guarantor States evaluate compliance and unanimously decide on whether to permit disbursement of assistance. (Art 3(1))

The EFSF decision-making body is the Board of Directors, where each state is represented by its representative in the Eurogroup Working Group. Votes are weighed according to the shares the States hold in the issued share capital of the EFSF. Decisions of a principal nature and affecting the liabilities of the Guarantors require unanimity. (Art 10(2))<sup>42</sup>

Side by side with expansion of the EFSF in 2011, plans were drawn up for a permanent *European Stability Mechanism* (ESM). A principal agreement on establishing this mechanism was reached at the Euro Group summit in July 2011, but negotiations on the final shape of the agreement dragged on to the following year.<sup>43</sup> The Treaty was finally signed by the euro-area states on 2 March 2012, and after the German Constitutional Court had on 12 September 2012 showed – with certain qualifications – a green light to German ratification, the ESM was able to start functioning on 8 October 2012. Drafting and negotiating the ESM was accompanied by a Treaty Amendment procedure in the simplified procedure under Art 48(6) TEU. The European Council decided on 25 March 2011 to amend Art 136 TFEU by adding to it a new paragraph 3.<sup>44</sup> The new provision lays down that ‘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’. Furthermore, ‘the granting of any required financial assistance under the mechanism will be made subject to strict conditionality’. However, the Amendment is only expected to enter into force on 1 January 2013, while the original date for the Treaty on the ESM was set on 1 July 2012. Consequently, the Amendment cannot constitute a legal basis for the Treaty.<sup>45</sup>

The ESM has sometimes been characterized as the IMF of the EU.<sup>46</sup> It is an ‘international organization under public international law’, as characterized in the Conclusions of the European Council of 24-25 March 2011.<sup>47</sup> All euro-area states are members of the ESM. The ESM is governed by a Board of Governors, composed of ministers of finance of the euro-area states, with the Commissioner for

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<sup>41</sup> The Working Group is a euro-area configuration of the Economic and Financial Committee. Only the euro-area Member States, the Commission and the ECB are represented. The Working Group prepares the work of the Euro Group, i.e. the euro-area composition of the Ecofin Council.

<sup>42</sup> The Commission and ECB are entitled to appoint an observer who may take part in meetings of the board of directors and present observations, without however having the power to vote. The board of directors may even permit other EU institutions to appoint observers. (Art 10(4)).

<sup>43</sup> Treaty Establishing the ESM, 11 July 2011, available at <<http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>> accessed 19 October 2012.

<sup>44</sup> Decision 2011/199 amending Art 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] L91/1.

<sup>45</sup> In the Preamble to the ESM Treaty, the Amendment is invoked but not as a competence basis for the Treaty (Recital 2).

<sup>46</sup> The Preamble explicitly evokes IMF practice (Recitals 12-3).

<sup>47</sup> European Council Conclusions, 24-25 March 2011, available at <<http://www.european-council.europa.eu/council-meetings/conclusions?lang=en>> accessed 19 October 2012.

economic and monetary affairs and the President of the ECB holding observer status. Major decisions on granting and financing assistance require mutual agreement, ie unanimity. However, an emergency voting procedure allows adoption of a decision by mutual agreement with a qualified majority of 85% of the votes cast. This procedure is to be used where the Commission and the ECB both conclude that failure to urgently adopt a decision to grant or implement financial assistance would threaten the economic and financial sustainability of the euro area. (Art 2(4))

The total authorised capital stock of the ESM amounts to 700 billion euros, of which the major part consists of callable instead of paid-up shares. As a rule, calls for callable shares require a decision of the Board of Governors taken by mutual agreement. The contribution of each ESM Member is calculated in accordance with the ECB Capital subscription key.

The main principles for providing ‘stability support’ are laid down in Art 12(1):

If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

The Board of Governors takes the decision on granting a request for stability support to an ESM Member on the basis of an assessment by the Commission and the ECB. The instruments available for stability support of the ESM are similar to those in the repertoire of the EFSF: financial assistance to an ESM Member for re-capitalisation of financial institutions; a loan to an ESM Member; purchase of bonds of an ESM Member on the primary market; as well as operations on the secondary market in relation to the bonds of an ESM Member. (Arts 15-18) The Board of Governors may also decide to grant precautionary financial assistance in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line (Art 14(1)). Furthermore, Art 19 provides the Board of Governors with the power to review the list of financial assistance instruments and make changes to it.<sup>48</sup> The European Commission negotiates – in liaison with the ECB and, wherever possible, together with the IMF – with the ESM Member concerned a Memorandum of Understanding detailing the conditionality attached to the financial assistance facility and signs it on behalf of the ESM. (Art 12(2))

During a transitional period, the ESM and the EFSF will function in parallel, with a total lending capacity of 700 billion euros. On expiry of the transitional period, the EFSF will be wound up.

The stability mechanisms adopted since eruption of the sovereign debt crisis in spring 2010 display both common and divergent traits. The former embrace reliance on intergovernmental legal and institutional structures – here the financially rather insignificant EFSM constitutes an exception – as well as the conditionality of assistance granted. Common to diverse forms of financial assistance – from the loans to Greece in May 2010 to the ESM – has also been the involvement of the IMF. The IMF has not only made a significant financial contribution to the assistance given but has participated in negotiating its conditions and in monitoring compliance with them.<sup>49</sup>

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<sup>48</sup> An intricate legal issue is what the limits of the Board’s reviewing power are. It could be argued that new forms of assistance must be in line with the assistance explicitly regulated in the Treaty; otherwise, the decision of the Board would substantively amount to amending the Treaty. Thus, constitutional doubts can be raised whether direct support to financial institutions would be compatible with a Treaty whose options only comprise support channelled through the recipient state.

<sup>49</sup> The Commission, the ECB and the IMF make up the notorious ‘Troika’, dominating much of the media coverage of rescue operations. The involvement of the IMF is explicitly set out in the Treaty on the ESM. According to the Preamble, ‘the ESM will cooperate very closely with the International Monetary Fund ... in providing stability support’, and ‘the active participation of the IMF will be sought, both at technical and financial level’ (Recital 8). The involvement of the IMF is evoked in the provisions on negotiating the MoU and monitoring compliance with it (Art 13(3) and 13(7)).

The mechanisms diverge in their exact legal form and the consequent legal status of the Member States providing assistance: in the Greek aid package of May 2010 they appear as creditors, in the EFSF as guarantors and in the ESM as shareholders, while in the EFSM the liability of Member States is restricted to their contributions to the EU budget. These differences may have important constitutional consequences at both European and Member-State level, but from the perspective of the beneficiary states they are largely irrelevant. Rather, what matters for the recipient states and their populace is the foremost common feature of the mechanisms, which has also been spelled out in the pending Amendment to Art 136(3) TFEU: the ‘strict conditionality’ of financial assistance. The MoUs which the beneficiary states have been obliged to sign not only define in aggregate terms required cuts in public expenditure but also determine how the cuts should be allocated. In addition, the MoUs indicate market-liberally oriented structural reforms. The Greek MoUs include commitments to, for instance, comprehensive healthcare and labour market reforms; in Ireland, the Government has to, *inter alia*, reform the legislation on the minimum wage and to take other measures ‘to facilitate adjustment in the labour market’; and Portugal has vowed to reduce pension expenditure by detailed pension reductions, to control costs in the health sector on the basis of detailed measures listed in the MoU and even to reduce cash social transfers other than pensions by at least a fixed minimum amount by tightening eligibility criteria and decreasing average benefits in selected cases.<sup>50</sup>

An overview picture of European emergency measures would be incomplete without depicting the role of the ECB. The ECB has been involved in the stability mechanisms in a consultative function, providing expertise for assessing the need for assistance, as well as for negotiating the conditions and monitoring compliance with these. But even more essential has been the ECB *Securities Markets Programme*, on which the Governing Council of the ECB decided merely a few days after the Council decision on the *Rettungsschirm*, on 14 May 2010.<sup>51</sup> The decision authorized Eurosystem central banks to purchase ‘(a) on the secondary market, eligible marketable debt instruments issued by the central governments or public entities of the Member States whose currency is the euro; and (b) on the primary and secondary markets, eligible marketable debt instruments issued by private entities incorporated in the euro area’. Within the programme, the ECB purchased from secondary markets crisis state debt instruments worth some 209,5 billion euros. In addition, the ECB has accepted these debt instruments, in the Greek case even in contradiction with its own earlier policy, as collateral for loans issued to private financial institutions.

On 6 September 2012, the ECB announced that the Securities Markets Programme was terminated. The Governing Council of the ECB decided to replace it with *Outright Monetary Transactions*. At issue are ‘outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy’. In spite of the emphasis on monetary policy transmission, it is obvious that the central objective is to calm down

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<sup>50</sup> \* The MoUs have run through several updates. As a sample see the third update of the Greek MoU, annexed to *The Economic Adjustment Programme for Greece Third Review – Winter 2011* (European Economy Occasional Papers, Brussels 2011), available at <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2011/op77\\_en.htm](http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op77_en.htm)> accessed 19 October 2012; Ireland’s MoU annexed to *The Economic Adjustment Programme for Ireland – Spring 2011 Review* (European Economy Occasional Papers, Brussels 2011), available at <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2011/op78\\_en.htm](http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op78_en.htm)> accessed 19 October 2012; and the fifth update of Portugal’s MoU *The Economic Adjustment Programme for Portugal. Fifth Review – Summer 2012* (European Economy Occasional Papers, Brussels 2012), <[http://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2012/ocp117\\_en.htm](http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/ocp117_en.htm)> accessed 19 October 2012. Spain is a special case. Financial assistance was granted under the EFSF Guideline on Recapitalisation of Financial Institutions which does not presuppose a macro-economic adjustment programme but only a more focused form of conditionality. Accordingly, only a **Memorandum of Understanding on Financial-Sector Policy Conditionality** was signed, available at <[http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2012-07-20-spain-mou\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-07-20-spain-mou_en.pdf)> accessed 19 October 2012. See Master Financial Assistance Agreement between European Financial Stability Facility, Kingdom of Spain as Beneficiary Member State, Fondo de Reestructuración Ordenada Bancaria as Guarantor and the Bank of Spain, available at [http://www.efsf.europa.eu/attachments/efsf\\_spain\\_ffa.pdf](http://www.efsf.europa.eu/attachments/efsf_spain_ffa.pdf) accessed 19 October 2012.

<sup>51</sup> Decision 2010/281 [2010] OJ L124/8.

sovereign debt markets and to (re-)establish financial stability in the euro area. Secondary market operations will only be launched on condition that the state concerned has accepted the ‘strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme’. On the other hand, ‘no ex ante quantitative limits are set on the size of Outright Monetary Transactions’.<sup>52</sup>

### ***Towards New European Economic Governance***

Side-by-side with efforts to ensure financial stability through financial assistance to individual euro-area states and building up a ‘firewall’ credible enough to prevent the crisis from spreading, European economic governance has step-by-step been reinforced with a view to tightening fiscal policy discipline in Member States and intensifying coordination of their macro-economic policies. The first step on this path consisted of the legislative package which the Commission introduced in autumn 2010 and which finally entered into force in December 2011.<sup>53</sup> The package, composed of five Regulations and one Directive, was nicknamed the ‘six-pack’.<sup>54</sup> Its primary objective was to increase the efficacy of both the preventive and the corrective arm of the Stability and Growth Pact: that is, the mutual surveillance procedure under Art 121 and the excessive deficit procedure under Art 126 TFEU. After the amendments of 2005, following the failure to take effective action against Germany and France, the excessive deficit procedure had lost much of its significance and credibility. Furthermore, the procedure only kept an eye on one of the two reference values alluded to in Art 126 TFEU, namely the budgetary deficit, under the assumption that low deficits would entail reduction of public debt. After the amendments of December 2011, not only excessive government deficit but even excessive public debt can trigger the procedure under Art 126 TFEU. Leeway for Member State justifications for exceeding reference values has been narrowed. Moreover, procedural time limits have been shortened and sanctions made more substantial. In addition, the probability of sanctions has been increased through introduction of reverse majority voting. The semi-automatic decision-making procedure makes it more difficult than before for Member States to form blocking majorities.<sup>55</sup>

Besides reinforcing the existing mutual surveillance and excessive deficit procedures, the six-pack introduced a new *excessive imbalances procedure* (EIP), which exceeds the limits of fiscal policy and reaches out to general economic policy. The new procedure was established through a Regulation on the prevention and correction of macroeconomic imbalances (1176/2011), issued under Art 121(6) TFEU.<sup>56</sup> The procedure includes an alert or early-warning system, which is based on ten indicators

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<sup>52</sup> European Central Bank, ‘Technical Features of Outright Monetary Transactions’ (Press Release 6 September 2012), available at <[http://www.ecb.int/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html)> accessed 19 October 2012.

<sup>53</sup> ‘Proposals for Council Regulations amending Regulation EC 1466/97’ (COM (2010) 526 final) and ‘1567/97’ (COM (2010) 522 final); ‘Proposal for a Regulation of the European Parliament and of the Council on the prevention of the macroeconomic imbalances’ COM (2010) 527 final; ‘Proposal for a Council Directive on requirements for budgetary frameworks of the Member States’ COM (2010) 523 final; ‘Proposal for a Regulation on enforcement measures to correct excessive macroeconomic imbalances in the euro area’ COM (2010) 525 final. All available at <[http://ec.europa.eu/economy\\_finance/Arts/eu\\_economic\\_situation/2010-09-eu\\_economic\\_governance\\_proposals\\_en.htm](http://ec.europa.eu/economy_finance/Arts/eu_economic_situation/2010-09-eu_economic_governance_proposals_en.htm)> accessed 19 October 2012.

<sup>54</sup> Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances [2011] OJ L306/8; Regulation 1175- and 1177/2011 amending Council Regulations 1466- and 1467/97 [2011] OJ L306/12 and L306/33; Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Directive 2011/85 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

<sup>55</sup> In reverse majority voting, the Council may only reject or amend the Commission’s recommendation by qualified majority.

<sup>56</sup> In the Preamble to the Regulation, (n 58), the new procedure is justified by reference to the need to broaden ‘surveillance of the economic policies of the Member States ... beyond budgetary surveillance to include a more detailed and formal framework to prevent excessive macroeconomic imbalances and to help the Member States affected to establish

covering the major sources of macro-economic imbalances and which is managed by the Commission. The Commission and the Council may adopt preventive recommendations under Art 121(2) of the TFEU at an early stage before imbalances become large. In more serious cases, there is also a corrective arm where an excessive imbalance procedure can be opened for a Member State. The Member State concerned will have to submit a corrective action plan with a roadmap and deadlines for implementing corrective action. The Commission will step up surveillance on the basis of regular progress reports submitted by the Member State.

For euro-area states, a two-step enforcement regime has been established. First, an interest-bearing deposit can be imposed after one failure to comply with the recommended corrective action. After a second compliance failure, this interest-bearing deposit can be converted into a fine of up to 0.1% of GDP. Sanctions can also be imposed for failing twice to submit a sufficient corrective action plan. In accordance with the new rules on the excessive deficit procedure, decision-making in the EIP is streamlined by prescribing the use of reverse qualified majority voting to take all the relevant decisions leading up to sanctions.

The Directive on requirements for Member State budgetary frameworks (2011/85) epitomizes a new intrusion in Member State budgetary sovereignty. A central objective of the Directive is to ensure that national fiscal planning is consistent with the Stability and Growth Pact. The Preamble to the Directive stresses that this requires a multiannual perspective and pursuit of medium-term budgetary objectives. (Recital 19) Each Member State should have in place numerical fiscal rules which ‘effectively promote compliance with its obligations deriving from the TFEU in the area of budgetary policy over a multiannual horizon for the general government as a whole’. In particular, these rules should promote compliance with the reference values on budget deficit and public debt set in accordance with the TFEU. Moreover, the rules are expected to facilitate adoption of a multiannual fiscal planning horizon, including adherence to Member States’ medium-term budgetary objective, as defined in their stability programme under the mutual surveillance procedure. (Art 5) The same objective is pursued by Member States’ obligation to ‘establish a credible, effective medium-term budgetary framework providing for the adoption of a fiscal planning horizon of at least 3 years, to ensure that national fiscal planning follows a multiannual fiscal planning perspective’ (Art 9(1)).<sup>57</sup>

In November 2011, the Commission introduced a proposal for so-called *two-pack legislation*, further tightening European control of national budget processes and making further incursions into national budgetary autonomy.<sup>58</sup> The legislation, which is still waiting for its approval, is to be based on Art 136 TFEU and, hence, will apply only to the euro-area. Euro-area states are required to introduce a common budgetary timeline and common budgetary rules, such as independent macroeconomic forecasts and independent fiscal councils monitoring implementation of national rules. They are obliged to submit their draft budgetary plans for the following year to the Commission and the Council in the autumn. The Commission addresses an opinion to a Member State if these plans do not appear to be in line with obligations under the Stability and Growth Pact and recommendations the Council has issued within the European semester.

(Contd.) \_\_\_\_\_

corrective plans before divergences become entrenched’; ‘such broadening of the surveillance of economic policies should take place in parallel with a deepening of fiscal surveillance’ (Recital 7). It is argued to be ‘appropriate to supplement the multilateral surveillance procedure referred to in paragraphs 3 and 4 of Art 121 TFEU with specific rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union’ (Recital 9).

<sup>57</sup> A further objective of the Directive is to increase the transparency of government finances in the budget process (Ch VI).

<sup>58</sup> ‘Proposal for a Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of the excessive of the Member States in the euro area’ COM (2011) 821 final; ‘Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect of their financial stability in the euro area’ COM (2011) 819 final.



In addition, two-pack legislation creates a particular monitoring regime for Member States confronting financial difficulties. The first Regulation includes provisions on graduated monitoring for states subject to the excessive deficit procedure. In turn, the second Regulation sets out explicit rules for enhanced surveillance for those Member States facing severe difficulties with regard to their financial stability; those in receipt of financial assistance on either a precautionary basis or as part of a full-scale assistance programme; as well as those in the process of exiting such assistance.

The *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (TSCG)<sup>59</sup> is the latest element in the strategy to constrain national fiscal policy with a view to ensuring financial stability in the euro area as well as the European Union as a whole.<sup>60</sup> The Treaty is an agreement under public international law and, thus, extends the intergovernmental option from financial assistance into European economic governance. Politically speaking, the intergovernmental way was entered into only after discussions on a Treaty amendment had fallen through, due to UK veto. The Treaty has been signed by 25 out of 27 Member States, the other state opting out being the Czech Republic.

The TSCG underwent several transformations in intergovernmental negotiations, and some of the most controversial provisions were dropped from the final version signed in the margins of the European Council meeting on 1-2 March 2012.<sup>61</sup> The first draft version, advocated by the German Government, would have directly encroached on the constitutional autonomy of the Contracting Parties: these would have been obliged to make the requirement of a balanced or surplus budget and the country-specific medium-term objective as defined in the revised Stability and Growth Pact constitutionally binding.<sup>62</sup> Furthermore, Member States would have been required to entrust national courts with the power to monitor compliance with these constitutionally anchored criteria. In most Member States, both of these obligations would have presupposed constitutional amendments. The requirement of national guarantees of budget discipline was gradually loosened. In its final version, Art 3(2) stipulates that ‘the rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty 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*’ (emphasis added).

Contrary to the first drafts, national courts are not involved in the monitoring process. However, a national correction mechanism should be put in place and triggered automatically in the event of significant observed deviations from the medium-term objective or the adjustment path towards it. This ‘mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time’. The Commission has the task of proposing common principles, ‘concerning in particular the nature, the size and the time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring the observance of the rules’. National constitutional concerns have been heeded in the provision, which lays down that the correction mechanism ‘shall fully respect the prerogatives of national Parliaments’. (Art 3(1)(e) – (2))

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<sup>59</sup> The Treaty as a whole is sometimes called the Fiscal Compact. Actually, the Fiscal Compact constitutes only one, albeit the most important one, of the eight Titles of the TSCG.

<sup>60</sup> The TSCG was preceded by the EuroPlus Pact, which is a political commitment by the Signatory States to reforms in the fields of competitiveness, employment, sustainability of public finances and reinforcement financial stability. It lacks direct legal relevance. The Pact was agreed on in March 2011 by 23 Member States. Conclusions of the Heads of State or Government of the Euro Area, 11 March 2011, Annex I, available at <<http://www.european-council.europa.eu/council-meetings/conclusions?lang=en>> accessed 19 October 2012

<sup>61</sup> Available at <http://european-council.europa.eu/eurozone-governance/treaty-on-stability> accessed 19 October 2012.

<sup>62</sup> Germany had already amended its Basic Law in 2009 and anchored the so-called debt brake (Schuldenbremse) constitutionally (Arts 109 and 115 of the Basic Law).

While national courts are excluded from the monitoring process, a Contracting Party may bring the matter to the Court of Justice of the European Union if it considers that another Contracting Party has failed to comply with Art 3(2). The case can be raised either on the basis of a report by the Commission or independently of such a report. The parties to the procedure must take the necessary measures to comply with the judgment within a time limit set by the Court. (Art 8)

In addition to the requirements on national budgetary legislation and procedure, making up the Title III Fiscal Compact, the TSCG contains general and rather vaguely formulated provisions on economic policy coordination and convergence. These provisions do not seem to add anything new to the obligations already established through Arts 121 and 126 TFEU, as well as the Regulations implementing the Stability and Growth Pact.<sup>63</sup> Finally, in its institutional provisions the TSCG confers formal recognition on Euro Summits, which have gained in importance during the ongoing economic crisis, and establishes the position of the President of the Euro Summit.<sup>64</sup>

Along with a general tightening up, a characteristic of the incrementalist reinforcement of European economic governance has been increased harmonisation and control of national budgetary processes, as well as further differentiation of the legal framework applicable to the euro area. European responses to the fiscal crisis have led to a plethora of monitoring and coordinating processes and to a consequent need for their mutual integration. The introduction of the *European semester* is an effort at meta-level coordination of the diverse monitoring and coordinating processes. At issue is an annual cycle of economic and fiscal policy coordination, which was first followed in 2011 and subsequently formalized through Regulation 1175/2011, belonging to the ‘six-pack’. The European semester starts with publication by the Commission of an Annual Growth Survey which is supposed to provide a basis for integrating macroeconomic, thematic and fiscal surveillance. In its spring meeting, the European Council then issues policy orientations covering fiscal, macroeconomic structural reform and growth enhancing areas, and advises on linkages between them. The legal form for this guidance is provided by integrated broad economic and employment-policy guidelines, invoked by Arts 121(2) and 148(2) TFEU. In April, Member States send to the Commission for assessment their Stability and Convergence Programmes, as presupposed by the mutual surveillance procedure under Art 121 TFEU, as well as their National Reform Programmes, introduced by the new economic imbalances procedure. In June or July, on the basis of the Commission's assessment, the Council issues country-specific guidance which is supposed to influence Member States when these finalise their draft budgets for the following year.<sup>65</sup>

Attention has also been paid to integrating the specific monitoring connected to financial assistance within the general framework of European economic governance. Art 126(9) TFEU has functioned as

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<sup>63</sup> Thus, Art 9 lays down that ‘building upon the economic policy coordination as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an economic policy fostering the smooth functioning of the Economic and Monetary Union and economic growth through enhanced convergence and competitiveness’. To further this end, ‘the Contracting Parties shall take the necessary actions and measures in all the domains which are essential to the good functioning of the euro-area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability’. Benchmarking and peer review practices evoked by Art 11 are not a novelty in European economic policy coordination, either: ‘With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves.’ Reliance on existing EU law is confirmed by the provision according to which ‘this coordination shall involve the institutions of the European Union as required by European Union law’.

<sup>64</sup> The Heads of State or Government of the Contracting Parties whose currency is the euro meet informally in Euro Summit meetings, together with the President of the European Commission, with the President of the ECB also being invited to take part in meetings. The President of the Euro Summit is appointed by the Heads of State or Government of the euro states at the same time as the European Council elects its President and for the same term of office. (Art 12(1))

<sup>65</sup> See European Commission, ‘Making it Happen – the European Semester’ (announcement on the Commission’s website), available at [http://ec.europa.eu/europe2020/making-it-happen/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/index_en.htm) accessed 19 October 2012.

a bridge between the excessive deficit procedure and economic adjustment programmes conditioning financial assistance and set out in MoUs. This provision authorises the Council to give notice to a Member State to take, within a specified time limit, measures for deficit reduction as judged necessary by the Council where a Member State persists in failing to put into practice previous recommendations the Council has issued under the excessive deficit procedure. The Council may also request the Member State to submit reports in accordance with a specific timetable in order to examine the adjustment. The Preamble to the Greek Loan Facility Agreement and the Intercreditor Agreement explicitly invoked Art 126(9).<sup>66</sup> In turn, the Preamble to the Treaty on the ESM alludes to the TSCG and makes its ratification a precondition for granting financial assistance within the framework of new programmes under the ESM.<sup>67</sup> Finally, the Commission proposal for two-pack legislation aims to anchor the economic adjustment programmes of euro-area states receiving financial assistance and their enhanced monitoring in EU legislation. It also seeks to harmonise the specific conditions and monitoring processes attached to financial assistance with the general procedures under Arts 121 and 126 TFEU, and the Stability and Growth Pact.

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<sup>66</sup> 'Measures concerning the coordination and surveillance of the budgetary discipline of Greece and setting out economic policy guidelines for Greece will be defined in a Council Decision on the basis of Arts 126(9) and 136 of the Treaty on the Functioning of the European Union (the "Council Decision"), and the support granted to Greece is made dependent on compliance by Greece amongst others with measures consistent with that act and laid down in a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding (hereinafter referred together as the "MoU") each signed on 3 May 2010 by the Borrower and the Bank of Greece.' Intercreditor Agreement, Recital 6 of the Preamble; see also Loan Facility Agreement, Recital 6 of the Preamble

<sup>67</sup> 'On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed to move towards a stronger economic union including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG will help develop a closer coordination within the euro area with a view to ensuring a lasting, sound and robust management of public finances and thus addresses one of the main sources of financial instability. This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Art 3(2) TSCG on compliance with the requirements of that article.' (Recital 5)

### III Doctrinal Issues of EU Constitutional Law

#### *The Two-Order Telos of the No-Bailout Clause*

I shall start the constitutional examination of European responses to the crisis from emergency measures. Debates on their legal impeccability have hinged on the provision on emergency financial assistance in Art 122(2) and the no-bailout clause in Art 125 TFEU. Assessments display a wide variance, depending on, inter alia, the chosen interpretive method. Some authors favour a textual interpretation, focusing on the wording of the respective provisions, others a systematic or teleological reading, putting the provisions in a wider regulative context and stressing the significance of their *telos*. How this wider regulative context and the *telos* of the provisions should be understood is not self-evident, which produces further variance in conclusions. In this paper, my primary aim is not to contribute to the doctrinal debate with my own interpretative proposals, but to examine the European economic constitution at the level of its underlying principles. Yet, a strict separation of doctrinal and principal levels is neither desirable nor even possible, and I shall initialize my discussion by commenting on the doctrinal debates. I shall first examine the emergency financial assistance and European stability mechanisms in light of Arts 122(2) and 125(1) TFEU, and then, after a brief comment on the role of the ECB, turn to constitutional issues arising from the use of intergovernmental agreements. My examination will cover the most pertinent legal issues, though it does not claim to be exhaustive.<sup>68</sup>

Let me anticipate my somewhat paradoxical conclusion. The constitutionality of individual measures can be defended persuasively enough, at least with regard to the key provisions in Arts 122(2) and 125(1) TFEU. However, equally persuasively can one argue for a teetering of the Maastricht principles of the European economic constitution!

Emergency measures responded to a situation which the provisions of the Maastricht Treaty had not envisaged. The Treaty did include a provision which was supposed to be applied in case of threatening insolvency in a Member State: the bailout clause (present Art 125 TFEU). But the Treaty provisions did not reckon with a sovereign debt crisis which cannot be contained within a single state and which endangers the financial stability of the euro area as a whole. In this respect, the judgment of the legal service of the German Ministry of Finance that we have been dealing with a regulative lacuna is correct.<sup>69</sup>

However, even if the objective of guaranteeing the financial stability of the euro area as a whole was not explicitly enshrined in the Treaties, it can still be claimed to be part and parcel of the *telos* of the regulative whole where the bailout clause finds a systematic location. This regulative whole, which comprises Arts 123 to 126 TFEU, aims to impose on Member States, particularly those of the euro area, the fiscal and budgetary discipline which common currency and common monetary policy focusing on price stability were seen to require. Art 123 sets out the prohibition of central-bank financing of government expenses, and Art 124 denies the Union and the Member States privileged

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<sup>68</sup> Issues that will be left outside present discussion include the competence basis of individual pieces of secondary legislation, especially the reach of the delegations in Arts 121, 126 and 136 TFEU, as well as introduction of the voting rule of reverse qualified majority. The role of the IMF raises questions of compatibility with the IMF Statute, but these questions, falling under public international law, will be left unexplored as well. See C Gaitanides, 'Intervention des IWF in der Eurozone – Mandatswidrig?' (2011) 14 *Neue Zeitschrift für Verwaltungsrecht*, 848; D Thym, 'Euro-Rettungsschirm: Zwischenstaatliche Rechtskonstruktion und Verfassungsgerichtliche Kontrolle' (2011) 5 *Europäische Zeitschrift für Wirtschaftsrecht* 167, 169; M Ruffert, 'The European Debt Crisis and European Union Law', (2011) 48 *Common Market Law Review* 1777, 1788.

<sup>69</sup> See the reference in C Calliess, 'Perspektiven des Euro Zwischen Solidarität und Recht – Eine Rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms' (2011) 14 *Zeitschrift für Europäische Studien* 213, 263, fn 235.

access to financial institutions. The no-bailout provision in Art 125(1)<sup>70</sup> expresses the principle of Member States' fiscal liability. It was also expected to encourage Member States to a solid fiscal policy and avoidance of excessive indebtedness. It was supposed to ward off the moral hazard which could arise if states were allowed to rely on other Member States' coming to the rescue in case of a threatening insolvency. By the same token, it alerted creditors that they could not count on the EU or other Member States coming to the rescue in case of a threatening default. The provision expressed confidence in the disciplinary effect of the credit market. States would have to pay for reckless fiscal policy in the form of higher interest rates, which would induce them to adhere to a policy of sound public finances. Thus, in promoting fiscal discipline credit markets would complement the monitoring mechanism established by Art 126, the Protocol on excessive budget deficits and the Stability and Growth Pact. Finally, if nothing worked, the way out which the no-bailout clause showed was default, where the Member State concerned would for instance negotiate with its creditors a sufficient reduction of its debts.

Yet in the spring of 2010, when Greece had drifted close to the brink of insolvency, this exit was considered to be closed. According to the expert judgement of economists from the Commission and the ECB, as well as the political judgment of the Council and representatives of euro-area governments, imminent danger existed of contagion and spread of the debt crisis to other euro states. On this view, at stake was not only the solvency of Greece and the continuance of its membership in the EMU, but the financial stability of the euro area as a whole and the future of the common currency in general; indeed, ultimately, the very idea(l) of European integration.<sup>71</sup> By the same token, an unprecedented constitutional question arose: did the regulative whole of Arts 123 – 126 TFEU constitute an obstacle to reacting to a crisis it had not, contrary to its *telos*, managed to prevent? When trying to respond to this question, Art 122(2), explicitly allowing for emergency financial assistance to a Member State, must be drawn into the discussion. However, discussing emergency financial assistance in constitutional terms requires heeding the distinction between Union and Member-State measures. The emphasis in emergency measures has lain on the latter side, for the simple reason that due to Member States' fiscal sovereignty and exclusive competence in taxation, only they possess the necessary resources. Consequently, I shall start my discussion with the assistance provided by other Member States.

The no-bailout clause of Art 125 TFEU is explicitly addressed to both the Union and the Member States. Neither the Union nor a Member State is to be 'liable for or assume the commitments' of a(nother) Member State. In contrast, at least according to its wording, Art 122(2) regulates merely financial assistance by the EU: 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned.' Art 122(2) is a competence provision, which, in

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<sup>70</sup> 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.'

<sup>71</sup> This alarmist tone was conspicuous in Chancellor Angela Merkel's speech before the *Bundestag* on 19 May 2010: 'Es geht um viel mehr als um eine Wahrung. Die Wahrungunion ist eine Schicksalsgemeinschaft. Es geht deshalb um nicht mehr und nicht weniger als um die Bewahrung und Bewahrung der europaischen Idee. Das ist unsere historische Aufgabe; denn scheidet der Euro, dann scheidet Europa. Wenden wir diese Gefahr aber ab, dann werden der Euro und Europa starker als zuvor sein.' The transcript is available through the Cabinet of Germany's (*Bundesregierung*) website at <<http://www.bundesregierung.de/Content/DE/Regierungserklaerung/2010/2010-05-19-merkel-erklaerung-eu-stabilisierungsmassnahmen.html>> accessed 19 October 2012.

accordance with the *principle of conferral* enshrined in Art 5(2) TEU,<sup>72</sup> empowers the Council with a competence it would not otherwise possess. It is no accident that Member States are not mentioned in Art 122(2). Member States, acting individually or in concert, do not need an explicit competence basis in the Treaties. They are free to act, provided that no legal obstacles, deriving from EU law, exist.<sup>73</sup> Union and Member-State competences are assessed from opposite premises. This also entails that no immediate legal conclusions with regard to Member States' financial assistance can be drawn from Art 122(2). Member States' measures fall outside the scope of this article, and for instance an *e contrario* argument, deriving from it a prohibition of Member-State assistance, would be wholly groundless. If the legality of Member States' assistance is rejected, this has to be supported with arguments drawn from elsewhere than Art 122(2). Two possible grounds exist: the no-bailout clause of Art 125(1) TFEU and the principle of pre-emption. I shall discuss the latter issue separately and now confine myself to the no-bailout clause.

A literal interpretation would emphasize the wording of Art 125(1) which only prohibits 'liability for or assumption of the commitments' of a Member State by other Member States or the Union. As recent rescue operations have proved, assistance can take other forms than those expressly covered by the wording of the no-bailout clause. But as many German discussants have stressed, the *Sinn und Zweck* of the no-bailout clause should be considered as well, and circumventing the prohibition through assistance which in effect equals the explicitly-banned forms of bailout should not be allowed, either; here the German term is *Misbrauchsverbot*. This argument, together with a teleological and systematic reading of the no-bailout clause, cautions against making too much of the particular form of assistance. Although loans are not covered by the wording of the clause, it is warranted to equal them with the forms of assistance expressly evoked in Art 125(1) TFEU.<sup>74</sup> Moreover, the instruments available to the EFSF and the ESM are not restricted to credit but comprise purchases of debt instruments issued by a Member State in both primary and secondary markets; such purchases clearly entail 'liability for or assumption of the commitments' of a Member State, explicitly prohibited in Art 125(1).

In a legal assessment of emergency financial assistance, the *moral-hazard* issue cannot be ignored. Taken separately, the no-bailout provision clearly aims to induce Member States to responsible fiscal policy and to ward off the moral hazard which awareness of other Member States' coming to the rescue in a sovereign debt crisis could entail. This aim also justifies treating different forms of financial assistance in equal terms under this provision. But a teleological interpretation should heed not only the particular *telos* of the no-bailout clause but also the more general objective of the regulative whole Art 125(1) is part of. And this 'second-order' *telos* of the no-bailout clause undoubtedly includes the financial stability of the euro area as a whole. This argument supports the legal impeccability of Member-State assistance, in spite of the no-bailout clause and the inapplicability of the emergency provision in Art 122(2) TFEU. But it also justifies and even presupposes, at least to a certain extent, the 'strict conditionality' of assistance. The viewpoint of moral hazard retains its relevance even when retreat from stringent bailout prohibition is considered legally possible. Through the conditions attached to the assistance an effort can – and, legally speaking, should! – be made to restrict the ensuing moral-hazard effect. The conditions laid down in the Memoranda of Understanding which beneficiary states have been obliged to sign have required spending cuts and other measures considered necessary for reducing budgetary deficits and government indebtedness, as well as lowering the price of credit. Through its conditionality, financial assistance pursues the very same objectives which the no-bailout clause and the excessive deficit procedure under Art 126 are expected

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<sup>72</sup> According to Art 5(1), 'the limits of Union competences are governed by the principle of conferral'. In turn, Art 5(2) lays down that 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'.

<sup>73</sup> This point has also been made by, eg, Calliess (n 74), 213 and 222.

<sup>74</sup> Cf Calliess (n 74), 261-3.

but have failed to achieve.<sup>75</sup> Financial assistance can only be a temporary measure, aiming at (re-)establishing the circumstances where Art 125 and 126 can reassume their role in guaranteeing the fiscal discipline which financial stability in the euro area requires.

### ***Application of the Emergency Provision***

Let us now turn to financial assistance by the Union, which has been channelled through the EFSM and which in the whole of rescue operations has played but a minor role. As I have argued, the emergency provision in Art 122(2) TFEU is of relevance merely in discussing financial assistance from the Union. And, indeed, it was invoked in the Preamble to Regulation 407/2010, which established the EFSM as part of the ‘rescue umbrella’, also comprising the EFSF as an inter-governmental financial institution – a ‘Special Purpose Vehicle’ –and a commitment on assistance from the IMF. Does the emergency provision provide the distinct competence basis which the Union needs for its actions, in accordance with the principle of conferral?

At first glance, Art 122(2), with its explicit reference to natural disasters, seems to address other types of ‘exceptional occurrences’ than economic crises. But, in fact, in drafting and negotiating what became the Maastricht Treaty, the general presumption was that the emergency provision would also allow for financial assistance to a Member State struck by an economic crisis. Art 108 of the Rome Treaty had provided for the possibility of the Council’s granting mutual assistance, including credits by other Member States, to a Member State facing difficulties in its balance of payments. The provision was retained by the Maastricht Treaty and found its way into the TFEU as Art 143. However, its scope has been narrowed down so that it can only be applied to non-euro states (‘Member States with a derogation’). In pre-Maastricht negotiations, the Delors Commission and economically weaker Member States pushed for the possibility of financial assistance even to Member States which had already adopted the common currency, while Germany advocated a no-bailout clause and abolition of financial assistance to Member States suffering from difficulties in their balance of payments. The end-result was a compromise, which included the no-bailout clause (Art 125(2) TFEU) but also facilitated financial assistance not only to non-euro states (Art 143 TFEU) but to euro states as well (Art 122(2) TFEU).<sup>76</sup> Thus, excluding economic crises in general or fiscal crises in particular *a priori* from the scope of application of Art 122(2) appears to be ungrounded.

Yet in interpreting Art 122(2), the no-bailout clause of Art 125(1) must, of course, be taken into account, and a reading which harmonizes the two provisions should be sought. In recent debates, some discussants have contended that financial assistance must be regarded as an exception to the no-bailout clause and that, consequently, Art 122(2) should be given a narrow interpretation.<sup>77</sup> By contrast, others have argued that Arts 122(2) and 125(1) stand at the same level, and that the former constitutes a counter-weight rather than an exception to the latter.<sup>78</sup> Member States’ fiscal liability as one of the main Maastricht principles of the European economic constitution underlies Art 125(1) TFEU. Financial assistance by the Union under Art 122(2) diverges from this principle, and in this sense it constitutes an exception. But this does not warrant the conclusion that financial assistance by the Union to overcome a sovereign debt crisis in a Member State would inevitably contradict the no-

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<sup>75</sup> The complementary nature of the excessive deficits procedure and financial assistance is also proven by the overlapping between, on the one hand, Council recommendations and notices issued under Art 126(9) and, on the other hand, the MoU’s specifying the conditions of financial assistance.

<sup>76</sup> U Häde, ‘Haushaltsdisziplin und Solidarität im Zeichen der Finanzkrise’ (2009) 12 Europäische Zeitschrift für Wirtschaftsrecht 399, 402-3; JV Louis, ‘Guest Editorial: The No-bailout Clause and Rescue Packages’ (2010) 47 Common Market Law Rev 971, 981-3).

<sup>77</sup> See, eg, K Fassbender, ‘Der Europäische “Stabilisierungsmechanismus” im Lichte von Unionsrecht und Deutschem Verfassungsrecht’, (2010) 13 Neue Zeitschrift für Verwaltungsrecht 799, 800-1; L Knopp, ‘Griechenland – Nothilfe auf dem Verfassungsrechtlichen Prüfstand’, (2010) 63 Neue Juristische Wochenschrift 1777, 1780-1).

<sup>78</sup> See, eg, Häde (n 81), 403; Louis (n 81), 983.

bailout clause. The ‘second-order’ *telos* of the no-bailout provision is as relevant in assessing Union as it is in assessing Member-State assistance.

The application of Art 122(2) TFEU presupposes that the exceptional occurrences which cause already realized or seriously threatening difficulties are ‘beyond the control’ of the Member State at issue. In legal debates, much ink has been spilled over the issue whether Art 122(2) permits financial assistance to a Member State whose fiscal crisis is not a mere consequence of external factors but at least partly self-induced through reckless fiscal policy and maybe even conscious statistical falsifications. Two alternative readings of Art 122(2) seem plausible. Some commentators have claimed that assistance may not be granted where the crisis is self-induced because then the background developments have not been beyond the control of the Member State.<sup>79</sup> According to the alternative reading, Art 122(2) relates the requirement of ‘beyond the control’ to the situation ‘as is’ and not to preceding developments. Following this interpretation, what is essential for the Council’s competence to grant assistance is a Member State’s inability to cope with the crisis, which Art 125 with its underlying assumptions about the fiscal behaviour of Member States and reactions of credit markets or the provisions of Art 126 and complementary secondary legislation on the excessive deficit procedure have not been able to prevent.<sup>80</sup>

In the Preamble to Regulation 407/2010 establishing the EFSM, any reference to self-causation is avoided, and the crisis is exclusively attributed to external factors; ‘a serious deterioration in the international economic and financial environment’ and ‘the unprecedented global financial crisis and economic downturn that have hit the world over the last two years have seriously damaged economic growth and financial stability and provoked a strong deterioration in the deficit and debt positions of the Member States’ (Recital 3). This account of the causal backdrop seems to imply the relevance of a *culpa* assessment in applying Art 122(2).<sup>81</sup> However, the Preamble also alludes to another consideration which has been the main justification for financial assistance, from the Greek rescue package in spring 2010 to establishment of the ESM: the financial stability of the European Union (or the euro area) as a whole.<sup>82</sup> The deepening of the financial crisis is claimed to have led to ‘a severe deterioration of the borrowing conditions of several Member States beyond what can be explained by economic fundamentals’; ‘at this point, this situation, if not addressed as a matter of urgency, could present a serious threat to the financial stability of the European Union as a whole’ (Recital 4). It is ‘this exceptional situation beyond the control of the Member States’ which appears to make it ‘necessary to put in place immediately a Union stabilisation mechanism to preserve financial stability in the European Union’ (Recital 5). Art 1, defining the aim and scope of the Regulation, also gives expression to the comprehensive, supra-state objective of assistance.<sup>83</sup>

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<sup>79</sup> Eg Fassbender (n 82), 800; Knopp (n 82), 1780.

<sup>80</sup> See the discussion in Calliess (n 74), 242-3, where he ultimately rejects this interpretation.

<sup>81</sup> This account is questionable at least with regard to Greece, which, however, has not received assistance from the EFSM.

<sup>82</sup> In their statement Euro Group Ministers concurred ‘with the Commission and the ECB that market access for Greece is not sufficient and that providing a loan is warranted to safeguard financial stability in the euro area as a whole’. Draft Statement by the Eurogroup (n 37). Correspondingly, the EFSF was established ‘in order to financially support euro-area Member States in difficulties caused by exceptional circumstances beyond such euro-area Member States’ control with the aim of safeguarding the financial stability of the euro area as a whole and of its Member States’. (Recital 1 of the Preamble to the EFSF Framework Treaty) In turn, the Treaty on the ESM defines the purpose of the ESM in the following terms: ‘The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the 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.’

<sup>83</sup> Interestingly enough, Art 1 also establishes a link between financial assistance under Art 122(2), available to all Member States, and assistance under Art 143, available only to non-Euro states: ‘With a view to preserving the financial stability of the European Union, this Regulation establishes the conditions and procedures under which Union financial assistance may be granted to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control, taking into account the possible application of the



By tying financial assistance granted through the EFSM to preservation of the financial stability of the European Union as a whole, Regulation 407/2010 defines its presuppositions in narrower terms than would have been possible under Art 122(2) TFEU, which focuses exclusively on the situation in an individual state. Legally speaking, this is not a problem because the Regulation cannot be considered an exhaustive regulation of financial assistance under this article, not even with regard to the type of crisis we are now experiencing; it does not rule out other Union financial assistance than that channelled through the EFSM. Attention to more comprehensive financial stability does not replace the country-specific preconditions but adds a new aspect to them.<sup>84</sup> Even as regards the *culpa* issue, no legal obstacle exists to defining the criteria of a particular type of financial assistance in stricter terms than Art 122(2) would facilitate.

Regulation 407/2010 contains general provisions and does not replace case-by-case assessment of the preconditions for assistance. The EFSM has been activated for assistance to Ireland and Portugal but not to Greece, which is the usual culprit in the debate on self-causation of the crisis. Hence, the *culpa* issue has not really been put to the test. Whatever position is taken it, the viewpoint of moral hazard retains its pertinence in the context of Union assistance, too. Although the second-order *telos* of the no-bailout clause can be invoked to justify assistance, the clause presupposes minimizing the danger of moral hazard through the conditions of assistance. And, in fact, Art (122(2) does not allow for unconditional aid, but explicitly lays down that the Council may only grant assistance ‘under certain conditions’.

To sum up, my conclusion would be that in the ongoing sovereign debt crisis, Art 122(2) has been available as a competence basis for Union financial assistance. Still, it is questionable whether Art 122(2) alone suffices to justify the Regulation on the EFSM. Art 122(2) creates a competence which the Council may use directly under the Treaty. It does not refer to complementary secondary legislation, nor does the delegation under Art 125(2) cover Art 122(2).<sup>85</sup> Arguably, to justify the Regulation recourse must also be made to the auxiliary competence under Art 352(1) TFEU.<sup>86</sup> Such recourse seems necessary even for Commission competence to finance loans issued by the EFSM by borrowing on the capital markets or from financial institutions (Art 6(3) of the Regulation).

### ***Why the Treaty Amendment?***

Thus, a reading of Arts 122(2) and 125(2) TFEU can be defended which allows for such Union and Member-State financial assistance as has been offered to Greece, Ireland, Portugal and most recently Spain for which the various stability mechanisms have been created.<sup>87</sup> No resort is needed to a general

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existing facility providing medium-term financial assistance for non-euro-area Member States’ balances of payments, as established by Regulation (EC) No 332/2002.’

<sup>84</sup> Furthermore, this is in line with the presuppositions of financial assistance under Art 143 TFEU, which also sets out both country-specific and more general criteria: ‘where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy ...’

<sup>85</sup> ‘The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Arts 123 and 124 and in this Article.’

<sup>86</sup> Art 352(1) TFEU provides that ‘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’. In German debates, Häde (n 81), 403, and Callies (n 74), 246-7, have pointed to the necessity of invoking Art 352(1) (former Art 308(1)).

<sup>87</sup> Because of low interest rates for credit, some debaters have also seen problems in the relation of financial assistance to the prohibition of privileged access to financial institutions in Art 124 TFEU. This view appears to be based on a misreading: ‘privileged’ refers to legal privileges.

EU-law principle of solidarity whose status and reach remain controversial.<sup>88</sup> Nor does it seem justified: the overriding consideration has not been solidarity towards fellow Member States but a common interest in financial stability in the euro area and the European Union at large. The arguments put forth above make recourse to unwritten emergency law – *Unionnotstand* – unnecessary as well.<sup>89</sup> Opening the door for emergency-law reasoning is as risky in a transnational as in a national setting, due to the threat of relativizing the legal effect of Treaty law.

In the light of these findings, what legal added value does the still pending amendment to Art 136 TFEU bring? The new provision would authorise euro-area Member States to ‘establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro-area as a whole’. This provision is invoked in the Preamble to the Treaty on the ESM. However, as the Treaty entered into force before the Amendment, the latter cannot constitute the competence basis for the former. The premise being Member States’ freedom of action, establishing a mechanism for Member States’ financial assistance through an intergovernmental agreement does not in general need any competence basis in the Treaties.

The Amendment was introduced in the simplified procedure under Art 48(6) TEU. This procedure allows the European Council, acting in unanimity after consulting the European Parliament, the Commission and, in certain cases, the ECB, to adopt a decision amending all or part of the provisions of Part Three of the TFEU. However, such a decision may not increase the competences conferred on the Union in the Treaties. Accordingly, in the Preamble to the Decision of 25 March 2011 on amending Art 136 TFEU, the European Council explicitly states that ‘the amendment ... does not increase the competences conferred on the Union in the Treaties’ and refers to Art 122(2).<sup>90</sup> The argument presented by the European Council is somewhat confusing.

In its Decision, the European Council states that the permanent stability mechanism ‘will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro-area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself’. The European Council has ‘agreed that, as this mechanism is designed to safeguard the financial stability of the euro-area as whole, Art 122(2) of the TFEU will no longer be needed for such purposes’. Therefore, the European Council has agreed that this provision ‘should not be used for such purposes’. Yet, the Amendment does not regulate Union financial assistance, which constitutes the scope of Art 122(2), but Member States’ assistance, which is not covered by this article. Union assistance cannot be based on the new Art 136(3), but recourse to Art 122(2) is still needed. In turn, Member States’ assistance does not require explicit authorization by the Treaty, nor did Art 122(2) ever function as its competence basis.

A possible justification for the Amendment is to confirm explicitly that EU law allows for financial assistance by Member States in emergency situations notwithstanding the no-bailout clause in Art 125(1). However, this point is evoked in neither the Decision of the European Council nor the Preamble to the ESM Treaty. Another explanation would be that through the Amendment, the objective of safeguarding the stability of the euro area as a whole will receive explicit constitutional acknowledgement.

### ***The Role of the ECB in the Light of Treaty Provisions***

The role the ECB has played in efforts to re-establish financial stability within the euro area raises constitutional doubts which seem to be more difficult to dispel than those concerning financial

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<sup>88</sup> Art 122(1) explicitly evokes the solidarity principle. From recent discussion, see Calliess (n 74), esp. 270-3.

<sup>89</sup> On *Unionnotstand* see the discussion in F Schorkopf, ‘Gestaltung mit Recht – Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft’ (2011) 136 *Archiv des Öffentlichen Rechts* 323, 341-3; Calliess (n 74), 271-3.

<sup>90</sup> Council\*1 Decision 2011/199 (n 48), Recital 6.

assistance by Member States and the Union. Within its Securities Markets Programme, which has recently been replaced by the programme of Outright Monetary Transactions, the ECB has purchased from secondary markets debt instruments issued by crisis states. At first glance, Art 123 TFEU, which seeks to curb Member State profligacy through a prohibition of central-bank financing of public expenditures, seems to facilitate such purchases by banning merely primary-market operations.<sup>91</sup> This has been a central argument for the constitutionality of the Securities Markets Programme and Outright Monetary Transactions. Furthermore, the official aim of Outright Monetary Transactions is said to be ‘safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy’. Still, it is clear that both programmes primarily aim at solving the sovereign debt crisis. Thus, mere reference to the permissibility of secondary market operations under Art 123 TFEU does not dispense all constitutional misgivings surrounding ECB policies.

Pursuing a textual interpretation, it may be discussed whether the ECB is directly affected by the no-bailout clause in Art 125(1) TFEU. The clause is addressed to the Union, and at the time of its introduction the ECB was not yet included among Union institutions, at least not at the Treaty level; this only occurred through Art 13(1) TEU-Lisbon.<sup>92</sup> But regardless of the direct applicability of Art 125(1) to the ECB, this provision belongs to the same regulative whole as Art 123 and, consequently, should be taken into account in interpreting the latter. Hence, it can be argued that even though secondary market operations are allowed by Art 123(1), they should not be used for bailout purposes. Evidently, the *telos* of the exception made in Art 123(1) in favour of secondary market purchases is to facilitate ‘normal’ liquidity operations and not emergency measures amounting to the bailout of a Member State threatened by insolvency.<sup>93</sup>

Acceptance of crisis states’ debt instruments as collateral for loans to private financial institutions is also open to legal criticism. Art 18(1) of the ECB Statute lays down that the ECB may ‘conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral’. It is questionable whether the debt instruments of especially Greece amount to ‘adequate collateral’.

Further constitutional concerns relate to the ECB’s independence, enshrined in Art 130 TFEU, and price stability as the primary monetary-policy objective, as set out in Art 127(1) TFEU.<sup>94</sup> The Securities Markets Programme was adopted in concert with EU and Member-State financial rescue operations, although no formal instructions were issued by (other) EU institutions or Member States. Together with the Commission and the IMF as the other ‘Troika’ members, the ECB has also been involved in planning and negotiating EU and Member-State packages, and the intergovernmental agreements on stability mechanisms have formalized its role. Arguably, this involvement contributes to the reduction of the ECB’s independence.

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<sup>91</sup> ‘Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as ‘national central banks’) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.’

<sup>92</sup> Before Lisbon, the status of the ECB was a controversial issue in legal doctrine. See the discussion in C Zilioli and M Selmayr, ‘The Constitutional Status of the European Central Bank’ (2007) 44 *Common Market Law Review* 355.

<sup>93</sup> The constitutionality of the ECB operations has been questioned by, eg. Ruffert (n 73) 1787-8.

<sup>94</sup> ‘When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.’

### *Constitutionality of the Intergovernmental Option*

Recourse to intergovernmental measures outside the EU framework has been a typical feature in European reactions to the ongoing fiscal crisis. This goes especially for emergency financial assistance: only the EFSM, which has played but a minor role in rescue operations, has been both established through EU secondary legislation and administered by EU institutions within their Treaty-based competences. In strengthening European economic governance, secondary legislation has constituted the primary means, but here too resort has also been taken to intergovernmental measures by-passing EU legislative instruments. The EuroPlus Pact agreed on in March 2011 is a political commitment without immediate legal significance. By contrast, the still pending TSCG cannot be ignored in a legal discussion on the reach of intergovernmental instruments.

Broadly speaking, management of the crisis has given rise to two types of intergovernmental agreement. First, we have agreements with primarily a *private law* character. This category comprises the agreements of the first Greek rescue package – the Loan Facility Agreement and the Intercreditor Agreement – and the EFSF Framework Agreement. Secondly, we have agreements concluded under *public international law*; namely, the Treaty on the ESM and the TSCG. A clear-cut division is complicated by the fact that agreements in the first category also possess features which point to the direction of public international law and which are of relevance from the perspective of EU law as well.

The above classification is based on the criterion of the applicable law. Agreements in the first category declare themselves to be governed by English law.<sup>95</sup> The ESM Treaty or the TSCG do not contain any reference to applicable law but are premised on the pertinence of public international law. As regards their substance, the agreements of the first category involve provisions on, not merely typical private-law issues, but tasks of EU institutions as well; i.e. issues on which English law does not offer much guidance. Substantively the agreements exceed the boundaries of private law. What is also noteworthy is that although the private-law company EFSF is a party to the Framework Agreement, the institutional provisions have been concluded only between the euro-area Member States. Indeed, the Framework Agreement can be argued to involve two agreements, one agreed on by and binding upon all the parties and another one agreed on by and binding upon merely the state parties. Disputes arising from or in the context of the Greek agreements fall to the exclusive jurisdiction of the Court of Justice of the European Union. Hence, the CJEU is supposed to rule on private-law issues, applying English law. In turn, the EFSF Framework Agreement submits disputes between Member States to the jurisdiction of the CJEU, whereas disputes between one or more Member States and the EFSF belong to the jurisdiction of the Courts of the Grand Duchy of Luxembourg. All in all, institutional provisions and jurisdictional arrangements lend especially the Greek Intercreditor Agreement and the EFSF Framework Agreement a hybrid character; an international-law flavour is added to the primary private-law character, and even EU law remains relevant. A further international-law element derives from the fact that both the Greek aid package and establishment of the EFSF were first agreed on by the representatives of the euro-area Member State countries through decisions which appear to fall under international law. According to the Statement by the Euro Group issued on 2 May 2010, ‘following a request by the Greek authorities, euro area Ministers unanimously agreed today to activate stability support to Greece via bilateral loans centrally pooled by the European Commission under the conditions set out in their statement of 11 April’.<sup>96</sup> In turn, the establishment of the EFSF was agreed upon through a Decision taken by the Ministers of the

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<sup>95</sup> See, eg, Art 14(1) of the Loan Facility Agreement, Art 14(1) of the Intercreditor Agreement and Art 18(1) of the EFSF Framework Agreement: ‘This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law.’

<sup>96</sup> Draft Statement by the Eurogroup (n 37).

euro-area Member States, ‘wearing their intergovernmental hats’,<sup>97</sup> at the Council session of 9 May 2010.<sup>98</sup>

Differences between agreements under private law and agreements under public international law may be important for national constitutional law,<sup>99</sup> but less so for EU law. From the EU law perspective, the default position for both types of agreement is Member States’ freedom of action: Member States may conclude agreements between themselves under both public international law and private law, if no ground to the contrary can be derived from EU law.

The gravest constitutional doubts raised by recourse to intergovernmental agreements are related to the sidestepping of the procedural requirements which have to be respected in amending the Treaties or in drafting and adopting secondary legislation. These requirements aim to engage all the major EU institutions, including the European Parliament, and grant a voice to all Member States. In the post-Lisbon era, national parliaments, too, have a right to intervene in the legislative procedure. By contrast, drafting, adopting and implementing intergovernmental agreements involves merely the contracting parties. These, in turn, are represented primarily by governments, while parliamentary input depends on the provisions of the national constitution.

As regards financial stability mechanisms, the justification for intergovernmental option is obvious. The European Union, which lacks the power of taxation and whose budget resources are limited, does not possess the fiscal capacity needed for maintaining financial stability and buttressing the common currency. Recourse to intergovernmental assistance appears to be not only justified but even necessary.<sup>100</sup> These considerations are not relevant with respect to the TSCG. Here the reason for picking the intergovernmentalist way was simply the veto by the UK – and later the Czech Republic – which blocked the Union way. The TSCG is not the first instance where some Member States have relied on an intergovernmental agreement in order to proceed further in Treaty-related cooperation than other Member States, more jealous of their national sovereignty, have been willing to accept. The Schengen Agreement and the Convention are the precedents most often invoked.<sup>101</sup> Art K.7 of the Maastricht Treaty even explicitly authorised intergovernmental cooperation within the third Pillar of Justice and Home Affairs.<sup>102</sup> However, the Amsterdam Treaty changed the law by introducing provisions on enhanced cooperation in situations where unanimity among Member States on further integration has proven impossible to reach. It also repealed former Art K 7. This did not put an end to

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<sup>97</sup> B de Witte, ‘The European Treaty Amendment for the Creation of a Financial Stability Mechanism’ (2011) 6 *European Policy Analysis* 1, 6; see also Calliess (n 74), 218.

<sup>98</sup> In the Greek aid case, decided by the German Constitutional Court, one of the claimants argued that a treaty under public international law had been concluded and that it should have been submitted to the *Bundestag* for approval, in accordance with Art 59.2 of the Basic Law. However, the Constitutional Court denied the claimant standing in this issue. BVerfG, 2 BvR 987/10, 7 September 2011, [52] and [71].

<sup>99</sup> In Member States, a certain uncertainty is noticeable as to the legal character of the agreements and the necessity for their parliamentary approval. In Finland, the agreements for the first Greek rescue package were not submitted to Parliament for approval, but the EFSF Framework Agreement was. In Germany, none of these agreements were approved by the *Bundestag*.

<sup>100</sup> The establishment of the EFSM through Regulation 407/2010, though, shows that the Union framework allows for quite flexible arrangements, including credit-market financing. However, involving merely the euro states in a stability mechanism functioning under the EU budget might have been constitutionally difficult.

<sup>101</sup> See, eg, B de Witte, ‘Old-fashioned Flexibility: International Agreements between Member States of the European Union’ in G de Búrca and J Scott (eds), *Constitutional Change in the EU – From Uniformity to Flexibility* (Hart Publishing, Oxford 2001), 42. Reference can also be made to the Rome Treaty provision (Art 233, presently Art 350 TFEU) on Benelux-cooperation, as well as to the 1994 Accession Act provision on Nordic cooperation (Final Act, Pt III, Joint Declaration 28).

<sup>102</sup> ‘The provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided in this Title.’ See de Witte (2001) (n 106), 40.

recourse to intergovernmental agreements in third-pillar issues, as is shown by the Prüm Convention, concluded in 2005.<sup>103</sup> It is, though, questionable whether the Prüm Convention can be invoked as a precedent demonstrating the legal accessibility of the intergovernmental option. Its compatibility with EU law was never tested in the ECJ. In legal literature, it was criticised, not only for producing a political rift in the EU area of freedom, security and justice, but also for circumventing the Treaty-based procedures which give a voice to all principal EU institutions and all Member States.<sup>104</sup>

This criticism is equally pertinent in assessing use of intergovernmental agreements in European economic governance. If political negotiations aiming at consensus among all Member States fail, should the Member States who still want to push ahead not rely on the procedure the Treaties have expressly reserved for such a situation; namely, enhanced cooperation within the EU?

Bruno de Witte has argued for the availability of the intergovernmental option even after Amsterdam. His main premise is that to exclude this option would be ‘a drastic curtailment of the Member States’ treaty-making competences that cannot be assumed to have taken place in the absence of any clear indication in the founding treaties’.<sup>105</sup> Because of introduction in the Treaties of provisions on enhanced cooperation, this argument is not as convincing in the post- as it perhaps was in the pre-Amsterdam era. De Witte clearly perceives the main reasons for the continuing allure of the intergovernmental way: ‘i) the legal conditions for taking the “outside” route are less onerous than the conditions set for intra-EU closer cooperation and ii) Member States preserve, when acting under international law, complete control over the negotiation process and almost complete control over the implementation and enforcement of the obligations which they accept in the agreement’.<sup>106</sup> But he does not seem to accept the circumvention argument. He explains the severity of the conditions for enhanced cooperation in comparison with those for proceeding under public international law as follows: ‘as the closer cooperation delivers the keys of the powerful EU/EC engine to a group of Member States, such a move should be allowed less liberally than “old-fashioned” recourse to the more modest instruments of international law’.<sup>107</sup> But if a group of Member States through an intergovernmental agreement entrusts EU institutions with implementation tasks, they endeavour to have the best of both worlds: recourse to the ‘powerful EU engine’ within a regime established under the less onerous conditions of public international law.

The TSCG not only assigns tasks to EU institutions but even evokes employment of EU instruments for achieving its objectives. Art 2(1) assures that the Treaty will be applied and interpreted in conformity with EU procedural law ‘whenever the adoption of secondary legislation is required’. In a rather paradoxical way, in Art 10 the Contracting Parties declare their readiness ‘to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Art 20 of the Treaty on European Union and in Arts 326 – 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market’. In the face of such readiness, one cannot help wondering why the Contracting Parties did not at the very beginning opt for the

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<sup>103</sup> Convention between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Grand Duchy of Luxembourg and the Republic of Austria on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration, 6 December 2006, Council of European Union Doc 16382/06.

<sup>104</sup> T Balzacq and others: ‘Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats’, Working Document No 234, January 2006, Centre for European Policy Studies; J Ziller, ‘Le Traité de Prüm: Une Vraie-fausse Coopération Renforcée dans l’Espace de Sécurité de Liberté et de Justice’, No 2006/32, Law Working Paper, European Union Institute.

<sup>105</sup> De Witte (2001) (n 106), 40.

<sup>106</sup> *Ibid.* 33.

<sup>107</sup> *Ibid.* 57.

procedures available under the Treaties, but took recourse to an intergovernmental agreement, which the very procedures invoked in Art 10 of the TSCG render legally suspect.

Intergovernmental agreements which establish their own institutional structures are less vulnerable to the argument concerning employment of the ‘powerful EU engine’. This has been the case with financial assistance by Member States, although the respective agreements have assigned some tasks to EU institutions – the Commission, the Court and the ECB – as well. But creating new institutional structures parallel to those established by the Treaties is not unproblematic, either. The underlying rationale which calls for preference of EU procedures over new regimes created through intergovernmental agreements relates to democratic safeguards. As I shall discuss in more detail below, the fiscal crisis has led to growing institutional fragmentation and a new prominence of intergovernmental institutional structures, which has accentuated rather than alleviated the notorious democratic deficit of European integration.

### ***The Pre-Emptive Effect of EU Legislation?***

Even where the intergovernmental option is in principle available, its substantive reach can be subject to limitations deriving from EU law. The first set of possible restrictions relates to the pre-emptive effect of EU legislation.

The doctrine of pre-emption is an import from federal states, primarily the USA. In the context of EU law, it has mainly been elaborated in literature, and the CJEU has not explicitly employed it or clarified its normative contents. The Lisbon Treaty has now confirmed the premises of the doctrine through the general provisions of the TEU and TFEU on the division of competences between the Union and the Member States. These provisions are complemented by the Protocol on shared competences attached to the Lisbon Treaty. The Treaty provisions focus on *legislative competences*, which have been the main focus of scholarly discussion, too. However, the issue of pre-emption can be extended to Member States’ treaty-making power, as well: it is – at least in most cases – irrelevant whether legally binding acts are adopted by Member States acting separately or jointly through agreements *inter se*.<sup>108</sup>

In the field of EU *exclusive competence*, the pre-emptive effect is expressly laid down in Art 2(1) TFEU: ‘When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.’ If in a particular field no competence at all has been conferred upon the EU, the law is equally clear. As is expressly stated in Arts 4(1) and 5(2) TEU, competences remain with the Member States, and no pre-emption exists. Problems can only arise in fields of *shared competences*. Here the Lisbon Treaty introduced an explicit provision (Art 2(2)):

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

At its face, the provision does not take any clear position on the alternative understandings of pre-emption; termed *field*, *obstacle* and *rule pre-emption*.<sup>109</sup> Yet the general tone of the provisions on division of legislative competences between the Union and the Member States, including the provision on subsidiarity, points to rejection of the widest reading, i.e. field pre-emption. This interpretation

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<sup>108</sup> For the purposes of present discussion, treaties involving non-Member States – treaties *cum tertiis* – can be ignored.

<sup>109</sup> On different accounts of pre-emption, see R Schütze, ‘Supremacy without Pre-emption? The very slowly emergent Doctrine of Community Pre-emption’ (2006) 43 Common Market Law Review 1023.

finds confirmation in the Protocol on shared competences. The Protocol lays down, with reference to the Treaty provision on shared competence, that ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’.<sup>110</sup>

How should we locate EU competences within the field of (non-monetary) economic policy with regard to division between exclusive and shared competences? Both before and after entry into force of the Lisbon Treaty, some authors have characterised economic policy as *disguised shared competence*, with the clear implication of applicability of the pre-emption doctrine.<sup>111</sup> This position does not seem to stand critical examination.

According to their wording, the Treaty provisions on exclusive and shared competences primarily concern legislation and adoption of legally binding acts. Reference is to acts which are legally binding within Member States and where pre-emption encroaches on Member State legislative sovereignty. This already raises doubts about the relevance of the doctrine of pre-emption for economic policy. Here the Union’s main task is to facilitate coordination among Member States; both primary and secondary legislation lacks direct applicability or direct effect within Member States. Significantly enough, in the general provisions of the TFEU the Union’s economic policy competencies are regulated outside the division of exclusive and shared competences. Art 2(3) on economic policy comes after the provisions on exclusive (Art 2(1)) and shared (Art 2(2)) competences: ‘The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.’ The Union’s exclusive competences are enumerated in Art 3 and shared competences in Art 4. Again economic policy coordination, together with coordination of employment and social policy, is left outside this distinction and subsumed under a specific provision in Art 5.<sup>112</sup>

In sum, it appears that the doctrine of pre-emption can – and should – be laid aside when discussing the use of inter-governmental agreements in the field of economic policy, covered by Chapter 1 Title VIII TFEU. EU legislation or other measures of economic governance under Art 121 and 126 TFEU or financial assistance under Art 122(2) do not engender such a pre-emptive effect as would prevent Member States’ action through intergovernmental agreements under private law or public international law. For instance, establishing the EFSM through Regulation 407/2010 did not pre-empt the field of financial assistance or entail the conclusion that founding the EFSF and concluding the Framework Agreement would have been in breach of EU law. Nor have Arts 121 and 126 TFEU, complemented by secondary legislation, pre-empted the field of economic governance for an intergovernmental agreement, such as the TSCG.<sup>113</sup>

Yet, an important restriction on Member States’ treaty-making competence exists which bears resemblance to what has been called rule and obstacle pre-emption. The provisions of

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<sup>110</sup> ECJ case law preceding the Lisbon Treaty also seems to have rejected field pre-emption. In its *Bangladesh* ruling on development aid, the Court confirmed that since Community competence in the field of development aid was not exclusive, the Member States remained free to act collectively, individually or jointly with the Community. (Joined Cases C-181/91 & C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685) The same argument was employed in *Lomé* (Case C-316/91 *Parliament v Council* [1994] ECR I-625).

<sup>111</sup> R Smits, ‘The European Constitution and the EMU: An Appraisal’ (2005) 42 *Common Market Law Review* 425; A Antoniadis, ‘Debt Crisis as a Global Emergency: The European Economic Constitution and Other Greek Fables’ in Antoniadis, R Schütze and E Spaventa (eds), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart Publishing, Oxford 2011).

<sup>112</sup> Art 5(1) repeats the Member States’ obligation to coordinate their economic policies within the Union and adds that ‘to this end, the Council shall adopt measures, in particular broad guidelines for these policies’. It also lays down that ‘specific provisions shall apply to those Member States whose currency is the euro’.

<sup>113</sup> Calliess (n 74), 250-1 and 259, also rejects the pre-emption argument.



intergovernmental agreements may not contradict EU legislation, primary or secondary, or otherwise prevent the EU from achieving its objectives. But this restriction flows, not from pre-emption, as this is defined in Art 2(2) TFEU and the Protocol on shared competences, but from Member States' duty of *loyalty* or *sincere cooperation*, as it is called in TEU-Lisbon. Art 4(3) TEU lays down, inter alia, that 'the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'. Arguably, the intergovernmental agreements under discussion pursue similar aims in financial assistance and economic governance to Union measures. Moreover, in the ESM Treaty and the TSCG the primacy of EU measures is explicitly spelled out. The Preamble to the ESM Treaty states that 'strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area' (Recital 4). In turn, Art 2(1) of the TSCG evokes the loyalty principle enshrined in Art 4(3) TEU: 'This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Art 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required'. Furthermore, Art 2(2) lays down that 'the provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law' and that 'they shall not encroach upon the competences of the Union to act in the area of the economic union'.<sup>114</sup>

Nonetheless, in one area it seems justified to evoke a restriction on Member States' competence which comes close to so-called field pre-emption. The Lisbon Treaty confirmed the institutional and legislative status of the euro area through the provisions in Chapter 4 Title VIII TFEU (*Provisions specific to Member States whose currency is the euro*), complemented by the Protocol on the Euro Group attached to the Treaty. This can be argued to have given expression to a constitutional principle: if particular institutional structures, complementing or relating to the institutions listed in Art 13(1) TEU, are created for the euro area, this should take place through Treaty law. This principle would hold even if these structures do not possess formal decision-making powers. Thus, provisions on the Euro Group and its President are included in Art 137 TFEU and the related Protocol, although these bodies do not take legally binding decisions. In the light of this argument, the provisions in Title V of the TSCG (*Governance of the euro area*) on Euro Summit meetings and the President of these meetings appear constitutionally problematic. Euro Summit meetings are not convened merely for the purposes of implementing the TSCG but are supposed to discuss economic governance of the euro area in general.<sup>115</sup> Constitutional doubts can be extended to the provision on the conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments.

### ***Conferral of New Tasks on EU Institutions***

If Member States are free to coordinate their economic policy activities through intergovernmental agreements, may they also entrust EU institutions with implementing or monitoring implementation of these agreements? Should not the regulation of Treaty-based EU institutions and their tasks fall under the exclusive competence of EU legislation? This question receives new weight from the provision in

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<sup>114</sup> The Greek Loan Facility Agreement also involves a provision which implies the primacy of EU law. Art 6(6) of the Agreement lays down that if 'the Court of Justice of the European Union in a final decision decides that this Agreement or the making of the Loans violates European Union law and such violation cannot be remedied then the Facility as a whole (i.e. the Commitments of all of the Lenders hereunder) shall immediately and irrevocably be cancelled'.

<sup>115</sup> According to Art 12(2) of the Compact, 'Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area'.

Art 13(2) which belongs to the novelties introduced by the Lisbon Treaty. The provision sets out that each EU institution ‘shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them’.<sup>116</sup> All the intergovernmental agreements under examination contain provisions on the tasks of EU institutions, mainly the Court and the Commission but even the ECB. Have the Member States here encroached on an area reserved for EU legislation, primarily the Treaties?<sup>117</sup>

Due to explicit authorisation by the TFEU, involving the Court does not raise constitutional concerns. Art 273 TFEU lays down that ‘the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties’. All the intergovernmental agreements discussed now relate to ‘a subject matter of the Treaties’ and no objection can be made to their provisions on the jurisdiction of the Court.<sup>118</sup>

In relation to the Commission, a point of reference is provided by two rulings of the ECJ from the early 1990s, *Bangladesh* and *Lomé*. In *Bangladesh*, the Court held that the TEEC did not prevent Member States from entrusting the Commission with the task of coordinating collective action undertaken by them on the basis of an act of their representatives meeting in the Council.<sup>119</sup> Correspondingly, in the latter ruling the Court stated that no provision of the Treaty prevented Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating Community institutions with the procedure thus set up.<sup>120</sup>

The Preambles to the Greek Intercreditor Agreement, the EFSF Framework Agreement and the ESM Treaty refer to authorisation by the representatives of the Member States to entrust the Commission with tasks of implementation.<sup>121</sup> Yet, it is difficult to see what legal significance such authorisations possess. Member States’ representatives have acted under international law. Consequently, the authorisations, too, raise the constitutional problem of sidestepping EU legislation through intergovernmental agreements in assigning new tasks to EU institutions. The inclusion of all Member States – that is, even, non-euro area states – does not remove the problem. EU legislative procedures aim not only at guaranteeing the influence of all Member States but also the democratic input of the European Parliament and, after Lisbon, national parliaments as well. No authorisation by all Member States supports the tasks entrusted to the Commission through the TSCG. This means that not only

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<sup>116</sup> See P Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 *European Law Review* 231, where Art 13(2) TEU is also invoked.

<sup>117</sup> If the doctrine of pre-emption is used in the broad sense of the term, this could also be defined as an issue falling under it. However, above I have opted for discussing pre-emption merely in relation to Art 2(2) TFEU.

<sup>118</sup> Art 8(3) of the TSCG refers explicitly to Art 273 TFEU: ‘This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union.’

<sup>119</sup> *Bangladesh* (n 115) [20].

<sup>120</sup> *Lomé* (n 115) [41].

<sup>121</sup> Recital 3 of the Preamble to the Intercreditor Agreement: ‘Representatives of the Member States of the European Union have decided on 5 May 2010 to entrust the Commission with the tasks in relation to coordination and management of the Pooled Bilateral Loans as set out in this Agreement.’ Recital 3 of the Preamble to the EFSF Framework: ‘By a decision of the representatives of the governments of the 16 euro-area Member States dated 7 June 2010, acting on the basis of the conclusions of the 27 European Union Member States of 9 May 2010, the Commission was tasked with carrying out certain duties and functions as contemplated by the terms of this Agreement.’ Recital 10 of the Preamble to the ESM Treaty: ‘On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the ECB to perform the tasks provided for in this Treaty’.

parliaments but also non-signatory Member States have been bereft of the possibility to assess the appropriateness of the new tasks.<sup>122</sup>

It is questionable whether *Bangladesh* or *Lomé* can be invoked as a precedent, either. The tasks assigned to the Commission in intergovernmental financial assistance are wider than in these cases and comprise, for instance, monitoring the beneficiary state's compliance with the conditions of assistance set out in the respective MoU. In turn, under the TSCG the Commission is expected to monitor whether the Contracting Parties have abided by their obligation to guarantee that the rules on government deficit and debt, set out in Art 3(1) of the Treaty, are 'fully respected and adhered to throughout the national budgetary processes' (Arts 3(2) and 8).

The obvious counter-argument is that the tasks assigned to the Commission are not exactly new but similar or analogous to those the Commission already exercises under EU legislation. For instance, the Commission's monitoring tasks would be similar to those which the Commission exerts under the Stability and Growth Pact. Indeed, monitoring compliance with MoUs conditioning intergovernmental financial assistance is closely interconnected with monitoring within the excessive deficit procedure. Correspondingly, the Preamble to the TSCG alludes to monitoring procedures under Arts 121, 126 and 136 TFEU.<sup>123</sup> However, as Paul Craig has argued, the fact that an EU institution has a power under the Lisbon Treaty or EU legislation cannot *per se* legitimate use of the same or an analogous power under a different treaty. Thus, 'the statement in the Preamble to the TSCG that when reviewing and monitoring budgetary commitments under the TSCG, the Commission will act within the framework of its powers as provided by Arts 121, 126 and 136 TFEU, cannot in itself determine the issue of whether those Arts of the TFEU are indeed capable of being used in this way in the TSCG'.<sup>124</sup>

The case of the ECB is constitutionally perhaps even more problematic than that of the Commission. First, the ECB is one of the EU institutions which 'shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them' (TEU 13(2)). But, secondly, as Art 130 TFEU makes clear, the ECB is supposed to function under an enhanced principle of independence, which arguably imposes additional restrictions on Member States' assigning new tasks to it.

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<sup>122</sup> Paul Craig has largely based his criticism of the TSCG's reliance on the EU institutional framework on the fact that resort to an agreement under international law was only taken after the UK's veto. He criticises, first, principle P1, which responds affirmatively to the following question: 'If the Member States fail to attain unanimity for amendment, and do not seek or fail to attain their ends through enhanced cooperation, does it mean that 12, 15, 21 etc Member States can make a treaty to achieve the desired ends and the EU institutions can play a role therein, where the twenty seven Member States have not agreed to use of the EU institutions, and where the treaty thus made deals with subject matter covered directly by the existing Lisbon Treaty?' Secondly, he rejects what he calls P2 and which states 'it is open to a group of Member States outside the confines of the existing Treaties to decide in agreement with an EU institution that it should be empowered or mandated to perform certain tasks not specified in the existing EU Treaties'. Craig (n 121).

<sup>123</sup> The Contracting Parties take 'note that, when reviewing and monitoring the budgetary commitments under this Treaty, the European Commission will act within the framework of its powers, as provided by the Treaty on the Functioning of the European Union, in particular Arts 121, 126 and 136 thereof'.

<sup>124</sup> To argue to the contrary, would, according to Craig, amount to subscribing to what he terms P3: '(A) treaty could be made outside the confines of the Lisbon Treaty and the framers of the former could decide that institutional powers accorded under the Lisbon Treaty or EU legislation could apply within the new treaty ordering.' Craig (n 121), 243.

#### IV The Fate of the Maastricht Principles

In preceding sections, I have examined major doctrinal EU-law issues raised by emergency assistance and financial stability mechanisms: the legality of assistance in the light of Arts 122(2) and 125(1) TFEU; the compatibility of the role assumed by the ECB with the prohibition of central-bank financing in Art 123 TFEU, the bailout prohibition and ECB independence as defined in Art 130 TFEU; and reliance on intergovernmental agreements instead of EU legal instruments. These are significant issues individually. Still, even more imperative is to discuss their implications with regard to the Maastricht principles of the European economic constitution.

The new layer of the European economic constitution, introduced by the Maastricht Treaty and reinforced through the Stability and Growth Pact, Europeanized monetary policy and assigned it to the ECB, which was supposed to enjoy enhanced independence from political influence. In contrast, in fiscal and economic policy Member States retained their sovereignty, while the Union was to possess merely coordinating functions. Yet, fiscal sovereignty was not absolute but circumscribed by constitutionally defined reference values on budget deficit and public debt. Restrictions on fiscal sovereignty reflected the primacy of the monetary-policy objective of price stability; they were expected to impose on Member States the budgetary discipline which a monetary policy focusing on price stability was seen to require. Member States' fiscal sovereignty found its reverse in their fiscal liability, expressed by the no-bailout clause in Art 125(1) TFEU. The EU in general and the EMU in particular was supposed to be no 'transfer union', but only to allow for strictly limited financial transfers from the European level to Member States or from one Member State to another.

##### *Shaking of the Maastricht Principles of Monetary Policy*

During the fiscal crisis, Europeanized monetary policy and the ECB as its executive have assumed new roles which question the tenability of central Maastricht premises. The ECB Securities Markets Programme – replaced by Outright Monetary Transactions – has compromised on price stability as the primary objective of monetary policy, and the ECB's deep involvement in country-specific rescue operations and in re-establishing financial stability in the euro area has problematized the principle of independence. In the Securities Markets Programme, the Maastricht relationship between European monetary policy and national fiscal policy has been reversed: the needs of the latter have determined the objectives pursued by the former.<sup>125</sup> By the same token, the ordoliberal tenets of monetary policy's non-political character and of the self-evident truth of price stability as the focus of that policy have suffered a severe blow. We have witnessed a tendency towards monetary policy's *politicization*. What this means in terms of the *legitimacy* of the ECB and the policy it pursues remains to be seen. If the legitimacy issue is considered relevant at all from ordoliberal premises, it is defined in terms of expert and output legitimacy, instead of democratic input legitimacy. The further away from a monetary policy directed by the price-stability objective the ECB ventures and the more active a role it adopts in fiscal rescue operations, the more the original justification for its present institutional status loses coverage.

The ordoliberal view of monetary policy has never been as uncontested as is often intimated; divergent notions of the objectives of monetary policy, and of the optimal relationship between the central bank and the political branches of government have always existed as well. But it has clearly been the dominant position in post-war Germany, and it is doubtful whether Germany would ever have gone in for establishing the EMU without its acceptance as one of the cornerstones of the Maastricht economic

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<sup>125</sup> This has been the refrain in, in particular, German criticisms of the ECB. As a representative example, see A Belke, 'Driven by the Markets? ECB Sovereign Bond Purchases and the Securities Markets Programme', Ruhr Economic Papers 194, University of Duisburg-Essen

constitution. The German Constitutional Court has even declared ‘compliance with the independence of the European Central Bank and the primary objective of price stability permanent constitutional requirements of a German participation in the monetary union’.<sup>126</sup>

### ***Compromising on the Principle of Member States’ Fiscal Liability***

In fiscal policy, Maastricht principles have been at least as profoundly affected. Other euro-area states have come to the rescue of states caught up by the fiscal crisis, and the ESM, backed by the amendment to Art 136 TFEU, will confirm the availability of financial assistance financed by other Member States as a permanent policy. A strict principle of Member State fiscal liability seems to be impossible to reconcile with a common, Europeanized monetary policy and the financial stability this requires. Proposals for further steps towards a ‘transfer union’ are on the table, such as the introduction of Eurobonds – or stability bonds, as they are called in the Commission’s Green Paper<sup>127</sup> – which would Europeanize sovereign debt liability, or a ‘Banking Union’, which would Europeanize liability for banks.<sup>128</sup> Other proposals invoke the example of federal states – such as the USA, Switzerland or pre-Euro Germany – where common currency and federal monetary policy are backed by federal taxation and a federal budget large enough to facilitate transfer of resources to and among the federated entities. All these schemes are premised on the perceived failure of the Maastricht combination of Europeanized monetary policy and national fiscal policy.

### ***Curbing the Fiscal Sovereignty of the Beneficiary States***

The Maastricht model implies not only the principle of national fiscal liability but also its reverse, the principle of Member State fiscal sovereignty. This principle, too, is shaking.

The emergency measures taken to combat the fiscal crisis since Spring 2010 have affected the fiscal sovereignty of both beneficiary and assisting states. All forms of assistance, starting from the Greek loan package and ending with the ESM, are premised on ‘strict conditionality’. The Memoranda of Understanding or Programmes of Adjustment which the beneficiary countries – so far Greece, Ireland and Portugal - have been obliged to sign have contained not only general, aggregate, reference values on, say, public spending or the level of taxation, but also rather detailed provisions on how spending cuts should be allocated and deficits financed. Moreover, every new imbursement of assistance has been made dependent on the recipient state’s fulfilling its commitments, as assessed by transnational monitors. Demands have been raised for even tighter fiscal tutelage, a ‘financial receivership’.<sup>129</sup> Two-pack legislation providing for ‘enhanced surveillance’ of euro-area states experiencing severe financial difficulties or already receiving financial assistance does not go as far as some discussants have suggested, but in any case entails further curbing of the fiscal sovereignty of crisis states.<sup>130</sup>

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<sup>126</sup> BVerfG, 2 BvR 987/10 (n 103) [129], and BVerfG, 2 BvR 1390/12, 12 September 2012, [203].

<sup>127</sup> Commission (EU), ‘Green Paper on the Feasibility of introducing Stability Bonds’ COM (2011) 818 final, 23 November 2011.

<sup>128</sup> Commission (EU), ‘A Roadmap towards a Banking Union’ (Communication) COM (2012) 510 final, 12 September 2012.

<sup>129</sup> In a discussion paper published by the ECB, Schuknecht and others (n 20) propose that ‘a country requiring assistance under the ESM (be) placed in financial receivership if its adjustment programme fails to remain on track, with the planning and execution of budgets requiring the agreement of the appointed financial receiver’. The authors clarify their proposal as follows: ‘...financial receivership is necessary where countries have no political consensus in support of reforms. Without such a provision, the moral hazard emanating from support programmes and the risk of countries failing to comply and/or defaulting would not be sufficiently mitigated. This is the ultimate step in a graduated process of increased monitoring and control over national budgetary policies.’

<sup>130</sup> See Commission Proposal 819, (n 63), included in the two-pack legislation initiative from November 2011. On the basis of enhanced surveillance, the Commission could propose that the Council recommend that the Member State concerned seek financial assistance and that a macro-economic adjustment programme be prepared. Such a programme would also

Social expenditures have not been saved from cuts; to the contrary, they are among the main objects of saving. The population of the recipient countries have largely experienced the conditions for assistance as austerity programmes imposed from the outside on weak and failed national political decision-makers. As events in Greece have most conspicuously proven, this has jeopardized the legitimacy of both European integration and the national political regime, and engendered growing resentment towards assisting states, primarily Germany.

### *Curbing the Fiscal Sovereignty of Assisting States*

Measures taken to re-establish financial stability have had grave repercussions for the fiscal sovereignty of assisting states as well. Their financial liabilities, both taken separately for each instrument and in total,<sup>131</sup> are huge. This has resulted in constitutional problems in, for example, such Member States as Germany and Finland, where the constitution enjoys particularly high prestige in political and legal culture. The main constitutional concerns relate to national sovereignty, the fiscal powers of Parliament and democratic legitimation of fiscal policy decision-making.

In Finland, the Constitutional Law Committee of Parliament, which is responsible for *ex ante* constitutional review, has issued several opinions on Finland's liabilities deriving from, first of all, the EFSF Framework Agreement and the ESM Treaty.<sup>132</sup> In the worst scenario, Finland's losses from its guarantee commitment under the EFSF Framework Agreement could amount to 30 billion euros, which corresponds to more than a half of the annual budget. However, in its assessment the Constitutional Law Committee pointed to factors which soften the effect of the Framework Agreement on Parliament's budgetary power. All the major decisions in the EFSF affecting Member States' guarantee liabilities require unanimity. Art 96 of the Constitution, in turn, grants the Grand Committee of Parliament the right to pronounce on the position which Finland's representative will take in the Board of Directors.<sup>133</sup> Moreover, the law incorporating the Framework Agreement obliges Government to seek Parliament's authorisation for every guarantee given under the Agreement. The Constitutional Law Committee has considered such involvement of Parliament sufficient from a constitutional point of view.<sup>134</sup>

The ESM Treaty has been examined by the Constitutional Law Committee with regard to its impact not only on the budgetary power of Parliament but also on the sovereignty of Finland, enshrined in Art 1 of the Constitution. A complementary criterion has been the state's ability to honour its constitutional obligations. Finland's subscription to the authorised capital stock of the ESM amounts to 12.5 billion euros, which corresponds to more than a quarter of the annual government budget. If such a liability, to be paid in a single instalment, flowed directly from the Treaty, this would, arguably, violate Parliament's constitutionally anchored budgetary power, as well as national sovereignty.

(Contd.) \_\_\_\_\_

be required from States already receiving assistance. The draft programme would be prepared in agreement with the Commission and approved by the Council. It would then form the basis for further enhanced surveillance.

<sup>131</sup> In Finland, the Constitutional Law Committee of Parliament has repeatedly emphasised that liabilities should be assessed as a whole, in order to appraise the encroachment on Parliament's fiscal powers and the possible endangerment of the state's ability to cope with its constitutional obligations. In addition, the risk connected to liabilities should also be taken into account. Indeed, such a holistic approach is needed, although it is difficult to execute, due to the different legal and economic nature of liabilities and the variation in the respective risks.

<sup>132</sup> The first Greek rescue package was deliberated in Parliament merely in the context of an amendment to the budget. Neither the Loan Facility Agreement nor the Inter-creditor Agreement was submitted to Parliament for approval. Clearly, this was due to the formalistic reason of the private-law nature of these inter-governmental agreements.

<sup>133</sup> Art 96 provides that Parliament must be consulted on proposals for EU measures which otherwise, according to the Constitution, would fall within its competence. The proposals are discussed in the Grand Committee or the Foreign Affairs Committee, which may issue a statement to the Government. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made.

<sup>134</sup> See the following Reports of the Constitutional Law Committee: PeVL 5 and 14/2011.

Furthermore, the State's financial capability to meet its constitutional obligations could be jeopardized.<sup>135</sup>

However, the ESM Treaty divides the authorised capital stock into paid-up and callable shares. The liability of the ESM Members deriving directly from the Treaty covers merely the paid-up shares, which for Finland amounts to 1.4 billion euros. All the major decisions affecting financial liability must be taken by mutual agreement, that is, unanimously, by the Board of Governors; these comprise calls for authorised unpaid capital and changes in the authorised stock capital. The requirement of mutual agreement also covers major decisions on stability support provided by the ESM. Consequently, individual Member States possess a veto power, and in Finland, Parliament (the Grand Committee) can influence Government's voting position in the procedure under Art 96 of the Constitution. This allays the Treaty's impact on Finland's sovereignty and Parliament's fiscal power.

The ESM Treaty provides for an emergency procedure where decisions can be made by a qualified majority of 85% of the votes cast; under such a majority only the three largest Euro States – Germany, France and Italy – retain their veto power. According to Art 4(4), the emergency procedure 'shall be used where the Commission and the ECB both conclude that a failure to adopt a decision to grant or implement financial assistance would threaten the economic and financial stability of the euro-area'. When the emergency procedure was first introduced in treaty negotiations in late 2011, it would have covered not only decisions on granting assistance, but also decisions directly affecting the liability of Member States, such as calls for authorised unpaid capital. In December 2011, the Constitutional Law Committee concluded that if the provision on the emergency procedure were retained in its original form, the Treaty and the law on its incorporation would have to be accepted in Parliament by a qualified majority. Subsequently, the controversial draft provision was amended to the effect that decisions affecting the liability of Member States were left outside the emergency procedure. For the Constitutional Law Committee, this removed the contradiction with the Constitution. In its final report in June 2012, the Committee assessed the liabilities deriving from the ESM Treaty together with Finland's previous commitments under the Greek rescue package and the EFSF Framework Agreement. Even in such an overall appraisal, the Committee did not find a breach of the Constitution on the grounds of an infringement of Parliament's constitutional powers or national sovereignty. Nor did the Committee reckon that the commitments, even when taken as a whole, would jeopardize the State's capability to meet its constitutional fiscal obligations.<sup>136</sup>

The German Constitutional Court has issued two important rulings on the Greek rescue package and the EFSF, as well as the ESM. The main constitutional criteria the Court has applied have been national budget autonomy and the budgetary power of the democratically elected Parliament (the *Bundestag*). In its judgment of 7 September 2011, the Court assessed the Monetary Union Financial Stabilisation Act (*Währungsunion-Finanzstabilisierungsgesetz*), which authorised the loans granted to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), which authorised the guarantees under the EFSF Framework Agreement. The Court's final conclusion was that the Acts did not violate the complainants' right to elect the *Bundestag* under Art 38(1) of the Basic Law, and that 'by adopting these Acts, the German *Bundestag* did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy of future Parliaments'. However, the Court only held the Euro Stabilisation Mechanism Act compatible

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<sup>135</sup> In the Finnish system, contradiction with the Constitution is not an absolute obstacle to accepting an international treaty and incorporating its provisions in the domestic legal order. However, according to Arts 94 and 95, such a contradiction would entail a requirement of a two-thirds qualified majority, which in the present political situation would be difficult to obtain.

<sup>136</sup> See the following Reports of the Constitutional Law Committee: PeVL 22 and 25/2011, and PeVL 13/2012.

with the Basic Law provided that it be interpreted to the effect that the Federal Government is obliged to obtain prior approval by the Budget Committee of Parliament before giving guarantees.<sup>137</sup>

The second ruling, issued on 12 September 2012, dealt with the ESM Treaty and the Act establishing the European Stability Mechanism (*Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus*). Again, the Court concluded that the liabilities assumed through ratification of the Treaty were in compliance with the Basic Law, but only under certain conditions. First, the Court set as a condition for ratification that under international law it is ensured that Art 8(5) of the Treaty limits the amount of all Germany's payment obligations to the amount stipulated in Annex II so that higher obligations require the agreement of the German representative. Secondly, a similar ensurance is needed to guarantee that Treaty provisions on inviolability of documents, professional secrecy and immunity in Arts 32, 34 and 35 do not prevent comprehensive information to the German Parliament.<sup>138</sup>

For my present discussion, the Court's identical reasoning in the two cases possesses more interest than its final conclusions. The Court argues that Art 38(1) of the Basic Law on the right to vote, taken together with the principle of democracy, enshrined in Arts 20 and 79(3), presupposes that 'the decision on revenue and expenditure of the public sector remain in the hands of the German *Bundestag* as a fundamental part of the ability of a constitutional state to democratically shape itself'.<sup>139</sup> The Court underlines that 'as elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions in a system of intergovernmental governance as well'. Consequently, 'when establishing mechanisms of considerable financial importance which can lead to incalculable burdens on the budget, the German *Bundestag* must ... ensure that later on, mandatory approval by the *Bundestag* is always obtained again'. Thus, 'every larger scale aid measure of the Federation taken in a spirit of solidarity and involving public expenditure at international or European Union level must be specifically approved by the *Bundestag*'. Moreover, 'sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with'.

In its two rulings, the Court conceded the legislature a rather wide margin of appreciation with regard to assessments of an economic nature. This concerned the risk of execution of the guarantees given to the EFSF or the payment obligations and commitments to accept liability under the ESM Treaty, as well as sustainability of the federal budget. Against this background, the Court declared in the first ruling that 'the *Bundestag* did not deplete its right to adopt the budget and control its implementation by the government and did not disregard the essential content of the principle of democracy'. The Court held that it could not be established that the EFSF guarantees would render budget autonomy ineffective. It did not question the legislature's judgment that the guarantee authorisations are within the capacity of the federal budget and that 'even in the case of the complete realisation of the guarantee risk it would still be possible to refinance the losses through revenue increases, cuts in expenditure and longer-term government bonds'. Nor did the Court see any reason to assume 'an irreversible process with consequences for the German *Bundestag*'s budget autonomy'; neither of the two Acts it examined in its September 2011 ruling entails 'an automatism by which the *Bundestag* would relinquish its right to adopt the budget and control its implementation by the government'. Nonetheless, the Court stressed that the Act authorising the giving of guarantees to the EFSF must be interpreted 'in conformity with the constitution to the effect that the Federal Government is in

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<sup>137</sup> BVerfG, 2 BvR 987/10 (n 103).

<sup>138</sup> BVerfG, 2 BvR 1390/12 (n 131).

<sup>139</sup> The criterion 'the ability of a constitutional state to democratically shape itself' stems from the Constitutional Court's Lisbon judgment, where it was used to chart the constitutional essentials which must remain under national sovereignty. Issues which the Court considered particularly sensitive for this ability included 'fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, inter alia, by social policy considerations'. BVerfG, 2 BvE 2/08, 30 June 2009, [252] and [256].



principle obliged to always obtain prior approval by the Budget Committee before giving guarantees'. This interpretation corresponds to the procedure adopted in the corresponding Finnish law.<sup>140</sup> In turn, in its ruling on the ESM the Court stressed that the German *Bundestag*'s 'overall budgetary responsibility',<sup>141</sup> protected by the Basic Law, requires that the *Bundestag* is able to receive the information it needs to assess the fundamental basis and consequences of its decisions.

The Constitutional Court has also issued a further ruling which highlights how the *Bundestag* should use its prerogatives. The ruling of 28 February 2012 concerned the Act Amending the Euro Stabilisation Mechanism Act (*Gesetz zur Änderung des Stabilisierungsmechanismusgesetzes*), which incorporated amendments to the EFSF Framework Agreement agreed in May/July 2011. The Act provides that decisions of the German representative in the EFSF require the consent of the *Bundestag*. In particularly urgent and confidential cases, the *Bundestag*'s right of participation is exercised by a panel elected from among the members of the Budget Committee. The complainants, two Members of the *Bundestag*, claimed that this violated their rights as deputies, deriving from Art 38(1) of the Basic Law. The Court found the main thrust of complaint well-grounded, and declared that considerations of urgency did not justify delegation to the panel of any of the *Bundestag*'s powers related to the emergency measures of the EFSF.<sup>142</sup>

### ***The Newly-Opened Democracy Deficit***

Interestingly enough, in its rulings of September 2011 and September 2012 the German Constitutional Court also took a stand on the relation of the European Treaties to national budget autonomy. It declared that the 'Treaties are not contrary to an understanding of the national budget autonomy as an essential, inalienable competence of the directly democratically legitimised parliaments of the Member States but that they, on the contrary, require the existence of such competence'. Consequently, 'strict observance of the European Treaties guarantees that the actions of the institutions of the European Union have a sufficient democratic legitimation in Germany and for Germany'. This takes us to the crux of the issue: the view the Maastricht principles imply on the nature of economic policy and requirements for its legitimacy.

If monetary policy was conceived of in Maastricht as a field of independent experts, in fiscal policy even ordoliberal-minded discussants conceded the necessity of democratic input legitimacy.<sup>143</sup> This necessity arises from the value choices and redistributive effects which both taxation and spending decisions inevitably entail. In the Maastricht architecture of the European economic constitution, fiscal policy, retained under Member States' sovereignty, was expected to receive its legitimacy from national democratic procedures. Correspondingly, the more Member States' fiscal sovereignty and national parliamentary powers are restricted, the more fiscal policy loses of the legitimacy it is assumed to obtain at national level.

Despite the concerns they have evoked, both the German Constitutional Court and the Finnish Constitutional Law Committee have found the European financial stability mechanisms compatible with the respective constitutions. But if European reactions to the financial crisis are taken as a whole, one can hardly avoid the conclusion that the national fiscal sovereignty of especially euro-area states

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<sup>140</sup> In the Finnish Parliament, though, EU-related issues fall to the Grand Committee, or, if they touch on foreign and security policy, the Foreign Affairs Committee.

<sup>141</sup> This expression also stems from the Lisbon judgment, (n 145), where the Constitutional Court stressed that 'the overall responsibility, with sufficient political discretion regarding revenue and expenditure' must rest with the German *Bundestag*. ([258])

<sup>142</sup> BVerfG, 2 BvE 8/11, 28 February 2012.

<sup>143</sup> Eg EW Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union: Beiträge zur Rechtslehre und Politik der Europäischen Integration* (Nomos, Baden-Baden 2003).

has been considerably curtailed. The Maastricht economic constitution, reinforced by the Stability and Growth Pact, already constrained national budget autonomy through broad economic guidelines and mutual surveillance, as well as reference values on government debt and budget deficit. In an overall assessment, both aspects of European responses to the fiscal crisis must be taken into account. National sovereignty and budget autonomy are not threatened only by financial liabilities related to emergency assistance and financial stability mechanisms, but also by the gradual establishment of 'new European economic governance', involving closer surveillance and regulation of national budget procedures.

Efforts to tighten fiscal discipline have in a piecemeal way whittled away at Member States' fiscal-policy sovereignty, when European-level bodies and institutions have obtained increasing powers and Member States have been obliged to adapt their national budget procedures to European requirements. In the Maastricht regime, European monitoring was by and large based on soft law and peer review; on what subsequently came to be called the *open method of coordination*. Through recent amendments to the Stability and Growth Pact and the introduction of quasi-automatic sanctions in case of infringements, in particular the excessive deficit procedure has taken decisive steps in a hard-law direction. Regulation 1176/2011, which introduced the European semester, extended European monitoring from medium-term budget planning focusing on aggregate objectives to annual budget planning. Two-pack legislation goes still further and obliges euro-area Member States to submit annually a draft budgetary plan for the forthcoming year to the Commission and the Euro Group.<sup>144</sup> Although the Commission will not receive the competence to take legally binding decisions, its opinions will be public and expected to put strong pressure on Member States.<sup>145</sup> In turn, the excessive imbalances procedure, established through Regulation 1174/2011, extended mutual surveillance, which had largely focused on budgetary policy, to macro-economic policy.

Furthermore, with its requirements on national budgetary procedures, Directive 2011/85 opened a new inroad into national fiscal sovereignty. Two further instruments widen this inroad. First, two-pack legislation not only includes requirements on the draft budgetary plan to be submitted to the Commission but also stipulates that 'Member States shall have in place numerical fiscal rules on the budget balance that implement in the national budgetary processes their medium-term budgetary objective'. Furthermore, 'such rules shall cover the general government as a whole and be of binding, preferably constitutional, nature'.<sup>146</sup> Secondly, the main thrust of the TSCG is to create national guarantees to ensure that Member States respect the requirement of a balanced or surplus budget and the country-specific medium-term objective as defined in the revised Stability and Growth Pact. In its final form, the Treaty does not involve the obligation of constitutional entrenchment. Yet even in its watered-down shape, the requirement of national guarantees, together with the concomitant monitoring process involving the Commission and the CJEU, may cause constitutional problems in some Member States.

### ***Alternative Responses to the Erosion of Fiscal Policy's Democratic Legitimation***

Two alternative ways exist to react to the gradual erosion of national fiscal sovereignty and the consequent reduction of the legitimating power of national democratic procedures: either redefining

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<sup>144</sup> See Commission Proposal 821 (n 63) Art 5(1).

<sup>145</sup> According to the proposal, if the Commission identifies particularly serious non-compliance with the budgetary policy obligations laid down in the Stability and Growth Pact, it will request a revised draft budgetary plan from the Member State concerned and make the request public (Art 5(5)). In its final opinion, it assesses the revised plan. The opinion will be made public and, at the request of the Parliament of the Member State concerned, the Commission will present it to the Parliament concerned. (Art 6(1)-(2)) However, increasing the legal effect of the Commission's feedback is being negotiated on the basis of a report by the President of the European Council. (H van Rompuy, 'Towards a Genuine Economic and Monetary Union', EUCO 120/12, 26 June 2012, Brussels).

<sup>146</sup> Commission Proposal 821 (n 63) Art 4(1).

the nature of fiscal policy and its need of democratic legitimacy, or remedying the notorious democracy deficit at the European level and reinforcing democratic federalist structures. The first strategy is obvious in proposals for creating independent budget offices or councils at both the Member-State and European level. Two-pack legislation obliges euro-area states to establish an independent fiscal council. This is defined as ‘a body endowed with functional autonomy *vis-à-vis* the fiscal authorities of the Member State in charge of monitoring the implementation of national fiscal rule’.<sup>147</sup> Schuknecht (and others) advocate a European Budget Office, which would be free from ‘political interference’.<sup>148</sup> It would assess national policies within the euro-area and proper implementation of governance procedures, as well as act as the monitoring body and administrator for ESM programmes. The authors suggest that ‘it could potentially form the nucleus of what could become over time and in a step-wise manner a European Ministry of Finance’. They argue that ‘it is clear from past experience that, at the euro-area level, only a strong and independent institution can compensate for member countries’ tendency towards leniency in the implementation of fiscal rules’.<sup>149</sup>

The ECB’s involvement in rescue operations aiming at re-establishing financial stability manifests a tendency towards politicising monetary policy. Perhaps slightly paradoxically, a contrary tendency of *de-politicization* is perceivable in fiscal – and even macro-economic – policy. The call for independent budget offices or councils manifests the propensity to treat even fiscal policy as a non-political policy field which, in accordance with the Maastricht view on monetary policy, should be left to the province of non-political experts or where these would at least be authorised to impose restrictions on democratic procedures. This marks a major deviation from the underlying rationale of the Maastricht economic constitution with its acknowledgement of the redistributive effects of fiscal policy and the concomitant need of democratic legitimacy.

The alternative to redefining fiscal policy and further insulating it from democratic influences would be to at last take seriously the democratic deficit of the EU and head for *democratic federalism*. Unfortunately, the European Parliament and the national parliaments have been accorded but a peripheral position in both financial stability mechanisms and the ‘new European economic governance’. In financial assistance, opting for the intergovernmental way and sidestepping the EU legislative and institutional framework has not conceded the European Parliament any role at all in either the design or the administration and monitoring phase. In turn, the leeway and influence of national democratic procedures have depended, apart from pressures from the European level, on national constitutional arrangements.

From the very installation of the mutual surveillance and excessive deficit procedures, the European Parliament has played but a minor role, mainly restricted to the right to receive information.<sup>150</sup> Six-pack and two-pack legislation have responded to criticism for lack of democracy with provisions on *economic dialogue* between EU institutions, in particular the Parliament, the Council and the Commission. The dialogue is supposed to take place in the competent committee of Parliament, which may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Euro Group to appear before the committee to discuss issues under consideration in the surveillance and monitoring procedures. The Member State concerned can

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<sup>147</sup> Commission Proposal 821 (n 63) Arts 1(1)(1) and 4(2).

<sup>148</sup> Schuknecht and others (n 20).

<sup>149</sup> Other proponents of a European Ministry of Finance include Jean-Claude Trichet, former President of the ECB. L Elliot, ‘EU should Control Member States’ Budget says Bank Boss’ (The Guardian’s website, 2 June 2011), available at <<http://www.guardian.co.uk/business/2011/jun/02/trichet-wants-eu-central-finance-ministry>> accessed 19 October 2012.

<sup>150</sup> According to Art 121 TFEU, the Council informs the Parliament of its recommendation setting out the broad economic guidelines (Art 121(2)), and the President of the Council and the Commission reports to the Parliament on the results of multilateral surveillance. Furthermore, the President of the Council may be invited to appear before the competent committee of the European Parliament. In turn, Art 126 TFEU imposes on the President of the Council the obligation to inform the European Parliament of decisions taken with regard to a country submitted to the excessive deficit procedure.

also be allowed to participate in the discussion. Basic provisions on the dialogue have been set out in Regulation 1175/2011, which also formalized the European semester.<sup>151</sup> In enhanced surveillance in the euro area, Parliament's role is more prominent. In its Preamble, Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area states that 'the strengthening of economic governance should include a closer and a more timely involvement of the European Parliament and the national parliament' (Recital 1). The Preamble also provides for the possibility of an economic dialogue with the European Parliament which would enable the Commission to make its analyses public and which could involve the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Euro Group. Moreover, the Preamble evokes the prospect of public debate on the spill-over effects of national decisions, which could engender public peer pressure to be brought to bear on the relevant actors (Recital 12). Involving national parliaments and civil society actors has largely remained at the level of programmatic statements.<sup>152</sup>

The rather modest efforts to engage the European Parliament and national parliaments in European economic governance, as well as to increase its transparency, are hardly able to affect the general picture. . However, because of a potential institutional or – we could also say – *democratic asymmetry*, a more far-reaching involvement of the European Parliament is not unproblematic, either. Both stability mechanisms and deepening European economic governance focus in particular on the euro area. The increasing impact of the European Parliament, representing the citizenry of the EU as a whole, raises democratic worries about the congruence of influence on, and effects of, decision-making. Democracy requires that all those concerned be given a chance to participate. But, arguably, it also requires that those not concerned be left without a voice.

The federalist structures that are gradually evolving from the incrementalist mode of reinforcing European economic governance are largely based on intergovernmentalism, supported by expertise-based institutions, such as the Commission and the ECB. The sneaking federalism we see emerging has rightly been termed '*executive federalism*', based on intergovernmental structures.<sup>153</sup> The *rise of new intergovernmentalism* is evident both in the creation and administration of financial stability mechanisms and the strengthening of economic governance under the umbrella of Arts 121, 126 and 136 TFEU.

*Institutional and legislative fragmentation* belong to the major unintended, constitutionally relevant consequences of incrementalist European reactions to the fiscal crisis. New official, semi-official and unofficial bodies have abounded; some of them with formal decision-making powers, others without any formal competence but still exercising considerable influence. Not only has the European Parliament been largely kept on a side-track but even the Commission and the Council have found rivals in novel organisational forms. Financial assistance and the tightening of fiscal discipline have been planned and discussed not only within the institutions acknowledged by the Treaties but also in,

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<sup>151</sup> Regulation 1175/2011, (n 58), focuses on the mutual surveillance procedure under Art 121. The other Regulations of the six-pack and the two-pack contain corresponding provisions on Economic Dialogue in the competent Committee of Parliament. In a uniform way, the provisions invoke the principle of transparency: the dialogue aims to ensure greater transparency and accountability.

<sup>152</sup> Thus, the Preamble to Regulation 1175/2011, (n 58), contains the following statement: 'In line with the legal and political arrangements of each Member State, national parliaments should be duly involved in the European Semester and in the preparation of stability programmes, convergence programmes and national reform programmes in order to increase the transparency and ownership of, and accountability for the decisions taken. Where appropriate, the Economic and Financial Committee, the Economic Policy Committee, the Employment Committee and the Social Protection Committee should be consulted within the framework of the European Semester. Relevant stakeholders, in particular the social partners, should be involved, within the framework of the European Semester, on the main policy issues where appropriate, in accordance with the provisions of the TFEU and national legal and political arrangements.' (Recital 16)

<sup>153</sup> J Habermas: 'Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts' in Habermas, *Zur Verfassung Europas* (Suhrkamp, Berlin 2011), 43.

for instance, a Working Group of the President of the European Council, the Working Group of the Euro Group, the Euro Summit, ‘Merkozy’ meetings ... The European Council, with its President, and the Euro Summit, both epitomizing executive, intergovernmental federalism *par excellence*, have clearly taken the lead in determining the measures to be taken to overcome the crisis. Stability mechanisms, such as the EFSF and the ESM, operate as separate financial institutions outside the Treaty framework, with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality. Intergovernmental stability mechanisms remain outside the scope of application of both Treaty provisions on the principle of transparency and complementary secondary legislation.<sup>154</sup> Such an institutional development makes any control by the European Parliament or national parliaments, not to mention civil society and the citizenry, extremely difficult.<sup>155</sup> Supervision is also hampered by the fragmentation of legal instruments, to which the intergovernmental agreements have made a major contribution, as well as the extremely complicated contents of these instruments.

The provisions in Chapter 4 Title VIII TFEU, introduced in Lisbon, have constitutionally facilitated the *euro area’s increasing institutional and legislative differentiation* within the EU framework as well. Bodies such as Euro Summit and Euro Group, as well as the President and Working Group of the Euro Group, have gained in importance and at least partially surpassed the corresponding bodies where all Member States are represented. In European economic governance, in turn, the euro area has been subjected to tighter supervision than other Member States. Institutional parallelism and legislative divergence under the EU umbrella add to the fragmentation and opacity of decision-making structures and applicable rule work which have resulted from exploitation of the intergovernmental way. This development has also been one of the factors which have jeopardized the principle of Member States’ equality.<sup>156</sup> On the other hand, institutional parallelism finds democratic justification in the need to assure symmetry of influence and effects in decision-making within the EU. It may also well be that any significant steps towards democratic federalism are politically feasible only in the euro area. It may also well be that any significant steps towards democratic federalism are only possible in the euro area.

Through the Lisbon Treaty, the solemn principles of democracy and transparency were enshrined in Title III TEU. Recent developments related to the European economic constitution have not been very conducive to their realisation.

### ***Repercussions in Other Constitutional Dimensions***

Arguably, during the first decade of the 21<sup>st</sup> century the focus of the European process of constitutionalisation was on the security dimension.<sup>157</sup> As a result of the present crisis, the economic constitution has reoccupied the leading position it held in the early years of European integration and has again directed developments in other constitutional dimensions. The federalist implications of European responses to the crisis, the rise of new intergovernmentalism and institutional and legal fragmentation, as well as their repercussions for the principles of democracy and transparency, point to

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<sup>154</sup> In addition to the provisions on democratic principles in Title II TEU-Lisbon, Art 15 TFEU lays down in more detail the obligations of EU institutions and EU citizens’ access to documents. The most important piece of secondary legislation is Regulation 1049/2001 on public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

<sup>155</sup> As I have explained above, in its ESM ruling the German Constitutional Court presupposed that the provisions of the ESM Treaty on the violability of documents, professional secrecy or immunity do not hamper the *Bundestag*’s right to obtain the information necessary for exercising its budgetary power.

<sup>156</sup> Chiti et. al. (n 3) 421-2.

<sup>157</sup> K Tuori, ‘A European Security Constitution?’ in M Ficchera and J Kremer (eds), *Security and Law in Europe – Reconsidering the Security Constitution* (Intersentia, Cambridge 2013) (forthcoming).

the dimension of the *political constitution*. The economic constitution is defining the agenda for the political dimension. The obvious danger is that the economic constitution dictates the terms of development as well, so that insufficient attention is paid to specifically political constitutional values, such as democracy, transparency and legitimacy. This danger is enhanced by the sneaking, piecemeal mode in which the political constitution is being remoulded under the impact of the economic one.

Equally important to paying attention to political developments is to be aware of the implications within the fledgling European *social constitution*. From the very beginning, the subordination of the social to the economic constitution has been clear enough. In social policy, division of tasks and competences between the Community and the Member States followed the guidelines adopted in economic policy. In line with economic and fiscal policy, social policy was retained under Member States' sovereignty. Building-up the post-war welfare state was a national project, premised on the solidarity uniting the national *demos*. Social policy enjoyed the legitimacy provided by state-level democratic procedures, as even ordoliberal discussants, insofar as they in general approved of social-policy measures, were prone to recall. The need of democratic legitimacy, which only national legislative procedures are able to engender, has remained one of the main objections to a social Europe which would involve European-level redistributive measures or harmonizing Member State welfare policies. The general expectation was that the economic constitution establishing a common market functioning in accordance with the principles of market freedoms and undistorted competition would produce socially beneficial results in the shape of increased general welfare and resources for the national welfare-state project. In the division of labour and competences between the Community/Union and Member States, guaranteeing the socially just (re)distribution of increased prosperity fell to the latter.

However, Member States' sovereignty in social policy has been constrained by the implications of the economic constitution. The ECJ has played a crucial role in transmitting the social-policy implications of the first layer of the economic constitution; that, is free movement and competition law. The Court has not hesitated to strike down Member State social legislation which it has deemed to derogate from fundamental market freedoms and which has not passed its test of proportionality. Since the SEA, it has also been the driving force in subjecting services – including such core welfare services as social security and healthcare – to internal market law.

The second layer of the European economic constitution, introduced through the Maastricht Treaty, has added to the curtailment of Member State sovereignty in social policy. Social policy is intimately intertwined with fiscal policy, and the fiscal constraints introduced by the Maastricht Treaty already reduced the leeway for national social policy. And at neither the European nor the national level has the social constitution fared very well in the recent turmoil. Its subordination to developments in the field of the economic constitution has been conspicuous enough. The European Council approved in March 2010 – that is, on the eve of eruption of the sovereign debt crisis – the Europe 2020 strategy, which is supposed to be implemented through the Integrated Guidelines for Economic and Employment Policies and thus integrated into the framework of the mutual surveillance procedure under Art 121 TFEU. As Hacker and Van Treeck have claimed, the strategy leaves objectives of greater social cohesion in the margins, subordinates social to economic policy and builds on the neo-liberal tenets of marketization and flexibilisation.<sup>158</sup> In general, European economic governance

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<sup>158</sup> 'For example, tax and social contribution systems are to be reformed in order to boost incentives to seek employment. Public spending on older people in the areas of pensions and health care is to be cut and retirement ages raised in order to safeguard the sustainability of the financial system. The active labour market policies advocated are aimed, first and foremost, at establishing an obligation on the unemployed to reintegrate themselves in the labour market. Education is viewed functionally and in economic terms, primarily as a means of obtaining qualifications to enable participation in the labour market.' B Hacker and T van Treeck, *What Influence for European Governance? The Reformed Stability and Growth Pact* (Friedrich Ebert Stiftung, Berlin 2010)

appears to favour a liberal market economy and impose increasing pressures on its alternative, a social market economy.<sup>159</sup>

Such pressures largely work through soft law and the open method of coordination. More dramatic is the impact of the ‘strict conditionality’ attached to financial assistance. Social spending is a major victim of the austerity programmes which the recipient states have been forced to accept as a price of assistance. The gradual strengthening of the rights-dimension of the European social constitution culminated in inclusion of the *Solidarity* chapter in the EU Charter of Fundamental Rights. According to the prevalent view of social rights, manifest in, eg, the so-called Limburg principles, in times of austerity these rights function as criteria of prioritization directing targeting of spending cuts.<sup>160</sup> In neither the Memoranda of Understanding, signed by the Commission, nor the Council Decisions under Art 126 TFEU, summarizing their contents, has any reference ever been made to the European Social Charter, which is binding at the Member-State level; which is, together with the Community Charter of the Fundamental Social Rights of Workers, explicitly invoked in Art 151 TFEU; and which the ECJ has included in the common European constitutional tradition defining fundamental rights as general principles of EU law. Nor has the Solidarity Title of the EU Charter of Fundamental Rights been invoked, although the Lisbon Treaty affirmed the Charter’s legal effect and although the institutions, bodies, offices and agencies of the Union are expected to ‘respect the rights, observe the principles and promote the application thereof in accordance with their respective powers’ (Art 51(1)). Once again, the social constitution has proven to be the underdog among the many constitutions of Europe.<sup>161</sup>

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<sup>159</sup> FW Scharpf, ‘The Asymmetry of European Integration, or why the EU cannot be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211.

<sup>160</sup> ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 122.

<sup>161</sup> In the field of trade union rights, the MoUs are problematic with regard to the ILO treaty framework as well. See ‘Report on the High Level Mission to Greece’, 19-23 September 2011, Athens, International Labour Office <[http://www.ilo.org/global/standards/WCMS\\_170433/lang--nl/index.htm](http://www.ilo.org/global/standards/WCMS_170433/lang--nl/index.htm)> accessed 19 October 2012.





