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The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments

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René Smits

Abstract

Writing about developments in Europe's Economic and Monetary Union ("EMU") at this juncture in time is a bold endeavour and a hazardous undertaking. 'Bold' because the developments are manifold, highly technical in nature and deeply contested among the players and the public—between Greeks and Germans, between mainstream political parties and (emerging) parties taking a different view, and between politicians and the electorate. 'Hazardous' as developments go so fast that these lines shall be partially outdated the moment they appear in published form. And yet, there is a need to explore and explain. That's what this contribution seeks to do: to explore and explain the developments in EMU law. An occasional aside from the legal approach will be undertaken to broaden the perspective.

KEYWORDS: EMU, International Law, Economic Governance, Six-Pack, Euro Plus Pact, SGP, Crisis

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*René Smits**

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INTRODUCTION

A. *A Bold and Hazardous Undertaking*

Writing about developments in Europe's Economic and Monetary Union ("EMU") at this juncture in time is a bold endeavour and a hazardous undertaking. 'Bold' because the developments are manifold, highly technical in nature and deeply contested among the players and the public—between Greeks and Germans, between mainstream political parties and (emerging) parties taking a different view, and between politicians and the electorate. 'Hazardous' as developments go so fast that these lines shall be partially outdated the moment they appear in published form. And yet, there is a need to explore and explain. That's what this contribution seeks to do: to explore and explain the developments in EMU law. An occasional aside from the legal approach will be undertaken to broaden the perspective.

B. *The European Union and the Euro Area in a Nutshell*

A few words at the outset about the stage on which the EMU players act. The 28-nation European Union ("EU") defies classical definitions: it is neither a single State nor a pure federation of States. Yet, it has many of the attributes of the latter. The Member States have ceded sovereignty in areas of joint policy-making to the Union, sometimes giving exclusive powers to the EU (*inter alia*, trade policy,¹ competition rules for the internal market,² and monetary policy for the States that use the euro),³ often retaining powers and sharing them with the Union (again, without intending to be complete, internal market, social policy, environmental protection, transport, issues of 'freedom, and security and justice'). Economic policy is another shared competence.⁴ In areas of internal competence, the Union also has external competence, *i.e.*, is exclusively competent to

1. The area of the customs union and the common commercial policy. Consolidated Version of the Treaty on the Functioning of the European Union art. 3, March 30, 2010 (1)(a), (e), 2010 O.J. (C 83) 47, 51.

2. TFEU art. 3(1)(b).

3. TFEU art. 3(1)(c).

4. TFEU art. 5.

enter into international agreements.⁵ A Common Foreign and Security Policy (“CSFP”) seeks to align the foreign policies of the Member States. The EU works on the basis of attribution of competences: where no competence has been conferred⁶—even ‘just’ to harmonise national law or practices—the EU may not act. Any transgression would be *ultra vires*. Since its inception,⁷ a part of litigation before the Union’s top court is about the exact limits of the Union’s powers, and the legal basis on which actions have been adopted.

This brings us to the other likeness of the Union with a federation: joint bodies have been established to govern the EU. Legislative power is vested in the Council of Ministers, each from every Member State (“Council”), acting in concert with the European Parliament (“EP”) on the initiative of the European Commission. The Commission is executive body⁸ and guardian of the Treaties: it oversees conformity of action by the Member States with Union law.⁹ The Court of Justice, consisting of a General Court and the Court of Justice,¹⁰ oversees the application of the law, often in collaboration with national courts which may (if the highest instance: must) refer questions of EU law to the Luxembourg-based judges for a preliminary ruling, an incident in their own national proceedings.¹¹ The Court of Auditors oversees finances. Overall direction to the Union is given by the Heads of State or Government and the President of the Commission gathered in the European Council.¹² This

5. TFEU art. 3(2) and case law, notably *AETR* judgment of 31 March 1970 in Case 22/70 (*Commission vs. Council*) and subsequent cases.

6. Consolidated Treaty of the European Union art. 5, Oct. 26, 2012, 2012 O.J. (C 326) 13, 17 [hereinafter TEU].

7. References are to the (European) Union, acknowledging that the international legal person this names stands for, used to be known as the European Economic Community (EEC), later: European Community (EC), and that ‘European Union’ was the name given between the Maastricht (signed 7 February 1992, entry into force 1 November 1993) and Lisbon Treaties (signed 13 December 2007, entry into force 1 January 2009) to the EC plus the intergovernmental cooperation in ‘internal’ (justice *et cetera*) and ‘external’ (foreign policy) affairs. With the entry into force of the Lisbon Treaty, the EU gained legal personality.

8. Its Vice-President is also the High Representative of the Union for Foreign Affairs and Security Policy and heads the EU’s External Action Service.

9. The European Central Bank performs a similar function in respect of the National Central Banks. Protocol on the Statute of the European System of Central Banks and of the European Central Bank art. 35.6.

10. And a Civil Service Tribunal to settle disputes with EU civil servants.

11. TFEU art. 267.

12. TEU art. 15(5) & (6).

institution is chaired by a permanent President.¹³ The European Central Bank (“ECB”) has been established to independently define and conduct the monetary policy of the Union, with maintaining price stability as its primary objective.¹⁴ It does so in conjunction with the National Central Banks (“NCBs”) of the Member States whose currency is the euro (participating Member States). The ECB and the NCBs constitute the European System of Central Banks (“ESCB”). To distinguish between the ESCB serving the 28-nation Union and its components acting as the monetary authority for the euro area, the ECB and the NCBs of the States that have adopted the single currency have been named: the Eurosystem.¹⁵

All Member States are supposed to adopt the single currency, which, as of 1999, has replaced the former national currencies,¹⁶ with two exceptions: the United Kingdom and Denmark. These two States negotiated an ‘opt-out’ in Maastricht. The other Member States are legally required to fulfil the criteria for the adoption of the euro.¹⁷ Before they pass these conditions for admission to the eurozone, they are ‘Member States with a derogation.’ Adoption of the single currency is a one-way street, an irreversible process, as the Protocol on the transition to EMU¹⁸ adopted in Maastricht¹⁹ and repealed in Lisbon²⁰ made clear. The only legal means to abandon the single

13. The (ordinary, ministerial) Council configurations are chaired by a Member State, on a rotating basis.

14. TFEU art. 127(1). This provision adds: “Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union.”

15. TFEU art. 282(1).

16. Subsequently, for Greece (2001), Slovenia (2007), Cyprus and Malta (2008), Slovakia (2009) Estonia (2011), Latvia (2014), and Lithuania (2015).

17. By intentionally not fulfilling the convergence criteria, Sweden has manoeuvred itself into a *de facto* opt-out position; a second (the first was in 2003) referendum on adoption of the euro should pave the way for adoption of the single currency.

18. Treaty on European Union (Maastricht text), July 29 1992, 1992 O.J. (C 191) 1, Protocol on the transition to the third stage of economic and monetary Union, at 87. (“THE HIGH CONTRACTING PARTIES, Declare the irreversible character of the Community's movement to the third stage of economic and monetary union by signing the new Treaty provisions on economic and monetary union . . .”).

19. Treaty on European Union (Maastricht text), July 29 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht TEU].

20. Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 36) 1 [hereinafter Treaty of Lisbon]. The Lisbon Reform Treaty inserted the main provisions of the European Constitution (2004, never ratified whilst defeated in referendums in France and the Netherlands) into the two founding treaties, the Treaty of Rome (1957), since named: Treaty

currency is secession from the Union,²¹ for which Article 50 TEU provides a basic mechanism. Institutionally, the euro area is embedded in the EU, although ‘institutional specification’ is taking place, with the Euro Group of Finance Ministers from the participating Member States already recognised in the TFEU.²²

Although this summary of the EU’s make-up does not, by far, do justice to the complexity of the Union, it is included to set the stage for the bewildering array of actions, and their qualification, that follow. As participants in the discussions about ‘Grexit,’ ‘deepening’ EMU and unconventional monetary policy measures often use undefined terms, a recall of basic features of the EU serves a well-informed debate.

C. Outline of the Article

This Article discusses the adaptation of economic governance of the EU in Part I, unconventional monetary policy measures in Part II, the main features of ‘banking union’ in Part III, other measures addressing the crisis (the ‘bail-out’ funds) in Part IV, and finally the judicial challenges to the crisis response in Part V.

I. ECONOMIC GOVERNANCE OF THE EU

A. ‘Economic Union’ Based on Free Markets’ Disciplining Players

The effects of the financial crisis of 2007–2008 that led to the Great Recession were felt worldwide, and became particularly acute in Europe as of 2010. Then, the crisis evolved in a debt crisis that showed the vulnerability of EMU and led to financial markets questioning the euro’s permanence. EMU had been established on the basis of the 1980s free-market thinking. Markets would discipline

on the Functioning of the European Union (“TFEU”) and the Treaty on European Union (“TEU”). TFEU and TEU, together with the Charter of Fundamental Rights, form the basic sources of EU law (‘primary law’). ‘Lisbon’ is not a self-standing treaty.

21. On withdrawal from the Eurozone, see CHARLES PROCTOR, *MANN ON THE LEGAL ASPECT OF MONEY* 771–92 (6th ed. 2005); Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, (ECB Legal Working Paper Series No. 10, December 2009), <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp10.pdf>.

22. TFEU Protocol no. 14 on the Euro Group. The Euro group has a permanent chair, first Luxembourg Prime Minister and Finance Minister, current European Commission President Jean Claude Juncker (2005-2013), since 2013 Dutch Finance Minister Jeroen Dijsselbloem.

governments towards prudent budgetary behaviour, necessary to avoid undermining a single currency in a bloc whose governments would continue to sit at the levers of economic policy, only monetary policy being made 'single.' Markets would also determine the exchange rate of the single currency: this rate would be the outcome of economic policies, as assessed by the markets. What weak mechanisms were in place for policy makers to influence the exchange rate were more or less abdicated by the European Council at the inception of EMU.²³ On this basis, the Treaty provisions provide for certain principles²⁴ (including the free market principle²⁵), prohibitions (the prohibition of monetary financing by central banks,²⁶ and of privileged market access for the public sector to the financial sector,²⁷ and the 'no bail-out' clause²⁸), procedures for coordination: the multilateral surveillance procedure,²⁹ and the excessive deficit procedure ("EDP").³⁰ Only the last of these procedures concerns more than mere coordination and includes the option of sanctions against a deviant Member State.³¹

B. Stability and Growth Pact as a Supplement to the EDP

Just ahead of the transition to currency union, the Member States agreed on the toughening up of the EDP: the Stability and Growth

23. Resolution of the European Council of 13 December 1997 on economic policy coordination in stage 3 of EMU and on Treaty Articles 109 and 109b of the EC Treaty, [now: Articles 138 and 219, and 284, respectively, TFEU] 1998 O.J. (C 35) 1.

24. EMU is bound by the guiding principles of stable prices, sound and sustainable public finances and monetary conditions and a sustainable balance of payments. TFEU, art. 119(3) TFEU. *See also* TEU art. 3 for the Union's objectives and values.

25. TFEU art. 119(1) & (2). The ESCB is subject to this principle, as well. TFEU art. 127(1).

26. TFEU art. 123.

27. TFEU art. 124.

28. TFEU art. 125.

29. TFEU art. 121.

30. TFEU art. 126. Reference is made to this author's writing on the pre-crisis economic union provisions. *See* René Smits, *The Impact Of EMU Law on National Budgetary Freedom: an Inquiry into the Limits of State Sovereignty in Economic Policy Matters*, in *INTERFACE BETWEEN EU LAW AND NATIONAL LAW* (D. Obradovic and N. Lavranos eds.); University of Amsterdam, *The Hogendorp Papers* 7, 2006, 131–68; *see also* René Smits, *Some Reflections on Economic Policy*, in *LEGAL ISSUES OF ECONOMIC INTEGRATION* 34(1), 5–25 (Kluwer Law Int'l ed., 2007).

31. Of the euro area: Member States with a derogation or an opt-out are not subject to such sanctions. Space does not permit giving attention to the specific situation of the United Kingdom under the EMU law provisions. *See* Protocol No. 15 on Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland.

Pact was adopted in Amsterdam in 1997. It mainly consists of a resolution of the European Council, and two regulations (1466/97³² and 1467/97³³) that filled in the discretionary powers of the Commission and the Ecofin Council under the Treaty. At the very first instance when the SGP was supposed to show ‘bite,’ the two main Member States refused to be subjected to its discipline. The stand-off with France and Germany led to a court case between the Commission and the Council in which the limits of the first to compel the latter to proceed were confirmed.³⁴ Subsequently, the SGP was amended and, by and large, weakened.³⁵ Had there, previously, been a Community-wide engagement to achieve, over time, budgetary balance (well beyond the Treaty-imposed criteria of a budget deficit below 3% of GDP and public debt below 60% of GDP³⁶), now each Member State was to follow its own, ‘country-specific’ medium-term budgetary objective (“MTBO”). Longer periods of adjustment were adopted and structural reform efforts undertaken by the Member States were to be taken into consideration when applying the budgetary criteria. On the other hand, the 2005 amendments brought some strengthening of the SGP, as well. Notably, Member States were supposed to take quantifiable steps towards their MTBO, with a 0.5% of GDP benchmark for annual improvements in their budgetary situation if not yet compliant, and needed to give reasons for deviations from the MTBO. Many Member States failed to abide by even these less strict rules.³⁷

32. Council Regulation EC No. 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. L 209/1, as amended.

33. Regulation (EC) No. 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 1997 O.J. (L 209) 6, as amended.

34. C-27/04 *Commission vs. Council*, [2004] E.C.R. I-06649.

35. Council Regulation 1055/2005, 2005 O.J. (L 174) 1 (EC); Council Regulation 1056/2005, 2005 O.J. (L 174) 5 (EC). These amendments were preceded by a Council Report to the European Council, *Improving the implementation of the Stability and Growth Pact*, 21 March 2005, available at http://www.eu2005.lu/en/actualites/documents_travail/2005/03/21stab/stab.pdf.

36. Note that these criteria are the quantitative limits woven into qualitative language that leaves discretion to the political authorities to determine whether a budgetary situation is unsustainable. This was to be an assessment by the politically responsible institutions, not by the judiciary: TFEU Article 126(10) excludes Court competence concerning compliance with the EDP’s budgetary rules.

37. Of the 28 Member States, only three (Estonia, Luxembourg and Sweden) have never had an excessive deficit; several have been in the EDP procedure for many years (Germany, Spain, Cyprus: 8; Portugal, UK: 10; France, Greece, Ireland, Malta, Poland: 11 years). See the presentation on economic governance that Commission President Jean-Claude Juncker gave

C. Crisis Reveals Weakness of Governance Arrangements

Markets that were supposed to have disciplined, failed to do so. During EMU's first ten years, governments could borrow on almost equal terms, with the 'spread' between interest rates Germany needed to pay and those exacted from Greece, a few basis points only. With interest rates set by the ECB for the entire euro area, the level may have been unsuitable for its constituent parts. As the authors of the Report of the *Tommaso Padoa-Schioppa Group*³⁸ declared: 'Rather than being "one size fits all," the ECB's monetary policy was "one size fits none.' The ECB's monetary policy had adverse and even self-enforcing pro-cyclical effects in those Member States whose economic fundamentals were not in line with the euro area average. And this, although the ECB did exactly what was required of it: 'the ECB ran the right monetary policy for a country that did not exist.' This may have led to real estate bubbles in Spain and Ireland, and overconsumption in Portugal and Greece. It certainly did nothing to prevent a—second³⁹—major aberration of the public finances of Greece which became public at the end of 2010. Financial markets panicked, and credit rating agencies ("CRAs") accelerated an irrational widening of the 'spread.' Had, before, any risk been considered absent, now markets acted as if Greece and other 'peripheral' States were the world's worst debtors and requested excessive returns. Being denied market access, other Member States and the Union stepped in. This led to the establishment of 'bail-out' funds, discussed in Part IV below. Not until ECB President Mario Draghi stated that 'within our mandate, the ECB is ready to do whatever it takes to preserve the euro,'⁴⁰ did a measure of calm return

before the 12 February 2015 European Council meeting, *available at* http://ec.europa.eu/priorities/docs/economic-governance-presentation_en.pdf.

38. *See generally* HENRIK ENDERLEIN ET AL., COMPLETING THE EURO A ROAD MAP TOWARDS FISCAL UNION IN EUROPE (2012), *available at* <http://www.institutdelors.eu/media/completingtheeuroreportpadoa-schioppagroupneune2012.pdf?pdf=ok>.

39. In 2004, the Commission opened in an infringement procedure against Greece at the European Court of Justice for serious fraud in budgetary statistics. *See* press release IP/04/1431, *Commission reports on Greek statistics, starts infringement procedure*, 1 Dec. 2004. This case was not pursued. For an overview of Greek statistics, *see* Eurostat's 2010 Report: *Report on Greek government deficit and debt statistics*, COM(2010) 1 final, (Jan. 8, 2010), *available at* http://ec.europa.eu/eurostat/documents/4187653/6404656/COM_2010_report_greek/c8523cfa-d3c1-4954-8ea1-64bb11e59b3a.

40. Verbatim of the remarks made by Mario Draghi, Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, *available at* <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

to the markets, only to be disturbed again when, early in 2015, a new Greek Government was elected that intended to un-do the strict constraints of conditionality imposed by the EU and the International Monetary Fund (“IMF”).

The crisis had also exposed the weak ‘economic’ underpinning of the currency union. Policy makers had assumed that national divergences would fade away in the internal market with a single currency, making the intra-Union balance of payments irrelevant. Deviating economic developments and an unabated continuation of perceptions of States as being the main actors proved them wrong. The disconcerted response to the financial crisis in October 2008, when Member States took different approaches instead of acting in close harmony to face market panic and economic turmoil, contributed to the perception of States remaining in charge of economic developments. Worse even, financial markets disintegrated quickly: national solutions were sought for problems at banks, supervisors didn’t communicate or coordinate properly, and banks retreated to their home ‘turf,’ encouraged by their central banks and supervisors. ‘Banking union,’ outlined in Part III below, was to be the answer to this. The currency union proved less integrated than assumed, when the first major crisis struck. Addressing weaknesses in economic policy coordination was the primary task the EU legislator set itself.

D. Major Reconstruction: ‘Six-pack’ and ‘Two-pack’

In order to remedy economic governance weaknesses, six legislative proposals were introduced and adopted in record time. Two legal acts amend the SGP regulations⁴¹ and, thus, concern budgetary policy. So does a directive requiring Member States to amend their budgetary frameworks.⁴² One legal act introduces a new

41. Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, 2011 O.J. (L 306) 33.

42. Council Directive 2011/85/EU of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41.

system of monitoring, and keeping in check, economic imbalances.⁴³ Two legal acts impose stricter enforcement of budgetary⁴⁴ and general imbalances monitoring⁴⁵ on euro area Member States. An in-depth discussion of these reforms is beyond the scope of this Article, which will focus on the major elements of a substantive and institutional nature.

1. 'Six-pack' Strengthening of the SGP: Material Norms

Since the SGP's inception, Member States have had to submit annual convergence (for the 'outs,' *i.e.*, the States with a derogation or opt-out) or stability (for the 'ins') programmes in which they set out the path towards sustainable public finances.⁴⁶ The 'six-pack' reinforcement of the SGP seeks to ensure that coherent, and aligned, stability and convergence programmes are submitted, that are made public. Each Member State continues to pursue its own MTBO but under stricter conditions, both in respect of the budget deficit and the debt level. The emphasis on debt is novel: although the budget criteria⁴⁷ address both deficit and debt, the latter had in practice been neglected in addressing sound public finances. On debt, it is now required that revenue windfalls (revenues in excess of what can normally be expected from economic growth) are to be allocated to debt reduction and, if public debt exceeds 60% of GDP, annual steps towards sustainable debt levels are to be in excess of 0.5% GDP.⁴⁸

2. 'Six-pack' Strengthening of the SGP: Institutional Changes

Institutionally, the amendments include the of the national budgetary process into a 'European Semester for Economic Policy Coordination,'⁴⁹ a sequence of actions starting in January with

43. Regulation EU No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25. See under 'Excessive Imbalances Procedure' below.

44. Regulation EU No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the euro area, 2011 O.J. (L 306) 1.

45. Regulation EU No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8. See under 'Excessive Imbalances Procedure' below.

46. In addition, Member States need to submit 'National reform Programmes' on how to support the EU strategy for growth and jobs ('Europe 2020').

47. TFEU art. 126(2)(a) & (b).

48. Regulation 1466/97, as amended by Regulation 1175/2011, *supra* note 41, art. 5(1).

49. *Id.* at art. 2-a.

Commission forecasts for economic growth, followed by the adoption of combined Broad Economic Policy Guidelines⁵⁰ and Employment Guidelines,⁵¹ so as to establish a Union-wide backdrop for the submission, by end-April, of national plans on public finances and their assessment, resulting in ‘country-specific’⁵² recommendations (“CSRs”) in July.⁵³ The Commission’s role has been strengthened in that it shall (instead of: ‘can,’ as in the past) give an early warning in case of a significant observed deviation from the adjustment path towards the MTBO. Also, many⁵⁴ (not all⁵⁵) Ecofin Council decisions on budgetary balance are taken by ‘reverse Qualified Majority Voting’ (“QMV”), a system under which the Commission’s recommendation for a Council legal act is deemed to be adopted unless the Council rejects it by simple majority. The introduction of ‘Economic Dialogue’ on economic policy, involving the European Parliament more closely with what hitherto had been largely an affair for ministers and the Commission,⁵⁶ is another institutional novelty.

50. Council Recommendation of 13 July 2010 on Broad Guidelines for the Economic Policies of the Member States and of the Union, 2010 O.J. L 191/28. Adopted pursuant to Article 121(2) TFEU. *See also*, the euro area’s ‘country-specific recommendation’ on Implementing the BEPGs: Council Recommendation of 8 July 2014 on the Implementation of the Broad Guidelines for the Economic Policies of the Member States Whose Currency is the Euro 2014 O.J. (C 247) 141.

51. Council Decision 2010/707/EU on Guidelines for the Employment Policies of the Member States, 2010 O.J. (L 308) 46. This was adopted pursuant to TFEU art. 148(2).

52. I would prefer to term these: ‘State-specific’, emphasising the nature of nations as Member *States* of the EU.

53. For an overview of Council recommendations in respect of each Member State (National Reform Plans, stability/convergence plans) see Council Recommendation of 8 July 2014 on the Implementation of the Broad Guidelines for the Economic Policies of the Member States whose Currency is the Euro, 2014 O.J. (C 247) 141-43.

54. *See* Council Regulation 1466/97, arts. 6(2) and 10(2), consolidated text after 2011 amendment in 2011 O.J., *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432563194593&uri=CELEX:01997R1466-20111213>. For decision-making in respect of participating Member States see Regulation 1173/2011 of the European Union Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, arts. 4(2), 5(2) and 6, 2011 O.J. (L 306) 1, 4-5 (EU) (stating respectively interest-bearing deposits, non-interest-bearing deposits and fines).

55. Notably, the decisions on whether an excessive deficit exists (TFEU art. 126(6)), on whether effective action has been undertaken (TFEU art. 126(8)) and to give notice to the deviant Member State (TFEU art. 126(9)) are taken by normal QMV. Please, note that—in respect of participating Member States—only the other euro area States take part in the vote (TFEU art. 139(4)). For all 28 States an exclusion to vote on their own matters applies in respect of the EDP (TFEU art. 126(13)).

56. Article 2-ab Regulation 1466/97, as lastly amended by Regulation 1175/2011, *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432563194593&uri=CELEX:01997R1466-20111213>; Article 2a Regulation 1467/97, as lastly amended by

3. Increased Strictness

The strictness of the SGP has been increased, by requiring public and aligned national programmes, based on the most likely, independently-made economic forecasts,⁵⁷ through the requirement of professional independence of national statistical authorities,⁵⁸ through publicity of remedial action,⁵⁹ and by a succession of sanctions that can be imposed on euro area Member States. Early in the monitoring process, an interest-bearing deposit of 0.2% of the preceding year's GDP is to be imposed on a participating Member State that has failed to take action in response to an Ecofin Council recommendation.⁶⁰ A non-interest-bearing deposit of equal size shall be imposed on a Eurozone State that the Council has identified, under Article 126(6) TFEU, as having an excessive deficit and that has already been the subject of the sanction of a non-interest-bearing deposit or, where the Commission identifies 'particularly serious non-compliance' with the SGP.⁶¹ A fine of equal size shall be imposed on a State using the euro about which the Council has decided, pursuant to Article 126(8) TFEU, that it failed to take effective action to correct the excessive

Regulation 1177/2011, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432568381107&uri=CELEX:01997R1467-20111213>; Article 3 Regulation 1173/2011. See, also, Article 15 Regulation 473/2013, and Article 18 Regulation 472/2013. Also, the Excessive Imbalances Procedure (EIP) regulations include provisions on economic dialogue (Article 14 Regulation 1176/2011; Article 6 Regulation 1174/2011).

57. Articles 3(2a) [stability programmes] and 7 (2a) [convergence programmes] Regulation 1466/97, as amended by Regulation 1175/2011.

58. Article 10a Regulation 1466/97, as amended by Regulation 1175/2011.

59. A State that has been given a notice under Article 126(9) TFEU needs to make public its report to the Council and the Commission on its response: Article 5(1a) Regulation 1467/97, as amended by Regulation 1177/2011.

60. Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, art. 4, 2011 O.J. (L306) 1, 4 (EU). Note that a recommendation 'shall' give rise to a sanction if not followed up. Recommendations are non-binding, see TFEU art. 288. Moreover, this kind of recommendation is issued in the context of the multilateral surveillance procedure, notably on the basis of TFEU art. 121(4), which doesn't foresee any sanctions. The legal basis must be found in a combination of TFEU art. 121(6), allowing the EU legislature to adopt detailed rules for the multilateral surveillance procedure, and TFEU art. 136, which provides a competence to enact euro area-specific secondary law 'to strengthen the coordination and surveillance of budgetary discipline,' and to adopt euro area-specific economic policy guidelines.

61. See Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, art. 5, 2011 O.J. (L306) 1, 4 (EU). Note that a sanction follows in a phase of the step-by-step procedure of TFEU art. 126 for which the Treaty does not yet provide for a sanction. For the legal basis, see *supra* note 60.

deficit.⁶² These sanctions are mandatory ('shall'). Their imposition follows the reverse QMV procedure.⁶³ Further sanctions, based on Regulation 1467, as amended, remain: a fine, as a rule, is to be imposed,⁶⁴ equal to 0.2% of GDP plus a variable component, related to the size of the offense against the budgetary rules.⁶⁵ Whereas, previously, interest and fines were supposed to be distributed among participating Member States without an excessive deficit in proportion to their share in total GNP of eligible Member States, nowadays, fines are to be channelled into the European Stability Mechanism ("ESM"), the permanent bail-out fund.⁶⁶ And this is not the end of the punitive measures that can be adopted: the Commission has been given similar investigative powers against manipulation of statistics as it has in the context of the enforcement of competition rules, with the Council obtaining powers to impose sanctions that are 'effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation' of data submitted in the context of the multilateral surveillance procedure or the EDP 'intentionally or by serious negligence.'⁶⁷ Also, the Commission may make a Member State subject to 'enhanced surveillance'; the dialogue that the Union's executive is to entertain with Member State authorities then evolves into on-site missions, together with the European Central Bank. The relevant provision⁶⁸ was the first codification of the 'troika.'⁶⁹ More were to follow in the 'two-pack.'

62. See Regulation 1173/2011, art. 6, 2011 O.J. (L306) 1, 5 (EU). Note, again, that a sanction follows in a phase of the procedure of TFEU art. 126 for which the Treaty does not yet provide for a sanction. For the legal basis, see *supra* note 60.

63. *Id.* arts. 4(2), 5(2) and 6(2). The Commission may recommend to the Council that it reduce or cancel the pecuniary measure, either at a reasoned request of the Member State, submitted within ten days of its adoption, or—only in the case of a non-interest-bearing deposit or a fine—'on grounds of exceptional economic circumstances' (*Id.* arts. 4(4), 5(4) and 6(4)).

64. Articles 6(2) and 11 Regulation 1467/97, as amended by Regulation 1177/2011. Consolidated version in the OJ available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1432568381107&uri=CELEX:01997R1467-20111213>.

65. Article 12 Regulation 1467/97, as amended by Regulation 1177/2011. Individual successive sanctions may not exceed 0.5% of the deviant State's GDP.

66. Article 16 Regulation 1467/97, as amended by Regulation 1177/2011.

67. Article 8 Regulation 1173/2011.

68. Article 10a Regulation 1467/97, as amended by Regulation 1177/2011.

69. The term for the European Commission, the ECB and the IMF jointly agreeing the conditionality for lending to Member States in distress, and overseeing adherence to these conditions. Note that the Advocate General, in his Opinion in the pending court case on OMT (Case C-62/14, *Gauweiler*) proposes that the ECB refrain from actively participating in

4. 'Two-pack' Innovations

This second set of laws was proposed even before the entry into force of the 'six-pack'⁷⁰ (December 13, 2011) and entered into force on May 30, 2013.

E. Brussels' Budget Oversight

The first of these legal acts reinforces budgetary discipline and coherence with general economic-policy coordination.⁷¹ To that end, it establishes a common budgetary timeline for participating Member States to synchronise key steps in national budget preparations,⁷² and requires independent bodies at State levels that apply 'numerical fiscal rules' and can trigger the activation of correction mechanisms when these rules are in danger of being disrespected.⁷³ A procedure for submission of draft budgets,⁷⁴ and for their assessment by the Commission,⁷⁵ is introduced. In a possible prelude to joint debt issuance, euro area Member States are to report to the Commission and the Eurogroup their debt issuance plans.⁷⁶ The correction of an excessive budgetary deficit is strengthened by the requirement for States established to be in excessive deficit, to submit 'economic partnership plans.' These set out the policy measures and structural reforms 'to ensure an effective and lasting correction' of the excessive deficit. They are monitored by the Council and the Commission. Each Eurozone State subject to an Article 126(6) TFEU-decision⁷⁷ needs to

economic policy prescription and oversight when putting OMT in effect, thus signalling an end to its troika role.

70. Both legal acts of the 'twin-pack' only apply to euro area Member States. See Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 on the Strengthening of Economic and Budgetary Surveillance of Member of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability, art. 1(3), 2013 O.J. (L 140) 1, 3 (EU); Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area, art. 1(3), 2013 O.J. (L140) 11, 16 (EU).

71. See Regulation 473/2013, art. 3, 2013 O.J. (L 140) 11, 17 (EU).

72. *Id.* art. 4, at 17.

73. *Id.* art. 5, at 18.

74. *Id.* art. 6, at 18. Remember that, under the SGP and the '2020' programme, Member States need to submit stability ('ins') or convergence ('outs') programmes, and National Reform Programs. The 'two-pack' goes much further than this, for Member States whose currency is the euro.

75. *Id.* art. 7, at 19.

76. *Id.* art. 8, at 20.

77. By which the Ecofin Council establishes that there is an excessive deficit.

present such a programme, and shall be made subject to additional reporting requirements to the Commission. Such requirements include an assessment of the execution of the budget, extending to contingent liabilities with large impacts on the public budget.⁷⁸ An independent audit of the accounts of the public sector may be required.⁷⁹

F. Enhanced Surveillance for Euro Area States in Severe Difficulties

If all of this doesn't go far enough, the second of the 'two-pack' legal acts⁸⁰ provides for incisive monitoring of a euro area Member State whose serious difficulties with financial stability or public finances threaten to have spill-over effects to the rest of the euro area, or that have requested or received financial assistance.⁸¹ These States come under 'enhanced surveillance.'⁸² This requires the State concerned to adopt measures to address the sources of its problems. Even if this State were not to experience an excessive deficit, its budgetary situation is closely monitored and it is to report on, and stress-test, the soundness of its financial system. Regular review missions will descend on this Member State to check on progress in implementing the measures it needs to take. If the review mission concludes that further measures are needed, and the State's situation 'has significant adverse effects on the financial stability of the euro area or its Member States,' the Council may recommend this State to adopt 'precautionary corrective measures.' Alternatively, an economic adjustment programme⁸³ may be recommended. Such a programme takes the place of an economic partnership programme. This involves extensive monitoring by a trio: Commission, ECB, and IMF. Post-programme surveillance continues as long as a minimum of 75% of the financial assistance received has not been repaid.⁸⁴ This second legal act amounts to a codification of practice evolved in

78. Think of a blanket guarantee for the financial sector (Ireland) or guarantees for specific banks (almost all Member States), or the requirement to provide additional funding to the ESM (Articles 8(4) and 25(2) ESM Treaty).

79. Regulation 473/2013, art. 10, 2013 O.J. (L 140) 21.

80. Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 20 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, 2013 O.J. (L 140) 1.

81. *Id.* arts. 1(1) & 2.

82. *Id.* art. 3.

83. *Id.* art. 7.

84. *Id.* art. 14.

respect of the 'peripheral' Member States that had received financial assistance.

G. *Out-of-Legal-Bounds: 'Fiscal Compact'*

On top of the Union legal acts adopted, a separate international treaty has been agreed on fiscal discipline. It copies major elements of the legislative package, and contains institutional provisions on economic governance. The 'Fiscal Compact' Treaty, or *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* ("TSCG"),⁸⁵ was initiated while the 'six-pack' was still in the legislative stage. Ratification of the TSCG is a condition for the granting of financial assistance under the ESM. Compliance with its crucial Article 3(2) is a further condition for financial assistance. This provision requires the contracting parties⁸⁶ to adopt in national law, preferably of a constitutional status, a balanced-budget rule, with automatic correction mechanisms triggered in case of deviation. In describing the balanced budget rule, the TSCG refers to the language of the SGP and the 'six-pack.' Further rules include the reduction, by one-twentieth per year as a benchmark, of public debt in excess of the reference value of 60% of GDP,⁸⁷ a budgetary and economic partnership programme for parties in excessive deficit,⁸⁸ and *ex ante* reporting on debt issuance to the Council and the Commission.⁸⁹

Apart from incisive undertakings on budgetary soundness, the TSCG introduces institutional novelties. The signatories 'commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure,' at least if a qualified majority does not object to what the Commission puts forward.⁹⁰ An intriguing and complex undertaking of support for the

85. Available at <http://www.consilium.europa.eu/en/european-council/euro-summit/>.

86. The Euro Area Member States plus the other EU Member States except the United Kingdom and the Czech Republic.

87. TSCG art. 4.

88. TSCG art. 5.

89. Compare TSCG art. 6 with Regulation 473/2013, *supra* note 79, at art. 8 (requiring *ex ante* and timely reporting to the Commission and the Eurogroup of national debt issuance plans according to a harmonised reporting format).

90. TSCG art. 7:

EU executive unless a qualified majority is against its input. The Commission is given a monitoring role under the TSCG, and there is even a stronger role for the CJEU than under the TFEU.⁹¹ If the Commission, or another Member State, finds that a Member State fails to abide by the ‘fiscal compact’ provision,⁹² they may bring the matter before the CJEU, even requesting the judges to impose a financial penalty if the State concerned continues to flout the rules.

The TSCG partners undertake to work towards an economic policy underpinning the proper functioning of EMU, in wording that may indicate an intention to adopt a single economic policy.⁹³ Convergence is further fostered by the undertaking to discuss and, where appropriate coordinate among themselves, ‘all major economic policy reforms that they plan to undertake.’⁹⁴ The governance of the euro area is strengthened by institutionalising Euro Summit meetings⁹⁵ and the promotion of joint input from the national parliaments and the European Parliament.⁹⁶

From a legal perspective, the relationship between the TSCG and the TFEU is intriguing. Within five years from the entry into force of the TSCG, its substance is to be incorporated into the legal framework of the European Union.⁹⁷ At the outset, the TSCG states that it is to be applied and interpreted in conformity with the TEU and the TFEU.

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

91. Compare TSCG art. 8, with TFEU art. 126(10), which excludes access to the CJEU for infringement of paras 1-9 thereof.

92. TSCG arts. 3(2), referring to TSCG art. 3(1), containing material budgetary rules and the requirement of translating these into national (preferably constitutional) statutory requirements.

93. TSCG art. 9 (“... to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness.”).

94. TSCG art. 11.

95. TSCG art. 11.

96. TSCG art. 13. Two inter-parliamentary meetings based on this provision have been held in Vilnius (2013) and in Brussels and Rome (2014). See <http://www.europarl.europa.eu/relnatparl/en/conferences/article-13.html>.

97. TSCG art. 16.

The TCSG is to apply only 'insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. Also, '[i]t shall not encroach upon the competence of the Union to act in the area of the economic union.'⁹⁸ This shows that the signatories were well aware of the duplication with EU primary and secondary law, and of the need to respect EU law when acting outside of the Treaty-given institutional framework.

H. *Excessive Imbalances Procedure*

Beyond the area of budgetary soundness, the shock of policy makers having overlooked imbalances in the economy prodded legislative reform, as well. Next to the establishment of the European Systemic Risk Board ("ESRB"),⁹⁹ with a special role for the ECB,¹⁰⁰ to strengthen macro-prudential oversight over the financial system, and simultaneously with the establishment of the European Supervisory Authorities ("ESAs"),¹⁰¹ a mechanism for the Commission to monitor, and for the Council to recommend redressing, macro-economic imbalances in the economy at large was

98. TCSG art. 2.

99. Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, 2010 O.J. (L 331) 1 .

100. Including a first application of TFEU art. 127(6), the enabling provision to make the ECB competent to exercise operational supervisory powers. This provision later formed the basis for the establishment of the SSM in the context of banking union. See Council Regulation No. 1096/2010 of 17/11/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, 2010 O.J. (L 331) 1 (EU).

101. For the founding instruments, see for the European Banking Authority (EBA): Regulation No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, 2010 O.J. (L 331) 12 (EU), most recently amended by Regulation No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010. For a consolidated version, see the EBA's website, available at <http://www.eba.europa.eu/about-us/legal-framework/founding-texts-and-mandates>. For the European Securities and Markets Authority (ESMA), see Regulation No. 1095/2010, 2010 O.J. (L 331) 84 (EU), and for the European Insurance and Occupational Pensions Authority (EIOPA) see Regulation (EU) No 1094/2010, 2010 O.J. (L 331) 48. All regulations are of the same date and appeared in the same edition of the Official Journal.

established.¹⁰² This alert mechanism identifies imbalances, defined as: ‘any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole.’ Imbalances are ‘excessive’ when they are ‘severe’; these include ‘imbalances that jeopardise or risk jeopardising the proper functioning of the economic and monetary union.’¹⁰³ A scoreboard with a limited set of economic, financial, and structural indicators¹⁰⁴ with indicative thresholds is monitored by the Commission. It publishes an annual report with outcomes.¹⁰⁵ For each EU Member State considered to be affected by imbalances, the Commission publishes an in-depth review,¹⁰⁶ and the Council may follow-up with a public recommendation.¹⁰⁷ Excessive imbalances may lead the Council to adopt recommendations to individual Member States which may be made public.¹⁰⁸

Once the Excessive Imbalances Procedure (“EIP”) has been opened, an EU Member State is to submit a corrective action plan.¹⁰⁹ This plan is either to be endorsed by the Council with a recommendation specifying specific action required to redress the excessive imbalance and the accompanying deadlines, or to be considered insufficient. In the latter case, a new plan is to be submitted. The corrective action plan, the Commission report thereon, and the Council recommendation are to be made public. Non-compliance with the corrective action plan can lead to a Council decision establishing non-compliance, together with a recommendation setting new deadlines for taking corrective action.¹¹⁰ Such Council decision is deemed adopted if the Council has not

102. Regulation No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, 2011 O.J. (L 306) 25 (EU).

103. *Id.* art. 2.

104. *Id.* The scoreboard includes: the current account balance, the net international investment position, export market shares, nominal unit labour costs, real effective exchange rates, the evolution of unemployment, private sector debt, private sector credit flow, house prices, and the general government sector debt.

105. Regulation 1176/2011, *supra* note 43, art. 3, at 25.

106. *Id.* art. 5, at 25.

107. *Id.* art. 6, at 25.

108. *Id.* art. 7, at 25.

109. *Id.* art. 7 & 8, at 25.

110. *Id.* art. 10, at 25.

rejected the Commission's recommendation on establishing noncompliance: reverse QMV.¹¹¹ The State concerned does not have a vote in its own procedure.¹¹² The EIP applies Union-wide.

For euro area Member States, a separate legal act gives bite to the EIP with sanctions.¹¹³ An interest-bearing deposit equal to 0.1% of GDP¹¹⁴ shall be required when the Council concludes that the Member State has not taken recommended corrective action.¹¹⁵ A yearly fine may be imposed in case of two successive Council recommendations in the same EIP where the Council considers that the Member State has submitted an insufficient corrective action plan, or where two successive Council recommendations in the same EIP find non-compliance with the corrective action plan.¹¹⁶ Decisions are made by reverse QMV¹¹⁷ by the other Member States of the Euro Area.¹¹⁸ The EIP has been put into practice, with excessive imbalances recently found in three, and imbalances in sixteen other Member States.¹¹⁹ No serious follow-up in the form of sanctions has, as yet, taken place.¹²⁰ A publication by the European Commission itself shows a meagre 40% response rate to macro-economic policy recommendations, both from the MIP¹²¹ and from other economic governance tools.¹²²

111. *Id.*

112. *Id.* art. 12, at 25.

113. Regulation 1174/2011, *supra* note 45. It applies to participating Member States only. *Id.* art. 1(1), at 10.

114. *Id.* art. 3(5), at 10.

115. *Id.* art. 3(1), at 10.

116. *Id.* art. 3(2), at 10.

117. *Id.* art. 3(3), at 10. By (regular) QMV, the Council may amend the Commission's recommendation to impose a sanction.

118. *Id.* art. 3(7), at 10.

119. See the Commission's Alert Mechanism Report 2015, which describes the process of balance-sheet repair and the remaining imbalances in many Member States. *Report From The Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee*, COM (2014) 904 final (Nov. 28, 2014).

120. For an overview of the MIP's application, see *Macroeconomic Imbalance Procedure*, EUR. COMMISSION, http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm (last updated Mar. 3, 2015).

121. Macro-economic Imbalances Procedure, as the EIP has been dubbed in euro parlance.

122. See generally Servaas Deroose & Jörn Griesse, *Implementing Economic Reforms—Are EU Member States Responding to European Semester Recommendations?*, EDFIN ECON. BRIEF, October 2014, at 1, available at http://ec.europa.eu/economy_finance/publications/economic_briefs/2014/pdf/eb37_en.pdf.

I. Euro Plus Pact, Strengthening of Commission

EU politicians make a lot of their commitment to competitiveness. Lack of competitiveness of European economies was often cited as a cause for the crisis. In the spring of 2011, twenty-three States agreed a ‘Euro Plus Pact.’¹²³ In this ‘pact,’ the Heads of State and Government of the Euro Area and Bulgaria, Denmark, Latvia, Lithuania, Poland, and Romania¹²⁴ agreed to undertake national commitments in areas that fall under their own, national competence,¹²⁵ and to ‘monitor politically’ their implementation. Legally, the Pact is no more than a set of commitments adopted in the European Council’s conclusions. Its main purpose was to show determination to address fundamental economic policy issues in a coordinated manner. Important in view of the lack of true coordination of the crisis response, the adherents to the Euro Plus Pact ‘commit to consult their partners on each major economic reform having potential spill-over effects before its adoption.’¹²⁶ Fostering competitiveness and employment, furthering sustainability of public finances and reinforcing financial stability are the four core concerns that the Pact identifies. It specifically mentions the development of unit labour costs in line with productivity growth, the review of wage setting arrangements, the opening up of sheltered sectors of the economy and reducing bureaucracy, especially for small and medium-sized enterprises (“SMEs”), as goals to be pursued. In labour markets,

123. Annex I to the Conclusions of the European Council, 24-15 March 2011, *available at* https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

124. Since, Latvia (2014) and Lithuania (2015) have adopted the single currency.

125. As the document emphasises time and again.

126. This requirement has since been given legal force in TSCG, art. 11: ‘... the Contracting Parties ensure all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves’, in a procedure that involves the EU institutions.

'flexicurity'¹²⁷ will be sought, a combination of flexibility and job security that should appeal to employers and employees alike.¹²⁸

This already lengthy overview would not be complete without mentioning the institutional strengthening of the European Commission's member holding the economic portfolio.¹²⁹ In October 2011, the EMU portfolio holder was elevated to Commission Vice President, and a Chief Economic Advisor was appointed. The idea was that Olli Rehn would have similar self-standing responsibilities as the Commissioner for competition, who also relies on a Chief Economist to pursue antitrust cases.¹³⁰

J. Assessment

The governance amendments reveal a specific perspective on the origins of the crisis. It is seen as originating in excessive debt accumulation, both private (housing bubbles, over-consumption fuelled by low interest rates) and public debt (government largesse). Statistical fraud was behind late discovery of the public spending situation in Greece, and lack of independent statistics and economic forecasts as the basis for budgetary planning had been a general issue in Europe. Both issues are addressed. Economic imbalances could thus develop that need monitoring, and redress. The focus in all of this is at individual Member States, and the approach is punitive in nature. National governments are to be disciplined and, if

127. 'Flexicurity' had been a feature of the 'Lisbon Strategy' to make the EU the most competitive and the most dynamic knowledge-based economy in the world by 2010, a much-touted effort that proved unattainable. Innovation, education, and a knowledge-based economy were key words. The Lisbon Strategy was followed by 'Europe 2020', which the initiating Commission calls 'a strategy for smart, sustainable and inclusive growth.' *Communication from the Commission, A Strategy For Smart, Sustainable And Inclusive Growth*, COM (2010) 2020 final (Mar. 3, 2010), available at http://ec.europa.eu/archives/commission_2010-2014/president/news/documents/pdf/20100303_1_en.pdf. The Europe 2020 Strategy has quantifiable goals in respect of employment, government spending on research and development (R&D), CO₂ emissions, and poverty reduction.

128. On 'flexicurity', see *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security*, Document COM (2007) 359 final, (Nov. 27, 2007), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52007DC0359>.

129. *Olli Rehn appointed Commission Vice President, with Additional Instruments, Algirdas Šemeta responsible for Eurostat*, EUR. COMMISSION (Oct. 27, 2011), http://europa.eu/rapid/press-release_IP-11-1284_en.htm.

130. A similar move towards copying from competition law enforcement practices can be seen in the competence to adopt of fining guidelines similar to those applicable under competition law, to enforce the new rules on avoidance of statistics manipulation. Regulation 1174/2011, *supra* note 45, art. 8, at 10.

recommendations and warnings fail, sanctions should apply in respect of euro area Member States. Although a more contractual form has been pondered, the top-down imposition of discipline prevailed. This was coupled with public scrutiny, and open debate: the requirement to publish programmes of redress and the economic dialogue provisions seek to foster debate and correction by the media. Here, the absence of a common European media space makes itself felt. Such discussions take place among the experts and those responsible (Ecofin, Euro Group, European Council, and ECB Governing Council) and are only reflected in the national debate, held in a national language, not in a shared language, such as in the United States.

K. Need for Thorough Rethinking

In the economic governance reboot, joint policy-making is not really explored,¹³¹ beyond shared views on the appropriateness of national policies. Article 122(1) TFEU, the sole Treaty provision that allows the Union to adopt economic policy measures, is conspicuous in its absence. With the emphasis on national policies that need to converge, and align with a certain view of correctness, perennial discord between Brussels and national capitals is assured. The envisaged new report on deepening EMU, to be presented by the Four Presidents¹³² to the European Council in June 2015, may suggest ‘proposals on further steps towards pooled sovereignty in economic governance.’¹³³

On paper, there have been joint stimulus programmes: three to date. At the depth of the financial crisis, the Commission adopted a

131. The TSCG’s mentioning, in Article 9, of ‘... an economic policy that fosters the proper functioning of the economic and monetary union and economic growth’ may perhaps be read as a precursor to a single policy.

132. The Presidents of the Commission, the European Council, the Euro Group and the ECB. Earlier Presidents’ Reports on deepening EMU have been presented. *See Towards a Genuine Economic and Monetary Union*, Herman Van Rompuy, President of the European Council In close collaboration with: José Manuel Barroso, President of the European Commission Jean-Claude Juncker, President of the Eurogroup Mario Draghi, President of the European Central Bank of 5 December 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

133. European Commission, Making the Best Use of the Flexibility within the Existing Rules of the Stability and Growth Pact, COM(2015) 12 Final Provisional, at 18 (January 2015).

European Economic Recovery Plan,¹³⁴ which urged a joint fiscal stimulus and efforts to restore competitiveness in national economies. At their meeting on June 29, 2012, the European Council adopted a *Compact for Growth and Jobs*, promising to unlock EU€120 billion through various windows.¹³⁵ This produced a nice headline but there is no way of testing whether this initiative led to any change actually felt on the ground, in depressed areas or by disadvantaged citizens. Upon its inauguration, the new European Commission announced *An Investment Plan for Europe*,¹³⁶ a plan 'to mobilise at least EU€315 billion in additional public and private investment into the real economy,' acting together with the European Investment Bank ("EIB"). The Commission proposes the establishment of European Fund for Strategic Investments,¹³⁷ the idea being that public guarantees can unlock private investments, notably favouring small and medium-sized enterprises. It is too soon to judge the latest stimulus proposal.

One must conclude that, until now, the EU did not have at its disposal means of swift and effective budgetary intervention. Economic stabilisers function at national level. Working towards an EU-, or euro area-wide system of economic stabilisers is called for. Only then will asymmetric shocks be absorbed at the level of the European economy. Introducing a modest shock-absorbing capacity,¹³⁸ e.g., through a basic funding at euro area level of unemployment benefits that individual States provide, may help diminish the need for recurring debates on funding governments of depressed States.

134. European Commission, A European Economic Recovery Plan, COM(2008) 800 final (November 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0800&from=EN>. This Commission Communication followed another one 'From financial crisis to recovery: A European framework for action', COM(2008) 706 final, issued one month before, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0706&from=EN>.

135. See European Council, Conclusion of the Compact for Growth and Jobs 3(h), 29 June 2012, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131388.pdf.

136. European Commission, An Investment Plan for Europe, COM(2014) 903 Final (November 2014).

137. See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Fund for Strategic Investments and Amending Regulations (EH) No 1291/2013 and (EU) No 1316/2013, COM(2015) 10 Final (January 2015) (establishing the Fund in COM(2015) 10 final).

138. Authors connected to the Bruegel think-tank have explored this. See Bruegel, <http://www.bruegel.org>.

L. *Legal Peculiarities*

The nature of the crisis response, with its emphasis on State interventions, coordinated *ex post* and on the threat of punitive measures, and the involvement of the IMF, has led to legal peculiarities. Convergence of economic policies, and restoration of budgetary soundness have been strictly enforced in respect of the ‘peripheral’ Member States through conditions attached to the financing provided. In accordance with IMF practice, these conditions were contained in Memoranda of Understanding (“MoUs”), agreed between the Member State concerned and the lending authorities.¹³⁹ But, they were also enshrined in legal acts at Union level: implementing decisions on the granting of financial assistance, and decisions under the EDP/SGP, and Article 136 TFEU,¹⁴⁰ addressed to Greece,¹⁴¹ Ireland,¹⁴² Portugal,¹⁴³ Spain,¹⁴⁴ and Cyprus.¹⁴⁵ This implies that the binding nature of the commitments emanates from Union law, with a supremacy status vis-à-vis national law.¹⁴⁶ Thus,

139. See Memorandum of Understanding between the European Commission acting on behalf of the Euro Area Member States and the Hellenic Republic, *available at* http://ec.europa.eu/economy_finance/eu_borrower/mou/2012-03-01-greece-mou_en.pdf.

140. Article 136 TFEU makes the Council competent to take action to ensure the proper functioning of EMU in respect of Euro area Member States. The Council can adopt measures relating to a strengthening of coordination and surveillance of budgetary discipline, and set out economic policy guidelines, respecting the EU-wide BEPGs.

141. Council Decision of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010/320/EU), O.J. L 145/6, 11 June 2010; and Council Decision of 13 March 2012 amending Decision 2011/734/EU addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2012/211/EU), L 113/8, 25 April 2012.

142. Council Implementing Decision of 7 December 2010 on granting Union financial assistance to Ireland (2011/77/EU), O.J. L 30/34, 4 February 2011, as lastly amended Council Implementing Decision of 22 January 2013 (2013/48/EU), O.J. L 21/30, 24 January 2013.

143. Council Implementing Decision of 30 May 2011 on granting Union financial assistance to Portugal (2011/344/EU), O.J. L 159/88, 17 June 2011, lastly amended by Council Implementing Decision of 18 February 2014 (2014/197/EU), O.J. L 107/61, 10 April 2014.

144. Council Decision of 23 July 2012 addressed to Spain on specific measures to reinforce financial stability (2012/443/EU), O.J. L 202/17, 28 July 2012.

145. Council Decision of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth (2013/236/EU), O.J. L 141/32, 28 May 2013, lastly amended by Council Implementing Decision of 24 March 2014 amending Implementing Decision 2013/463/EU on approving the macroeconomic adjustment programme for Cyprus (2014/169/EU), O.J. L 91/40, 27 March 2014.

146. See Declaration 17 to the Treaty of Lisbon, *Declaration Concerning Primacy*, 2007 O.J. (C 306) (referring to settled case law of the CJEU, notably Case 6/64 (*Costa/ENEL*)).

the conditionality imposed on borrowing Member States is characterised by a variety of legal vessels,¹⁴⁷ with the same content. It is clear that the strictness of the convergence compliance varies with the status of the Member State. Incisive, detailed economic policy prescriptions have been addressed to States in need of 'bail-out' by their peers.¹⁴⁸ Other Member States have largely escaped this strict scrutiny.

M. Flexibility of Enforcement

The same variations in applying strict enforcement can be seen in the practice of the EDP/SGP enforcement. Sharply increased sanctioning powers have not been applied. This is partially explained by the emphasis on structural reform and the focus on structural rather than actual budget deficits.

Where the TFEU's budgetary norm of a budget deficit exceeding 3% of GDP as excessive, in principle,¹⁴⁹ refers to the *nominal* deficit as reported on the basis of actual budget figures, the SGP refers to the *structural* balance between government income and expenses. This

147. Including financing agreements with the EFSF, or the ESM, which can be found at their websites <http://www.efsf.europa.eu/about/operations/index.htm> and <http://www.esm.europa.eu/assistance/index.htm>. See The Master Financial Assistance Facility Agreement between European Financial Stability Facility Kingdom of Spain as Beneficiary Member State Fondo De Reestructuracion Ordenanda Bancaria as Guarantor and The Bank of Spain, available at http://www.efsf.europa.eu/attachments/efsf_spain_ffa.pdf; The Master Financial Assistance Facility Agreement between European Financial Stability Facility the Hellenic Republic as Beneficiary Member State the Hellenic Financial Stability Fund as Guarantor and the Bank of Greece (as amended by the Amendment Agreement dated 12 December 2012), available at http://www.efsf.europa.eu/attachments/efsf_greece_fafa.pdf. A Second Amendment Agreement, extending the MFAF until and including February 28, 2015, was concluded on December 19, 2014. See Second Amendment Agreement Relating to the Master Financial Assistance Facility Agreement (as amended by an Amendment Agreement dated 12 December 2012) between European Financial Stability Facility The Hellenic Republic as Beneficiary Member State Hellenic Financial Stability Fund as Guarantor and The Bank of Greece, available at <http://www.efsf.europa.eu/attachments/Second%20Amendment%20Agreement%20Greek%20MFFA.pdf>. As is explained by a document on the ESM's website, www.esm.europa.eu, the EFSF Board of Directors, on February 27, 2015, decided to further extend the Greek MFFA by four months until June 30, 2015. The MoU did not have to be amended as it does not have an expiry date.

148. Illustrative of the breadth and depth of the required reforms is reading the provisions of the Implementing Decisions in respect of Greece (Article 2 of Decision 2010/320/EU), Portugal (Article 3 of Decision 2011/344/EU), Ireland (Article 3 of Decision 2011/77/EU), and Cyprus (Article 2 of Decision 2013/236/EU).

149. Note that TFEU art. 126(2) contains *qualitative* language requiring discretionary assessment of the existence of an excessive deficit on the basis of a *quantitative* reference value of 3%.

structural deficit is the product of corrections for incidental factors and cyclical movements. The structural deficit is calculated on the basis of the nation's 'output gap,' *i.e.*, the deviation of actual and potential GDP.¹⁵⁰ This 'top-down approach' to the structural deficit is complemented by a 'bottom-up approach' under which the effects of budgetary measures (tax increases and savings) is measured,¹⁵¹ net of their subsequent budgetary effects through their impact on GDP.¹⁵²

The second reason why flexibility of enforcement seems to be the norm is the emphasis on structural reform as a possible element to grant longer periods of budgetary adjustment to Member States that are verifiably serious about such reform. Recently, the European Commission, prodded by Italy and France, codified this, and other exceptions to the rules in an 'interpretative communication,'¹⁵³ which 'provides additional guidance, without changing or replacing the existing rules.' This document sets out Commission policy in respect of budgetary contributions to its *Investment Plan for Europe*,¹⁵⁴ and elaborates earlier practice. Notably, under strict conditions, public investment may justify a deviation from the MTBO ('investment clause'). Under the 'structural reform,' the Commission may grant eligible Member States additional time to reach the MTBO.

N. France's Prolonged Effort to Bring Nominal Deficit Under 3% of GDP

Immediately applying this new interpretation, the Commission has recommended, on February 27, 2015, to the Ecofin Council to allow France yet another two-year extension of the deadline for

150. See Johannes Hers & Wim Suyker, *Structural Budget Balance: A Love at First Sight Turned Sour* (CPB Economic Policy Analysis, 2014/07), available at <http://www.cpb.nl/en/publication/structural-budget-balance-love-first-sight-turned-sour>. CBP stands for *CPB Netherlands Bureau for Economic Policy Analysis* (CPB), an independent policy research and advice body for the Dutch government.

151. See Directorate-General for Economic and Financial Affairs of the European Commission, *European Economic Forecast 33* (EU, Spring 2013), available at http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee2_en.pdf.

152. Budget measures will have an effect on GDP, which in turn, translates in effects for the budget, e.g. savings measures may lead to lower tax income, thus increasing the deficit.

153. European Commission, *Making the Best Use of the Flexibility Within the Existing Rules of the Stability and Growth Pact*, COM(2015) 12 Final Provisional, (January 2015), available at http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/2015-01-13_communication_sgp_flexibility_guidelines_en.pdf.

154. National contributions to the EFSI will not be taken into account when assessing compliance with the Union's budgetary norms.

finally bringing its budget (just) within the 3% norm. After a Council recommendation to France in 2009 had given it time to redress its budget deficit by 2012, a one-year extension was granted in 2013, and a further two-year extension in 2013, because ‘although effective action had been taken by the French authorities, unexpected adverse economic events with major unfavourable consequences for government finances had occurred after the adoption of the [earlier] Council recommendation.’ French commitments under its Economic Partnership programme¹⁵⁵ and new engagements subsequently submitted, plus an assessment of the budgetary measures taken,¹⁵⁶ led the Commission to conclude that ‘the available evidence does not allow to conclude on no effective action’ and that a further extension to 2017 is warranted.¹⁵⁷ If this recommendation is adopted, France will have struggled for eight years to get its nominal deficit (just)¹⁵⁸ under 3%, albeit under strict scrutiny to adopt structural reforms.

O. Joint Debt Issuance: Mere Study

This assessment of the economic governance developments would not be complete without mentioning the investigations into joint debt issuance by the Member States. Jointly tapping the markets may prevent these from excluding governments from a reliable source of finance, but should, of course, heed the requirements of sound budgetary policies which the Treaty contain. The CJEU has interpreted the ‘no bail-out’ clause as permitting the establishment of a permanent mechanism to meet financing requirements of euro area Member States that experience, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the

155. Prescribed under Article 9 of Regulation 473/2013, one of the two legal acts from the ‘two-pack.’

156. Comparing the ‘fiscal effort’ undertaken with the level previously recommended by the Council.

157. Recommendation for a Council Recommendation with a View to Bringing an End to the Excessive Government Deficit in France, COM(2015) 115 Final, (February 2015), available at http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/126-07_commission/2015-02-27_fr_126-7_commission_en.pdf. European Commission, all legal acts in relation to the EDP of France, available at http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/countries/france_en.htm.

158. The Commission recommends France to reach a 2.8% nominal budget deficit in 2017. After submission of the manuscript, the Ecofin Council adopted the recommendation to France; see: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206704%202015%20INIT>.

euro area as a whole and of its Member States.¹⁵⁹ But providing finance to fellow Member States can only be accepted under Article 125 TFEU when it is assured that ‘the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.’¹⁶⁰ Even under the Court’s broad, objectives-based interpretation of the ‘no bail-out’ clause, Article 125 TFEU stands in the way of joint issuance.

An expert group established by the European Commission has scrutinised innovative mechanisms to reduce the current mountain of public debt,¹⁶¹ or to experiment with joint issue of ‘euro bills’—short-term sovereign debt instruments.¹⁶² Its report¹⁶³ highlights the legal difficulties of proceeding in this area. This Author, taking a longer-term perspective, considers that the introduction of Eurobonds may create a safe asset for a deeply liquid financial market whilst ensuring effective leverage over Member States’ budgetary policies. Sound and sustainable budgets can be fostered through conditions attached to access to the joint funding and by topping up the interest rate individual governments need to pay to the joint debt-issuing agency. All of this requires Treaty amendment. Member States might first explore joint issuance by setting up a joint agency by separate treaty that, like the TSCG, will later be woven into the TFEU.

II. UNCONVENTIONAL MONETARY POLICY MEASURES

The response by policy-makers and legislators was swift and encompassing. So was the response of the central banks. They were

159. Judgment of 27 November 2012 in Case C-370/12 (*Pringle*).

160. *Id.* at para. 135.

161. Hasan Doluca et al., *The European Redemption Pact: An Illustrative Guide*, (German Council of Econ. Experts Working Paper 02/2012, 2012), available at http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/download/publikationen/working_paper_02_2012.pdf.

162. The ELEC “Euro T-Bill Fund” A proposal for a two-year refinancing for all € bills/optional refinancing of bond maturities until 2015, EUROPEAN LEAGUE FOR ECONOMIC CO-OPERATION (Jan. 27, 2012), <http://www.elecece.eu/en/system/files/publications/elec-viewpoints/monetary/mon-12jan-emubondfund.pdf>. Disclosure: the present author contributed to this proposal and wrote Appendix II on the legal constraints.

163. *Expert Group on Debt Redemption Fund and Eurobills*, chaired by Gertrude Tumpel-Gugerell, Final Report (March 31, 2014), available at http://ec.europa.eu/economy_finance/articles/governance/pdf/20140331_report_en.pdf.

the first to act when markets froze, and liquidity dried up in the summer of 2007 and, seriously, in 2008. Successive waves of long-term liquidity were provided to the markets, swap arrangements were agreed among major central banks, so that euro area banks could also borrow dollars at the ECB, and interest rates were lowered to unprecedented levels in order to stimulate demand. The ECB was not alone here but acted in concert with fellow monetary authorities.

A. Addressing Convertibility Risk

Other central banks, serving a single jurisdiction, could sometimes act more decisively, and were not hindered by the mistrust in the single currency, and the reappearance of convertibility risk in Europe. The ECB faced a crisis of faith, of the financial markets and of citizens and companies, in the irreversible nature of the transition to monetary union. The ECB had to deal with financial fragmentation on the euro area, re-balkanisation of financial markets in Europe, and the fear¹⁶⁴ of euro collapse or, not as far as that, ‘Grexit’, or other national economies leaving the currency union and re-introducing separate currencies. The extremely high level of interest rates in ‘peripheral’ States thwarted the transmission of the ECB’s monetary policy: the lowering of interest rates in Frankfurt didn’t any more translate in interest rate reductions in ‘peripheral’ States.¹⁶⁵ Investors were not only weary of buying or holding public debt, they also openly speculated on States leaving the currency union, and on the demise of the euro. Strong commitment to the euro’s irreversibility¹⁶⁶ and the announcement of measures that would help re-integrate the euro money markets and restore the transmission mechanism for the single monetary policy¹⁶⁷ calmed markets and reinstated trust.

164. For some: the hope. Dislike of the single currency has united people across the continent in political movements that sometimes also dislike European integration, globalisation and everything ‘foreign.’

165. Explained on the ECB’s website. *Mechanism of monetary policy*, EUROPEAN CENTRAL BANK, <https://www.ecb.europa.eu/mopo/intro/transmission/html/index.en.html>.

166. Mario Draghi, President, European Central Bank, Speech at the Global Investment Conference in London (July 26, 2012), available at <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

167. Introductory statement to the press conference (with Q&A), Mario Draghi, President, European Central Bank, Vítor Constâncio, Vice-President, European Central Bank, Introductory statement to the press at Frankfurt am Main (Sept. 6, 2012), available at <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html>.

Nevertheless, the Press Release of September 6, 2012 specifying the technical features of Outright Monetary Transactions (“OMT”)¹⁶⁸ came under attack in Germany, which led to the referral by the German Constitutional Court of preliminary questions about the scope of the ECB’s powers in Case C-62/14 (*Gauweiler*).¹⁶⁹ Whatever the merits of the court case, and without a translation of the press release into legal acts¹⁷⁰ or actual market operations, the mere announcements of OMT in the summer of 2012 had real effects. It led to sharp reductions of interest rates. Remaining differences could be ascribed to the different standing of governments in terms of creditworthiness.

B. Widening Collateral Requirements

These differences in creditworthiness also played a role in the necessity for the Eurosystem to widen the scope of collateral that is eligible in its borrowing operations. The ECB and the NCBs can only lend on the basis of ‘adequate collateral.’¹⁷¹ Sovereign bonds with an adequate credit rating were accepted as collateral. When CRAs adapted these ratings to changed market conditions, and perceptions, their downgrades narrowed the scope for borrowing by banks from ‘peripheral’ Member States, at the very moment that they were most in need of cash. The ECB has taken successive steps to widen eligible collateral to ensure continued use of Greek,¹⁷² Irish,¹⁷³ and Portuguese¹⁷⁴ government bonds in the monetary policy operations of the Eurosystem. Recently, the ECB withdrew this status from Greek

168. Press Release, European Central Bank, Technical features of Outright Monetary Transactions, (Sept. 6, 2012), available at http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

169. Opinion of the Advocate General of 14 January 2015; judgment pending.

170. During the oral hearing before the CJEU, on 14 October 2014, it became clear that the ECB had drafted legal acts to operationalise OMT. The draft legal acts had been submitted to the Court but not yet made public.

171. Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art. 18.1.

172. Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2010/3), 2010 O.J. (L 117) 102. Note that subsequent decisions in respect of Greek collateral have been taken.

173. Decision of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government (ECB/2011/4), 2011 O.J. (L 94) 33.

174. Decision of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government (ECB/2011/10), 2011 O.J. (L 182) 31.

government bonds¹⁷⁵ as the new Greek government was no longer securely in a programme with its creditors, one of the conditions for accepting, with sharply increased haircuts,¹⁷⁶ such collateral. The widening of collateral requirements likewise sparked protest; it came under fire from German claimants before the CJEU.¹⁷⁷

C. *Buying Sovereign Bonds*

Two years before announcing OMT, simultaneously with the establishment of the Greek loan facility, on Europe Day (May 9th) 2010, the ECB introduced a Securities Market Programme (“SMP”).¹⁷⁸ Under the SMP, the ECB bought both sovereign bonds of Member States whose interest rates had become markedly out-of-line with the euro area average, and debt instruments issued by private entities. A quote from the preamble of the legal act clarifies the ECB’s thinking when adopting the SMP:

[] the Governing Council decided and publicly announced that, in view of the current exceptional circumstances in financial markets, characterised by severe tensions in certain market segments which are hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy oriented towards price stability in the medium term, a temporary securities markets programme (the “programme”) should be initiated. Under the programme, the euro area NCBs, according to their percentage shares in the key for subscription of the ECB’s capital, and the ECB, in direct contact with counterparties, may conduct outright interventions in the euro area public and private debt securities markets. The programme forms part of the Eurosystem’s single monetary policy and will apply temporarily. The programme’s objective is to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism.

175. Decision (EU) 2015/300 of the ECB of 10 February 2015 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic (ECB/2015/6), 2015 O.J. (L 53) 29.

176. Meaning that sovereign bonds with an impaired credit status do not count for 100% of their face value; they are accepted as collateral at a steep discount only.

177. Order of the General Court of 16 December 2011 in Case T-532/11 (*Städter v. ECB*), appeal rejected by Order of the Court of 15 November 2012 in Case C-102/12P.

178. Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5) (2010/281/EU), 2010 O.J. (L 124) 8.

The link of the SMP with economic policy undertakings by the affected Member States becomes clear in the following quote from the preamble of the legal act establishing the programme:

The Governing Council has taken note of the statement of the euro area Member State governments that they ‘will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures’ and the precise additional commitments taken by some euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances.

The SMP was ended with the announcement of the OMT, in September 2012. The link between purchases by the central bank of sovereign bonds and the direction of national economic policy was maintained as is evident from the section on ‘conditionality’ in the press release on OMT. It states: ‘[a] necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (“EFSF/ESM”) programme.’

D. Other Bond Purchases

At the same time of the introduction of the SMP, another programme was announced: the Covered Bonds Purchasing Programme (“CBPP”). According to the preamble of the relevant legal act,¹⁷⁹ the CBPP had four objectives: ‘(a) promoting the ongoing decline in money market term rates; (b) easing funding conditions for credit institutions and enterprises; (c) encouraging credit institutions to maintain and expand their lending to clients; and (d) improving market liquidity in important segments of the private debt securities market.’

The first CBPP was followed by a second such programme in 2011.¹⁸⁰ Its aims were those mentioned under (b) and (c) in the preamble of the first CBPP decision.¹⁸¹ On September 4, 2014, a third

179. Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16) (2009/522/EC), 2009 O.J. (L 175) 18.

180. Decision of the European Central Bank of 3 November 2011 on the implementation of the second covered bond purchase programme (ECB/2011/17) (2011/744/EU), 2011 O.J. (L 297) 70.

181. Recital 3 of the preamble to Decision ECB/2011/17 cites these objectives, numbering them as (a) and (b).

such programme was announced: CBPP3. As to its objectives, the recital of the relevant legal act¹⁸² states:

CBPP3 will further enhance the transmission of monetary policy, facilitate credit provision to the euro area economy, generate positive spill-overs to other markets and, as a result, ease the ECB's monetary policy stance, and contribute to a return of inflation rates to levels closer to 2%.

CBPP3¹⁸³ was announced simultaneously with further measures, including an Asset-Backed Securities Purchase Programme (“ABSPP”).¹⁸⁴

E. Introducing Negative Interest Rates

At the same time, the ECB effected yet another lowering of interest rates, including a negative rate on the deposit facility. This should encourage banks to cease holding funds overnight at the ECB and start lending to the real economy.

F. Providing Funding on Condition of On-lending to the Real Economy

On June 5, 2014, in a further effort ‘to enhance the functioning of the monetary policy transmission mechanism by supporting lending to the real economy,’ the ECB announced a new version of its long-term refinancing operations (“LTROs”), an instrument of support for the markets introduced during the crisis thanks to which banks can rely on funding for a prolonged period of time.¹⁸⁵ *Targeted* LTROs (“T-LTROs”)¹⁸⁶ provide¹⁸⁷ inexpensive funding to banks on

182. Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (ECB/2014/40) (2014/828/EU), 2014 O.J. (L 335) 22.

183. The amounts purchased under the SMP and the CBPPs are shown on the ECB’s website. Liquidity analysis, European Central Bank, <https://www.ecb.europa.eu/mopo/liq/html/index.en.html#portfolios>.

184. Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45), 2015 O.J. (L 1) 4. The objectives of the ABSPP are the same as that of CBPP3, quoted in the text.

185. For an overview of the ECB’s unconventional measures, see *The ECB’s response to the financial crisis*, ECB MONTHLY BULLETIN, (October 2010), https://www.ecb.europa.eu/pub/pdf/other/art1_mb201010en_pp59-74en.pdf?32eccc712239d864659194a97209589b.

186. Decision of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34) (2014/541/EU), 2014 O.J. (L 258) 11; the quote in the previous sentence on the objectives of T-LTROs is from the preamble of this legal act.

the condition that they on-lend to the private sector.¹⁸⁸ Banks need to report to the ECB on such lending. Failure to meet the lending benchmarks obliges the banks to early repayment of funds originally borrowed for four years by September 2016.¹⁸⁹

G. Forward Guidance and Transparency

Also unconventional, have been the ECB's 'forward guidance,' and its decision-making transparency. The former refers to the practice of central banks to announce their intention to maintain the current monetary policy stance for a prolonged period of time. The latter indicates the shift towards publication of an account (not the minutes) of the Governing Council.¹⁹⁰ This openness is to be welcomed even though it comes close to transgressing the Treaty-based injunction not to publish the proceedings.¹⁹¹ This obligation to maintain secrecy was introduced to protect the members of the Governing Council, who are to act collectively in the European interest, from criticism based on their nationality or their representation of a national central bank.

H. Quantitative Easing

Most recently, the ECB has decided to engage in quantitative easing ("QE"), whereby the central banks purchases long-term bonds

187. T-LTRO funding starts in 2015. See Calendar of the Targeted Long-Term Refinancing Operations (TLTRO) in 2015, EUROPEAN CENTRAL BANK (Dec. 16, 2014), available at <https://www.ecb.europa.eu/mopo/implement/omo/pdf/TLTRO-calendar-2015.en.pdf>.

188. But not for real estate purchases by private citizens. As the preamble of the relevant legal act makes clear: 'the Governing Council aims to support bank lending to the non-financial private sector, meaning households and non-financial corporations, in Member States whose currency is the euro. This measure does not propose to deal with lending to households for the purposes of house purchases. Eligible lending to the non-financial private sector in the context of this measure thus excludes loans to households for the purpose of house purchases.'

189. See Press Release, European Central Bank, ECB announces further details of the targeted longer-term refinancing operations (July 3, 2014), available at http://www.ecb.europa.eu/press/pr/date/2014/html/pr140703_2.en.html.

190. Announced by President Mario Draghi on several occasions in 2013 and 2014 and effected as of the first monetary policy meeting in 2015. See Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, (January 21–22, 2015), available at <http://www.ecb.europa.eu/press/accounts/2015/html/mg150219.en.pdf>.

191. 'The proceedings of the meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public.' Protocol on the Statute of the European System of the Central Banks and of the European Central Bank, art. 10.4.

in an effort to lower long-term interest rates (thus stimulating the economy) and to reduce investment opportunities for banks (thus seeking to nudge them towards resuming credit to the real economy, as their returns on these long-term assets falls and lending becomes more attractive). The expanded asset purchase programme will include the CBPP3 and ASBPP.¹⁹² The contested nature of the programme, which was opposed by several Governing Council members¹⁹³ can be seen in the decision on the sharing of hypothetical losses on purchases. Only 20% of additional assets purchases will be subject to loss-sharing. However, the entire Governing Council agreed that QE forms a monetary policy instrument that the ECB can legally employ.¹⁹⁴

I. Controversy and Contestation

Engaging in unconventional monetary policy measures has involved a lot of controversy. Internally and externally, the measures came under fire. The ECB's decision to engage in sovereign bond purchases was behind¹⁹⁵ the resignation of German Executive Board member Jürgen Stark in September 2011. It is no secret that the announcement of OMT was opposed by Governing Council member Jens Weidman, President of the Bundesbank. In proceedings before the German Constitutional Court on the validity of these measures,

192. See Press Release, ECB, *ECB announces expanded asset purchase programme* (Jan. 22, 2015), available at http://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html. See also, the introductory statement of ECB President Draghi of the same day, available at <http://www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html>.

193. See *supra* note 190. The first-ever account of a meeting of the ECB's Governing Council contains the following: 'A number of considerations in favour of maintaining a wait-and-see stance at the current meeting were also advanced by some members, as the cost-benefit assessment of the proposed measures was not positive in their view.' *Id.* And 'in the view of some members there appeared to be no urgent need for monetary policy action at the current meeting.' *Id.* The decision to activate QE was made by 'a large number of members;' they 'were in favour of expanding the existing private sector asset purchase programmes to include purchases of a broad portfolio of securities of euro area governments and agencies and of supranational institutions.' *Id.* The ECB President concluded that 'a large majority of voting members supported a decision to launch an expanded asset purchase programme.' *Id.*

194. 'As a general starting point, all members considered asset purchases, including sovereign bond purchases, to be part of the set of monetary policy instruments which, as foreseen in the ECB's legal framework, were at the Governing Council's disposal if and when required for it to deliver on its price stability mandate, although some members argued that this instrument should only be used in contingency situations.' See *id.*

195. See his interview with the German weekly *Wirtschaftswoche*, available at <http://www.wiwo.de/politik/europa/juergen-stark-ezb-chefvolkswirt-nennt-politische-gruende-fuer-ruecktritt/5967056.html>.

the Bundesbank pleaded against the ECB, submitting a brief that sets out its criticism of the measure.¹⁹⁶ Bundesbank President Weidman gave an expert opinion before the Karlsruhe-based German court, against the ECB's representative. Hardly a sign of consensual decision-making at the central bank. One may even ask whether openly challenging an ECB decision, once adopted, is compatible with the independence of the central bank,¹⁹⁷ a feature so cherished by the very German opponents of the ECB in respect of unconventional measures.

III. *BANKING UNION: OUTLINE*

The same qualified transparency that was introduced in respect of monetary policy operations also characterises the functioning of another novel arrangement in which the ECB plays a central role: banking union. The transparency arrangements will be touched upon after the following brief outline of the concept of banking union, and its realisation.

A. *Rationale*

When the weakness of the banking system had affected the standing of sovereigns who had to rescue banks and guarantee their liabilities, it became necessary to break the sovereign/bank doom loop. The Euro Area Summit of June 29, 2012 declared: 'We affirm that it is imperative to break the vicious circle between banks and sovereigns.'¹⁹⁸ By establishing a 'banking union,' the competence to effect micro-prudential supervision would be attributed to the EU level, so that the national bias and lack of coordination witnessed during the financial crisis would belong to the past. With banking

196. See http://www.handelsblatt.com/downloads/8124832/1/stellungnahme-bundesbank_handelsblatt-online.pdf.

197. As was argued by former ECB Executive Board member Lorenzo Bini Smaghi in the *Financial Times* of 14 June 2013, available at <http://blogs.ft.com/the-a-list/2013/06/14/the-ecb-is-doing-the-right-thing/#axzz2Wau7MEPr>:

. . . it can be questioned whether the publication of a national central bank opinion on monetary policy is fully in line with the Treaty requirement that no national nor community institution may seek to influence the members of the decision making bodies of the ECB. The governors of the Eurozone central banks are members of the ECB's Governing Council on a personal capacity and should not represent their own countries' views.

198. Euro Area Summit Statement, Brussels, (June 29, 2012), available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf.

supervision exercised at the euro area level, recapitalising banks from the ESM could be undertaken, thus relieving State budgets from this burden. In the words of the leaders of the euro area:

When an effective single supervisory mechanism is established, involving the ECB, for banks in the euro area the ESM could, following a regular decision, have the possibility to recapitalize banks directly. This would rely on appropriate conditionality, including compliance with state aid rules, which should be institution-specific, sector-specific or economy-wide and would be formalised in a Memorandum of Understanding.

Even though, within three months, the Ministers of Finance of Germany, the Netherlands and Finland backtracked on this commitment,¹⁹⁹ stating that direct ESM recapitalisation could only occur in respect of problems arising once banks had come under European supervision,²⁰⁰ a quick legislative process followed resulting in the adoption of legal acts that, more or less,²⁰¹ establish banking union.

B. Three Elements: Supervision, Resolution, Deposit Insurance

Banking union was to consist of three elements:

- 1) joint supervision by the ECB and National Competent Authorities (“NCAs”), together forming the Single Supervisory Mechanism (“SSM”), of all banks in the euro area, with a strong central role for the ECB;
- 2) a Single Resolution Mechanism (“SRM”) for banks, organised by the Single Resolution Board (“SRB”)²⁰²
- 3) single deposit insurance.²⁰³

199. Joint Statement of the Ministers of Finance of Germany, the Netherlands and Finland, 25 September 2012, press release 175/2012 of the Finnish Ministry of Finance, available at http://www.ministryoffinance.fi/vm/en/03_press_releases_and_speeches/01_press_releases/20120925JointS/name.jsp.

200. The statement said: ‘the ESM can take direct responsibility of problems that occur under the new supervision, but *legacy assets should be under the responsibility of national authorities*’ (emphasis added).

201. The qualifying language relates to the absence of unified deposit insurance.

202. Council Regulation 806/2014, 2014 O.J. (L 225) 1 (EU). The SRM and the SRF will not be discussed in this contribution.

203. As said, this element has not come to full fruition. See Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, 2014 O.J. (L 173) 149.

Banking union is based on a single rule book: a set of rules on prudential supervision that apply across the EU. The Single Rulebook has been established by the adoption of the Capital Requirements Regulation (“CRR”)²⁰⁴ and the Capital Requirements Directive (“CRD IV”),²⁰⁵ the Banking Recovery and Resolution Directive (“BRRD”)²⁰⁶ and additional legal acts.²⁰⁷ These EU legal acts partially reflect global consensus on banking standards agreed at the level of the Basel Committee on Banking Supervision (“BCBS”)²⁰⁸ and the Financial Stability Board (“FSB”).²⁰⁹

C. Single Supervisory Mechanism

The SSM became operational on 5 November 2014 on the basis of a second legal act activating the enabling provision of Article 127(6) TFEU.²¹⁰ Before, the ECB had engaged in a major operation to assess the books of the banks it would directly supervise. The results of this Comprehensive Assessment and Asset Quality Review, plus stress test, effected in cooperation with the EBA, were made public

204. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, 2013 O.J. (L 321/6). Note that the CRR has been amended subsequently.

205. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, 2013 O.J. (L 176) 338.

206. Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, 2014 O.J. (L 173) 190.

207. Further elements of the EU’s single rulebook can be found at the EBA’s website. See Interactive Single Rulebook, European Banking Authority, available at http://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/-/interactive-single-rulebook/main_documents.

208. See Basel Committee on Banking Supervision, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/>.

209. See FINANCIAL STABILITY BOARD, <http://www.financialstabilityboard.org>.

210. Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013 O.J. (L 287) 63 [hereinafter SSM Regulation].

ahead of the ECB's assumption of operational powers of prudential supervision.²¹¹

The SSM Regulation concerns micro-prudential supervision, *i.e.*, supervision with a view to the soundness of individual banks. In 2011, the ECB had been given a major role in macro-prudential supervision, which relates to overall systemic stability, when the ESRB was established.²¹² As of end-2014, the ECB directly supervises 123 significant banks²¹³ in the euro area,²¹⁴ and is directly responsible for licensing all banks in the euro area and for the authorisation of shareholders in banks.²¹⁵ The non-significant banks are primarily supervised by their national authorities. The ECB may decide to directly supervise NCA-supervised banks.²¹⁶ The ECB is responsible to ensure the effective and consistent functioning of the SSM²¹⁷ and exercises oversight over the functioning of the SSM.²¹⁸ To this end, the ECB is given extensive regulatory powers.²¹⁹

D. Supervisory Board: New Body of the ECB

As said, the attribution of operational supervisory powers to the ECB is based on Article 127(6) TFEU, an enabling provision that permits the Ecofin Council to awaken erstwhile dormant supervisory powers. Since the original Treaty arrangements did not provide for a decision-making mechanism in respect of banking supervision, a new body was introduced: the Supervisory Board. It consists of a Chair and Vice-Chair, four ECB representatives, and a representative for

211. See *Aggregate Report on the Comprehensive Assessment*, EUROPEAN CENTRAL BANK (October 2014), available at <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/aggreatereportonthecomprehensiveassessment201410.en.pdf>.

212. See *supra* note 99.

213. SSM Regulation, art. 6(5), 2013 O.J. (L 287) 76 (EU) SSM Regulation. For the supervisory powers of NCAs over other banks, see SSM Regulation, art. 6(6), 2013 O.J. (L 287) 76 (EU).

214. The criteria for significance of banks are set out in Art. 6(4). SSM Regulation, art. 6(4), 2013 O.J. (L 287) 75-76 (EU)

215. SSM Regulation, art. 4(1)(a)&(c), 14, 15, 2013 O.J. (L 287) 74, 80-81 (EU).

216. SSM Regulation, art. 6(5)(b), 2013 O.J. (L 287) 76 (EU).

217. SSM Regulation, art. 6(1), 2013 O.J. (L 287) 76 (EU).

218. SSM Regulation, art. 6(5)(c), 2013 O.J. (L 287) 76 (EU).

219. See, notably, Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities, (SSM Framework Regulation) (ECB/2014/17), 2014 O.J. (L 141) 1. More legal acts can be found at the ECB's dedicated website on the SSM: <https://www.bankingsupervision.europa.eu>.

each NCA.²²⁰ The Supervisory Board submits draft supervisory decisions to the Governing Council which, through a non-objection procedure, formally adopts them. Review by an independent panel of experts²²¹ may be requested by interested parties; they may also directly proceed against the ECB before the CJEU.

E. Other Legal Novelties: Treaty Basis, Separate International Agreement, Review, Accountability

Many legal novelties can be discerned in banking union.²²² Only a selected few can be noted here.²²³ The second leg of banking union has been established on the basis of Article 114 TFEU, the provision on harmonisation of national rules in the context of the internal market.²²⁴ The exercise of discretionary powers by bodies established under this provision was recently affirmed in respect of ESMA by the CJEU.²²⁵ However, Member States were reluctant to extend the regulation on bank resolution to the contributions to the single resolution fund, reserving this element to a separate treaty.²²⁶ So, in this area of EMU, as well, Member States took recourse to enacting measures outside of the main Union framework.

With the ECB competent to direct NCAs to adopt decisions, and with the EU sanctioning framework for supervision²²⁷ not providing

220. SSM Regulation, art. 26, 2013 O.J. (L 287) 85–86 (EU).

221. Decision of the European Central Bank of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules, 2014 O.J. (L 175) 51. Disclosure: the present author is an alternate member of the Administrative Board of Review (ABoR).

222. For an insightful overview of banking union, see: Christos Gortsos, *The crisis-based EU financial regulatory intervention: Are we on the top of the prudential wave?*, ERA FORUM (J. OF THE ACADEMY OF EUR. L.), Volume 16 (2015), issue 1.

223. For excellent discussions of these issues, see Niamh Moloney, *European Banking Union: Assessing the Risks and Resilience*, 51 COMMON MKT. L. REV. 1609–70 (2014).

224. Note the unanimity requirement of Article 127(6), whereas TFEU art. 114 requires QMV. Also, since the Lisbon Treaty, the role of the European Parliament is different under these provisions. By tying the adoption of Article 114-based measures to the adoption of the Article 127(6) legal act, the European Parliament gained more influence in the legislative process.

225. Case C-270/12, *United Kingdom v. Parliament and Council* (Jan. 22, 2014).

226. Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, 8475/15, 2014 O.J., available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT>.

227. See, e.g., SSM Regulation, art. 18, 2013 O.J. (L 287) 82–83 (EU); Council Regulation (EU) 2015/159 of 27 January 2015 amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions, 2015 O.J. (L 27) 1 (EU).

for sanctions in respect of individuals, the question arises which courts to have recourse to: the CJEU²²⁸ or national courts? The power of the ECB to apply national law²²⁹ makes the picture even more complex.²³⁰ The question of supervisory liability is raised by the reference, in recital 61 of the preamble to the SSM Regulation, to Article 340 TFEU.²³¹ Legal review of decisions has been diversely arranged for the SSM and the SRM, with review of resolution decisions organised²³² unlike those of the ECB²³³ but in line with review of decisions of the European Supervisory Authorities (“EBA,” “ESMA,” and “EIOPA”).²³⁴ These ESAs were established in 2011 as an initial institutional crisis response following the recommendations of the DeLarosière Report. Banking union followed just a few years later.

Most interesting will be the development of supervisory practice, and law, at the intersection of competences attributed to the SSM and those remaining with national authorities, in particular conduct-of-business rules, and the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection. The integrity of persons and banks is a concern for the ECB, as the central authority in the SSM: it needs to make an assessment to authorise banks, management, and shareholders. The

228. Directly, or after review by ABoR.

229. SSM Regulation, art. (4)(3), 2013 O.J. (L 287) 74–75 (EU).

230. See generally Raffaele D’Ambrosio, *Due Process and Safeguards of the Persons Subject to SSM Supervisory and Sanctioning Proceedings*, *Quaderni di Ricerca Giuridica della Consulenza Legale*, 74 BANCA D’ITALIA I (2013); Gijsbert ter Kuile et al., *Tailor-Made Accountability within the Single Supervisory Mechanism*, 52 COMMON MKT. L. REV. 155 (2015).

231. This provision provides for liability of Union institutions on the general principles common to the laws of the Member States. As Raffaele D’Ambrosio argues, the limitation of supervisory liability under the laws of many Member States, and other reasons, argue for a restrictive approach of liability for the ECB. See generally Raffaele D’Ambrosio, *The ECB and NCA liability within the Single Supervisory Mechanism*, *Quaderni di Ricerca Giuridica della Consulenza Legale*, 78 BANCA D’ITALIA I (2015).

232. Articles 85 and 86 Regulation 806/2014 establishing an Appeal Panel. Council Regulation 806/2014, art. 85 & 86, 2014 O.J. (L 225) 83–84 (EU).

233. Article 24 SSM Regulation and the ECB regulation establishing ABoR. SSM Regulation, art. 24, 2013 O.J. (L 287) 84–85 (EU).

234. Articles 58–61 of Regulation 1093/2010 establishing EBA, as amended, and Articles 58–61 of Regulations 1094/2010 and 1095/2010 establishing EIOPA and ESMA, respectively. Council Regulation 1094/2010, arts. 58–61, 2010 O.J. (L 331) 77–78 (EU). Decisions of the Joint Board of Appeal of the ESAs can be found here: <http://www.eba.europa.eu/about-us/organisation/joint-board-of-appeal/decisions>.

evolution of the interplay between national and European supervision may determine the effectiveness of the latter.

The novelty of far-reaching accountability and transparency mechanisms may be the most promising. Acknowledging that central bank independence²³⁵ for its monetary tasks²³⁶ differs from the independence²³⁷ and accountability befitting a prudential supervisor, special provisions were adopted. Extensive reporting and accountability mechanisms in the SSM Regulation, including vis-à-vis national parliaments, have been elaborated in an Interinstitutional Agreement between the ECB and the European Parliament²³⁸ and in an MoU between the ECB and the Ecofin Council.²³⁹ These documents contain guarantees for the confidentiality of supervisory information, yet give both branches of the legislative branch wide powers of oversight.

IV. OTHER MEASURES ADDRESSING THE CRISIS

The crisis response measures that were most notable, for their surprising introduction against expectations of strict observance of the ‘no bail-out’ spirit that assumes Member States were ‘on their own’ when confronted with market panic, as well as for their legal novelties, related to the establishment of support mechanisms. Three such mechanisms were established,²⁴⁰ one under EU law, one under

235. TFEU art. 130; Protocol on the Statute of the European System of the Central Banks and of the European Central Bank, art. 7.

236. Note that the SSM Regulation requires separation between the supervisory and monetary functions. SSM Regulation, art. 25, 2013 O.J. (L 287) 85 (EU); *see* Decision of the European Central Bank of 17 September 2014 on the implementation of separation between the monetary policy and supervision functions of the European Central Bank, 2014 O.J. (L 300) 57.

237. As to the independence, Article 19 echoes the wording of the Treaty provisions on monetary-policy related independence, extending this to NCAs as well as the ECB. SSM Regulation, art. 19, 2013 O.J. (L 287) 83 (EU).

238. Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU), 2013 O.J. (L 320) 1.

239. *See generally* Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism, 2013 O.J. (L 320) 1 (EU), *available at* https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf.

240. The Greek support facility was partially set apart from these mechanisms and involved bilateral lending.

the private laws of two Member States, and a third under public international law. This Part will discuss each.

A. *European Financial Stability Mechanism*

The use of Union budget funds was channelled through the European Financial Stability Mechanism (“EFSM”). It was established as a legal entity by Council decision under Article 122(2) TFEU.²⁴¹ The regulation specifies that financial assistance is granted ‘on the basis of the 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.’²⁴² The troika is in sight as the provision continues as follows: ‘these conditions will be defined by the Commission, in consultation with the ECB’ and the preamble adds: ‘Its activation will be in the context of a joint EU/International Monetary Fund (IMF) support.’

B. *European Financial Stability Fund*

Another facility could use funds raised on the capital markets, to be un-lent to a Member State in need. The European Financial Stability Fund (“EFSF”) was established as a special purpose vehicle under Luxembourg law.²⁴³ This is an intergovernmental structure, yet makes use of EU institutions in its operations. The EFSF can issue bonds (or other debt instruments) on the market to raise funds needed to provide loans to euro area states, recapitalise banks, or purchase sovereign debt. EFSF borrowing on markets is guaranteed by Member States up to specific amounts, in line with their NCB’s subscription to the ECB’s capital. The Treaty establishing the EFSF is governed by, and to be construed in accordance with, English law.

241. Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, 2010 O.J. (L 118) 1.

242. Regulation 407/2010, art. 3.

243. For the consolidated version of the Articles of Association, see <http://www.efs.europa.eu/attachments/EFSFStatusCoordonnees%2023AVRL2014.pdf>.

C. European Stability Mechanism

A permanent mechanism was finally established: the European Stability Mechanism.²⁴⁴ It is a separate legal entity, whose capital is in the hands of the Member States of the euro area. The ESM has authorised capital of EU€700 billion, of which EU€80 billion is issued. The contribution key is based on the NCBs' capital holdings in the ECB. A clear limitation of liability applies. Article 8(5) ESM Treaty states:

‘The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from ESM.’

The establishment of the ESM was preceded by the adoption of a TFEU amendment.²⁴⁵ A new paragraph was added to Article 136 TFEU, reading as follows:

3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

Ratification of the ESM Treaty and of the TFEU Treaty amendment were the subject of legal proceedings, including before the CJEU.²⁴⁶ This brings us to our last set of observations on EMU developments: judicial involvement in the crisis response.

D. Assessment

Numerous legal issues arise out of the creation of three ‘bail-out’ mechanisms, some of which are touched upon in the references to the *Pringle* case in this Article. Suffice it to say here that the ingenuity of

244. For the consolidated version of the ESM Treaty after accession of Lithuania to the euro area, see EFSF Framework Agreement, *available at* http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf.

245. European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, 2011 O.J. (L 91) 1.

246. Judgment of 27 November 2012 in Case C-370/12 (*Pringle*).

policy-makers to fill the gaps that EMU's original set-up revealed is laudable. Instruments were created that access the markets at favourable terms, and on-lend the funds thus borrowed to distressed fellow Member States, at strict conditionality, and in tandem with the IMF. At the same time, these novelties show the need for more comprehensive arrangements. The ESM Treaty was agreed twice, in 2011 and, again, in 2012, after a change of heart by politicians. Two versions of an international agreement in six months' time, so as to allow for progress in thinking.²⁴⁷ Even then, the ESM's tool kit does not include bridge financing, as the new Greek government elected in January 2015 found out. This underscores the topicality of the call, in 2012, by former ECB President Jean-Claude Trichet, for a euro area Ministry of Finance to be established.²⁴⁸ Relying on a permanent department at EU, or euro area, subject to adequate EU democratic control, level would obviate the need to devise *ad hoc* instruments, and successive amendments to an international law treaty to reflect evolving political compromises.

V. JUDICIAL INVOLVEMENT IN THE CRISIS RESPONSE

Until the crisis struck, EMU law was characterised by a low level of judicial involvement. Case law on the free movement of capital bloomed,²⁴⁹ after many years in which the provisions on

247. The 2012 version includes an array of support mechanisms: next to direct loans, a primary and a secondary market facility, a direct recapitalisation instrument and precautionary financial assistance, whereas the 2011 version provided for less tools. It took until 8 December 2014 to adopt the ESM's *Guideline on Financial Assistance for the Direct Recapitalisation of Institutions*. (Dec. 8, 2014). For all instruments available to the ESM, see: <http://www.esm.europa.eu/about/legal-documents/index.htm>

248. Trichet rhetorically asked his audience: 'In this Union of tomorrow, or of the day after tomorrow, would it be too bold, in the economic field, with a single market, a single currency and a single central bank, to envisage a ministry of finance of the Union? Not necessarily a ministry of finance that administers a large federal budget. But a ministry of finance that would exert direct responsibilities in at least three domains: first, the surveillance of both fiscal policies and competitiveness policies, as well as the direct responsibilities mentioned earlier as regards countries in a "second stage" inside the euro area; second, all the typical responsibilities of the executive branches as regards the union's integrated financial sector, so as to accompany the full integration of financial services; and third, the representation of the union confederation in international financial institutions.' Jean-Claude Trichet, *Building Europe, Building Institutions: President of the ECB on Receiving the Karlspreis 2011 in Aachen*, June 2, 2011, available at <http://www.ecb.europa.eu/press/key/date/2011/html/sp110602.en.html>.

249. Starting with its judgments on the direct effect of the freedom of capital movements (judgment of 14 December 1995 in Joint Cases C-163/94, C-165/94 and C-250/94 (*Sanz de Lera*), [1995] ECR I-4821), the CJEU became strongly involved in delineating this freedom

capital and payments had only given rise to the odd judgment.²⁵⁰ Today, judges are called in more frequently. Without discussing the merit of these cases, and with no claim to completeness, the following overview may shed some light on this aspect of legal developments in the area of EMU.

A. Member States Courts

Member States courts have been accessed to appraise the constitutionality of ratification of the crisis response. Notably the German Constitutional Court²⁵¹ has been active in assessing whether the financial assistance funds are in conformity with German constitutional law. Its judgments have led to direct involvement of the German *Bundestag* (Lower House of Parliament) in agreeing discrete steps in the activation of financial assistance. It is this feature of the euro area's constitutional make-up which allegedly has made US President Barack Obama remark that governing a single currency with (then) seventeen parliaments requires skillful management. The Estonian Constitutional Court²⁵² and a Dutch judge²⁵³ also had to deal with challenges to the ESM Treaty's ratification.

Member State courts have also been called in to assess the constitutionality of the conditionality attached to the 'bail-outs.' Notably, the Portuguese Constitutional Court has struck down elements of the austerity measures imposed.²⁵⁴ In so far as the conditionality had been enshrined not only in MoUs, but also in legal acts under Articles 126 and/or 136 TFEU, this judicial involvement raises the issue whether a national court is competent to assess the

with judgments on golden shares retained by governments after privatisation of companies, on tax treatment of non-residents, and on the application of 'targeted' financial sanctions against individuals and organisations.

250. See Case 203/80, *Casati*, [1981] E.C.R. 2595; Joint Cases 286/82 and 26/83, *Luisi & Carbone*, [1984] E.C.R. 377.

251. Even enumerating the cases related to the crisis response at the *Bundesverfassungsgericht* goes beyond the confines of this article. The German Constitutional Court's website (<http://www.bundesverfassungsgericht.de>) contains all judgments. See BUNDESVERFASSUNGSGERICHT, <http://www.bundesverfassungsgericht.de>.

252. The Estonian Constitutional Court publishes on its website in English, French and Russian, next to Estonian. See RIIGIKOHUS, <http://www.riigikohus.ee>.

253. President of the District Court of The Hague, 1 June 2012, available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2012:BW7242&keyword=esm>.

254. The Portuguese constitutional court's website is available in English. See TRIBUNAL CONSTITUCIONAL PORTUGAL, <http://www.tribunalconstitucional.pt/>.

validity of EU legal acts. Under EU law, this is a competence reserved for the CJEU.

B. Direct Challenges Before the CJEU

Direct challenges against the ECB have been unsuccessful, thus far. The unsuccessful attempts by *Herr Städter*²⁵⁵ to challenge the ECB measures to widen the eligibility criteria of collateral to ensure continued use of Greek,²⁵⁶ Irish,²⁵⁷ and Portuguese²⁵⁸ government bonds in the monetary policy operations of the Eurosystem were already mentioned. Similarly unsuccessful was the challenge, instituted in December 2013, by *Herr Von Storch* and 5216 other plaintiffs who opposed the ECB's announced OMT.²⁵⁹ It was held that the OMT needed additional legal instruments and decisions subject to the discretion of the ECB to become operative, whereas the applicants were not directly concerned in the sense of the fourth paragraph of Article 263 TFEU. An action for the annulment of an ECB decision taken in the context of the downgrading of Greek government debt and the Private Sector Involvement ("PSI"), the partial write-down of privately held Greek government debt, was also turned down. The latter case²⁶⁰ was initiated by Alessandro Accortini and over 200 fellow plaintiffs from Italy who argued that, as holders of Greek government bonds, they were disadvantaged by an ECB decision that made the eligibility of Greek government bonds for

255. His action for annulment of the ECB's legal acts was rejected as it was instituted after the period of two months from the publication of the legal acts concerned, prescribed in the sixth paragraph of Article 263 TFEU.

256. Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2010/3), 2010 O.J. (L 117) 102.

257. Decision of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government (ECB/2011/4), 2011 O.J. (L 94) 33.

258. Decision of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government (ECB/2011/10), 2011 O.J. (L 182) 31.

259. Case T 492/12, *Sven A. von Storch and Others v. ECB*, 2013 EUR-Lex CELEX LEXIS (Dec. 10, 2013). The Order holding the request inadmissible is available in French and German only. After the submission of the manuscript, the European Court of Justice dismissed the appeal against this Order (Order of the Court in Case C-64/14 P, 30 April 2015).

260. Case T-224/12, *Alessandro Accorinti and Others v. ECB*, 2014 EUR-Lex CELEX LEXIS (Apr. 3, 2014).

Eurosystem operations conditional upon a credit enhancement.²⁶¹ The Order provides a detailed and highly interesting unfolding story of the measures adopted in order to keep the Greek government and financial system afloat. It cites a Bloomberg²⁶² news article and refers to an unpublished ECB decision.²⁶³ The Italian bond holders also proceed in a case against the ECB requesting EU€12 million in damages.²⁶⁴ They want the Court to establish the ECB's liability²⁶⁵ for the negative impact on their bond holdings of the central bank's transactions which kept it out of the partial write-down of Greek privately-held debt.²⁶⁶

1. Cypriot Cases Against the Commission and the ECB

In the autumn of 2014, a raft of cases against the ECB relating to the conditions for the financial assistance to Cyprus were dismissed as either inadmissible or unfounded in law. One such judgment²⁶⁷ concerned the resolution of *Τράπεζα Κύπρου Δημόσια Εταιρεία Λτδ*, commonly known as the Bank of Cyprus ("BoC") following a Eurogroup Statement on Cyprus of March 25, 2013.²⁶⁸ The plaintiffs engaged the Commission and the ECB in proceedings whereas the act they attacked emanated from the Eurogroup. The General Court

261. This credit enhancement consisted of a specific guarantee executed by the Greek Government in favour of the ECB and the NCBs so as to avoid these members of the Eurosystem from undergoing the envisaged debt write-down by Greece.

262. Bloomberg itself acted against the ECB in different proceedings. These concerned the transparency of the ECB's handling of the Greek crisis. The General Court rejected Bloomberg's request for annulment of the ECB's decision refusing access to a document on the use of derivatives to conceal the seriousness of Greece's budgetary situation. The Court considered that disclosure would undermine the protection of the public interest as regards the economic policy of Greece. An appeal against its judgment of 29 November 2012 in Case T-590/10 (*Gabi Thesing and Bloomberg Finance LP v. ECB*) was dismissed by Order of 6 February 2014 (Case C-28/13 P).

263. ECB/2012/NP6. The numbering indicates that there have been at least six unpublished ECB decisions in 2012.

264. Case T-79/13, *Accorinti and Others v. ECB*.

265. TFEU art. 340 (establishing the Union's liability).

266. The plaintiffs allege that the ECB concluded a secret bond swap agreement with Greece on 15 February 2012, refused to participate in the restructuring of Greek debt imposed as part of Greece's public creditors' conditionality, where they allege a conflict of interest, with the ECB being part of the troika. They also attack the ECB's decision of 5 March 2012 which made the eligibility of Greek securities as collateral conditional upon the provision of a buy-back scheme in favour of NCBs.

267. Case T-332/13, *Chrysanthi Christodoulou and Stavrinou v. Commission and ECB*, 2014 EUR-Lex CELEX LEXIS (Oct. 16, 2014).

268. Available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/136487.pdf.

analyses the status of the Eurogroup and finds that ‘it is not possible to consider that the Eurogroup is controlled by the Commission or the ECB, nor that that it acts as an agent of such institutions.’ Imputing the Eurogroup statement to the ESM is equally rejected; the Court considers, in line with paragraph 161 of the *Pringle* judgment, that the Commission and the ECB do not have autonomous decision-making powers when acting in the context of the ESM Treaty.²⁶⁹ The language of the Eurogroup statement on the restructuring of the Cypriot banking sector did not indicate that the restructuring measures were part of the conditionality for financial assistance. Moreover, the statement does not produce legal effects, which is a requirement for an act to be susceptible to Court review. Thus, the action of these depositors at Bank of Cyprus was inadmissible. A similar outcome concerning a BoC depositor followed the same day.²⁷⁰ The General Court came to the same conclusions in respect of actions brought by depositors at Cyprus Popular Bank Public Co Ltd (“Laiki”).²⁷¹

Later in the autumn of 2014, the General Court dismissed an action against the Commission and the ECB for damage allegedly resulting from the signing of the MoU between Cyprus and the ESM. This legal act contains conditionality which led to loss of deposits held by a company established in Belize that faced a substantial reduction in value after the entry into force of a Cypriot decree which converted uninsured deposits at the BoC into BoC shares. The Court found that ‘the conduct which it is claimed gave rise to the damage suffered cannot be imputed to an EU institution’ as the MoU was adopted jointly by the ESM and the Republic of Cyprus. Furthermore, the conduct of the Commission consisting in its alleged failure to

269. Case T-332/13 *supra* note 268, at para. 48 (‘... the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.’).

270. In Case T-328/13 (*Tameio Pronoias Prosopikou Trapezis Kyprou v. European Commission and ECB*). Appeal pending: Case C-106/15 P.

271. Orders of the General Court of 16 October 2014 in Case T-331/13 (*Marinos Nikolaou v. European Commission and ECB*), appeal pending: Case C-109/15 P; Case T-330/13 (*Lella Chatziioannou v. European Commission and ECB*), appeal pending: Case C-108/15 P; Case T-329/13 (*Petros Chatzithoma and Ellenitsa Chatzithoma v. European Commission and ECB*), appeal pending: Case C-107/15 P; Case T-327/13 (*Konstantinos Mallis and Elli Konstantinou Malli v. European Commission and ECB*), appeal pending: Case C-105/15 P (this is the only judgment to be available in 15 other languages than Greek and French, but not (yet?) in English).

establish, when signing the MoU, that this was in conformity with EU law, notably Article 136(3) TFEU, could not lead to liability since the MoU was signed after the reduction in the value of the applicant's deposit at BoC. One of the three conditions²⁷² for liability pursuant to Article 340 TFEU, namely the causal link, was not fulfilled.

2. *Pringle* Case on ESM

Most prominent have been the *Pringle* case before the CJEU on the ratification of the ESM Treaty (and the accompanying TFEU amendment), and the pending case on the validity of the ECB's press release on OMT. In *Pringle*, the Court held that financial assistance to a Member States is an economic policy measure, so that the adoption of a separate ESM Treaty by the Member States does not infringe the exclusive competence for monetary policy at EU level.²⁷³ Also, the economic policy coordination competences of the EU were not affected as the ESM was established in the context of the strengthening of economic governance (the 'six-pack') and its functioning supports economic policy prescriptions emanating from the Ecofin Council and the Commission pursuant to EU law. Furthermore, the 'no bail-out' clause of Article 125 TFEU was considered not to prevent the granting of financial assistance to a Member State provided that this assistance, through the accompanying conditionality, supports the objective of this provision. The purpose of Article 125 TFEU is to ensure:

that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.²⁷⁴

The Court found that financial assistance does not amount to a guarantee of a Member State's outstanding debt, or to taking over such debt. The Treaty amendment confirmed a pre-existing competence of Member States to enter into a separate agreement to establish a permanent mechanism for financial assistance when such

272. The unlawfulness of the conduct, the occurrence of actual damage and the existence of a causal link between the conduct and harm alleged.

273. TFEU art. 3(1)(c).

274. Paragraph 135 of the judgment in *Pringle*.

support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.

3. *Gauweiler* Case on OMT

In the reference for a preliminary ruling submitted by the German Constitutional Court, the issues are, apart from the tussle about supremacy and the ultimate decision on the validity, in Germany, of acts adopted by the ECB, even more technical. The *Gauweiler* Case raises matters such as the ECB's non-preferential status and the issuing Member State's default risk. Also, the acceptability of holding sovereign bonds until maturity, and the selectivity of purchases of government bonds under an OMT programme are among the qualms of the highest German judges. They call upon the CJEU to interpret the prohibition of monetary financing. Article 123 TFEU does not forbid purchases of government bonds on the *secondary* (contrary to the *primary*) market but shouldn't the ECB observe a 'lock-in period' after primary debt issuance during which it abstains from secondary market purchases? More fundamentally, the CJEU is asked to rule whether the ECB's requirement of economic policy conditionality for OMT purchases to be effected in a specific Member State's bonds does not overstep the dividing line between monetary and economic policy, established by the Court in *Pringle*. In his recent Opinion, Advocate General ("AG") Cruz Villalón²⁷⁵ warned that the ECB's involvement in economic policy setting and monitoring should end in respect of Member States whose bonds the ECB would buy under such unconventional measures: an end to the troika, so *troixit* instead of Grexit. After scrutinising the, as yet unpublished draft decisions on OMT before the Court, the AG suggested the Court that the ECB be required, when implementing OMT, to be fully transparent in the reasons behind them (motivation requirement) and to respect the proportionality principle (the measures are to remain well within the limits of the necessary to obtain the stated goal).

Even the limits of the ECB's power on saving the single currency are called into question by the *Bundesverfassungsgericht*: it asks whether, by announcing the OMT programme and thereby keeping the euro area intact, it does not step on the Member States' powers to decide on the geographical scope of the euro area. An

275. In his Opinion issued on 14 January 2015.

obvious answer is that the ECB respects the political decision on adoption of the euro²⁷⁶ by defending the current composition of the Eurozone. The relevant provisions clearly establish the one-way transition towards the adoption of the single currency.²⁷⁷

CONCLUSION

As this overview of major crisis-response developments shows, the crisis has brought about changes in EMU law that are profound and wide-ranging. Even this lengthy contribution could not include several matters that also deserve attention. Among these: the joint oversight by the Commission, under state aid rules, and the ECB, acting in its advisory role in respect of draft legislation in its areas of competence, of State support measures for banks;²⁷⁸ the effects of the *Icesave* judgment on deposit insurance;²⁷⁹ the waves of banking regulations introduced and their effects on the business of banks²⁸⁰ and on competition from outside the traditional financial sector;²⁸¹ and the legality of the Cyprus exchange controls²⁸² which constituted the first restrictions on free capital movement in the monetary union.

276. It is submitted that Article 140 TFEU allows the Council to vary an earlier decision on the composition of the euro area.

277. Pursuant to TFEU art. 140(3), the Council is to ‘irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned.’ The irreversible nature of the single currency was also expressed in the Maastricht Treaty’s Protocol on the transition to the third stage of economic and monetary union, cited in footnote 18 above. This Protocol, considered superfluous ten years after the introduction of the euro, was repealed by the Treaty of Lisbon.

278. For the Commission’s current approach, see Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (‘Banking Communication’), 2013 O.J. (C 216) 1. For the joint efforts by the Commission and the ECB to regulate the governments’ interventions in the banking sector, see René Smits, European supervisors in the credit crisis: issues of competence and competition in *INTERNATIONAL MONETARY AND FINANCIAL LAW: THE GLOBAL CRISIS*, 305-28 (Mario Giovanoli & Diego Devos eds., 2010)

279. See generally Case E-16/11, *EFTA Surveillance Authority v. Iceland* (European Free Trade Assoc. 2013), available at http://www.eftacourt.int/fileadmin/user_upload/Files/News/2013/16_11_Judgment.pdf.

280. Where compliance functions are attracting ever more newly recruited bank staff. One may question whether this an expression of real change in banking culture or merely reflects the need to placate the supervisors.

281. Think, not only, of banks shedding assets that encumber their capital ratios but, also, of Capital Markets Union, a project to stimulate direct financing of SMEs. See generally *Commission Green Paper on Building a Capital Markets Union*, COM(2015) 63 Final (Feb. 18, 2015).

282. For the restrictive measures applicable in Cyprus, see generally CENTRAL BANK OF CYPRUS, http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12583.

Further study is warranted of intriguing legal and institutional novelties, such as the interplay between Union law and provisions adopted outside of this framework, and the role of the institutions in these 'other' arrangements.²⁸³ The announced inclusion of the TSCG into the Union's Treaties will be a testing ground for the ability to combine Union law and the necessary flexibility for addressing challenges specific to the euro area. A different kind of interplay will evolve between the EU (EEA-)²⁸⁴ wide powers of the EBA and the ECB's competences in the euro area.²⁸⁵

Observers of EMU law will be interested to follow the results of the ECB's declared intention is to limit national exemptions and supervisory options,²⁸⁶ thus enhancing the comparability of banks and the forging of a common supervisory culture. Banking union implies a practical convergence of supervisory practices, forging a common European supervisory culture, which will hopefully be formed while the banking culture evolves towards more servant and sustainable practices. Bringing in a new supranational supervisor provides an extraordinary opportunity to break supervisory capture, a phenomenon more widely known as 'regulatory capture.' Supervisors may be prone to speak the language of the supervised, to such an extent as to no longer observe an adequate distance for effective oversight. Supervisors may even come to understand the needs of the supervised to the detriment of the needs of society at large which they are to serve.²⁸⁷ As newly entrusted supervisory institution, the ECB is uniquely placed to break with this legacy.

283. The 'Fiscal Compact' Treaty, the ESM, the Single Resolution Fund.

284. The internal market extends beyond the EU to include Norway, Iceland and Liechtenstein, three non-member countries with which the EU forms the European Economic Area (EEA). *See generally* EFTA, <http://www.efta.int/legal-texts>.

285. Not to mention the possibility that Member States outside the euro area may join the SSM under the 'close cooperation' of Article 7 SSM Regulation. *See* SSM Regulation, art. 7, 2013 O.J. (L 287) 63 (EU).

286. Caroline Binham & Martin Arnold, *Europe's Big Banks Will Need to Raise Capital Warns ECB*, FINANCIAL TIMES (Feb. 24, 2015). The FT reports as follows: [Chair of the ECB's Supervisory Board] 'Danièle Nouy told the Financial Times that banks would have to raise more and better quality capital as a result of her new agency's drive to harmonise more than 150 national variances in capital rules. Fresh legislation from Brussels is likely to also be needed, she added.'

287. The preamble to the SSM Regulation acknowledges that national supervision has not always been serving societal interests where it states, in recitals 12 and 83, that credit institutions should be subject to 'supervision of the highest quality, unfettered by other, non-prudential considerations.' *See* SSM Regulation, arts. 12 & 83, 2013 O.J. (L 287) 64, 72 (EU).

Materially, the direction into which economic governance may best go would be towards a single economic policy for the euro area. Introducing a euro area Treasury, responsible for joint debt issuance and a separate budget, limited but adequate for automatic stabilisers to work at the level of monetary union; and more frequent use of Article 122(1) TFEU, should, in my view, be beacons. Unified external representation, long on the agenda and, strictly speaking, mandatory under EU law²⁸⁸ should also be pursued. Further down the line, replacing the tutelage under Regulation 472/2013 with a mechanism of strict federal oversight that permits restructuring of public debt of a Member State—an orderly ‘sovereign insolvency’ arrangement²⁸⁹—may be worthwhile considering.

The transparency of economic governance arrangements leaves a lot to be desired. Even with consolidated versions of the amended SGP regulations, the byzantine rules and practices put off serious interest from others than civil servants in a core issue of democracy: the budget. Clear rules, the compliance with which can independently²⁹⁰ be ascertained, are necessary for a sound public debate in a democracy. The increased transparency on both the monetary and the supervisory front will open the doors for debate on the policies pursued and may lead to further legal challenges. The experience thus far shows that courts may not be the most suitable places to determine the outcome of the policy debate. Proceedings against crisis measures have not met with much success thus far, with the notable exception of Portugal where the Constitutional Court has prevented some excesses of austerity. ‘Judicialisation’ of monetary policy should be avoided, yet protection against governments that impose hardship and, perhaps, act unlawfully, is much needed.

New winds blowing in the political arena of various Member States may undermine consensus on the policy direction, and force the policy-makers to acknowledge the human cost of conditionality. The technical nature of the issues should not make us overlook their ethical aspects. Nor should ‘silo thinking’ keep us within the confines

288. *See* TFEU arts. 138 & 219; the case law on external representation of the Union in areas of internal competence.

289. In the area of corporate insolvency, the EU might consider studying true harmonisation of winding-up proceedings for financial firms. The BRRD, with its deference to the outcome of national insolvency procedures (no creditor worse off principle) does not yet reach this level of harmonisation.

290. Independently from the Commission and from the independent agencies for budgetary and general economic forecasting.

of traditional dividing lines. Why is it that the various crises Europe is faced with haven't yet been addressed in a coherent fashion? Is it too far-fetched to link the energy union²⁹¹ with EMU-related efforts to stimulate the economy of 'peripheral' Member States?

More examples can be found where 'lateral thinking' would help us further. Relevant though law is, it is beyond the area of law where we should look for solutions. This Author submits that the cultural element of the crisis, and of European integration, has too often been neglected. Here, issues that can only be addressed over a long time horizon, such as the absence of a common media space, and of a shared (second) language, play a major role. But, just as in debt reduction—which will relieve our grandchildren from the fiscal burden we may leave—the long-term should not be overlooked, whatever the tenacity of the trouble. The euro, meant to crown and further European integration has proven divisive instead of inclusive, with hardening attitudes across the Union against neighbours in need. If lessons taken home from the crisis remind us of the value of the European project, of the need to stand firmly together in the face of major adversity, and of the imperative to widen our perspective on what constitutes good-neighbourliness, the complications of the past years will have not been in vain.

291. *See generally* A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 80 Final, (Feb. 25, 2015).