POLITICAL AND LEGAL ACCOUNTABILITY IN ECONOMIC AND MONETARY UNION

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ABSTRACT

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This thesis looks at the constitutional implications of the Euro crisis for the European Union and its Member States, which entails consideration of comparative public law as well as EU law. It focuses on political and legal accountability in Economic and Monetary Union, and examines three sets of issues: the revised EU economic governance framework and its bearing on national economic and fiscal policy; the respective roles of the EU and national institutions within this multi-level system of economic governance; and judicial review of economic and monetary policy measures at national and EU level. The new EU economic rules could potentially have a great impact on fundamental rights, the horizontal and vertical division of power in the EU, and the welfare state. It is hoped that the policy proposals put forward in this thesis will, if implemented, serve to strengthen political and legal accountability and bolster legitimacy in this pluralistic landscape.

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<www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16808&LangID=E> accessed 22 October 2016.	
UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, Report Mission to Greece (22-27 April 2013) to the UN Human Rights Council 25th Session, 11 March 2014 (A/HRC/25/50/Add.1) <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-50-Add1_en.doc> accessed 27 October 2016.	387
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Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1.

Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact [1997] OJ C236/1.

Regulation (EC) 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1.

Decision 2004/257/EC of the European Central Bank adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) [2004] OJ L80/33, as amended by Decision 2009/328/EC of the European Central Bank amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2009/5) [2009] OJ L100/10, Decision 2014/179/EU of the European Central Bank amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2014/1) [2014] OJ L95/56, and Decision (EU) 2015/716 of the European Central Bank amending Decision ECB/2004/2 adopting the Rules of Procedure of the European Central Bank (ECB/2015/8) [2015] OJ L114/11.

Decision 2004/258/EC of the European Central Bank on public access to European Central Bank documents (ECB/2004/3) [2004] OJ L80/42, as amended by Decision 2011/342/EU of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2011/6) [2011] OJ L158/37 and Decision (EU) 2015/529 of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) [2015] OJ L84/64.

Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2005] OJ L174/1.

Council Regulation (EC) 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L174/5.

Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (Codified version) [2009] OJ L145/1.

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Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rule of Procedure [2009] OJ L325/35.

Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

Regulation (EU) 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] OJ L331/1.

Regulation (EU) 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] OJ L331/12.

Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L331/48.

Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84.

Decision 2010/281/EU of the European Central Bank of 14 May 2010 establishing a securities markets programme [2010] OJ L124/8.

Regulation (EU) 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] OJ L306/1.

Regulation (EU) 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] OJ L306/8.

Regulation (EU) 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 [2011] OJ L306/12.

Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

Council Regulation (EU) 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] OJ L306/33.

Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

Council Decision 2011/288/EU of 12 May 2011 providing precautionary EU medium-term financial assistance for Romania [2011] OJ L132/15.

Council 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 [2011] OJ L296/38, as amended by Council Decision 2011/791/EU 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 [2011] OJ L320/28 and Council Decision 2012/211/EU 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] OJ L113/8.

European Council Decision 2011/199/EU 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] OJ L91/1.

Decision 2011/C 176/03 of the European Systemic Risk Board on public access to European Systemic Risk Board documents (ESRB/2011/5) [2011] OJ C176/3.

Communication from the Commission COM(2012) 342 final Common principles on national fiscal correction mechanisms [2012].

Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1.

Two Pack Code of Conduct – 'Specifications on the implementation of the Two Pack and Guidelines on the format and content of draft budgetary plans, economic partnership programmes and debt issuance reports', endorsed by ECOFIN on July 9, 2013, and amended on November 7, 2014 and on 8 November 2016 <ec.europa.eu/economy_finance/economic_governance/sgp/pdf/coc/2014-11-07_two_pack_coc_amended_en.pdf> accessed 18 January 2017.

Communication from the Commission replacing the Communication from the Commission on Harmonized framework for draft budgetary plans and debt issuance reports within the euro area (COM(2013) 490 final) COM(2014) 675 final (Brussels, 28 October 2014) <eur-lex.europa.eu/resource.html?uri=cellar:11541026-5e94-11e4-9cbe-01aa75ed71a1.0008.01/DOC_1&format=PDF> accessed 18 January 2017.

Regulation (EU) 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] OJ L176/1.

Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation).

Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320.

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] OJ L176/338.

Council Decision 2013/531/EU of 22 October 2013 providing precautionary Union medium-term financial assistance to Romania [2013] OJ L286/1.

Council Decision 2013/532/EU of 22 October 2013 granting mutual assistance for Romania [2013] OJ L286/4.

Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L141/1.

Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225/1 (SRM Regulation).

Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes (recast) [2014] OJ L173/149.

Directive 2014/59/EU of the European Parliament and of the Council 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] OJ L173/190.

Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism [2015] OJ L210/1.

Decision (EU) 2015/529 of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) [2015] OJ L84/64.

Council Implementing Decision (EU) 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece [2015] OJ L219/12.

Decision (EU) 2015/811 of the European Central Bank on public access to European Central Bank documents in the possession of the national competent authorities (ECB/2015/16) [2015] OJ L128/27.

Regulation (EU) 2016/445 of the European Central Bank on the exercise of options and discretions available in Union law (ECB/2016/4) [2016] OJ L78/60.

European Central Bank, 'ECB Guide on Options and Discretions Available in Union Law' (March 2016) <www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/ecb_guide_options_discretions.en.pdf> accessed 27 March 2016.

Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53.

Decision of the Executive Session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01).

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] OJ L320/1.

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 (SSM) <www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf> accessed 21 November 2015.

Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism [2015] OJ L339/58.

International law instruments

EFSF Framework Agreement (as amended with effect from the Effective Date of the Amendments) between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland and European Financial Stability Facility <https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 18 January 2017.

Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden <www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/> accessed 18 January 2017.

Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic

of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (ESM Treaty) <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en_1.pdf> accessed 18 January 2017.

Agreement between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland on the transfer and mutualisation of contributions to the Single Resolution fund <register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> accessed 30 March 2017.

Germany

Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik (Währungsunion-Finanzstabilitätsgesetz - WFStG) vom 7. Mai 2010 (BGBI I S. 537).

Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus (Euro-Stabilisierungsmechanismus-Gesetz) vom 22. Mai 2010 (BGBI I S. 627).

Gesetz zu dem Beschluss des Europäischen Rates vom 25. Marz 2011 zur Änderung des Artikels 136 des Vertrages über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist, Bundestag printed papers (Bundestagsdrucksachen – BTDrucks) 17/9047, 17/10159.

Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz), as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9048; 17/10126).

Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus – Bundestag printed papers 17/9045, 17/10126.

Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion – Bundestag printed papers 17/9046, 17/10125.

Greece

Decision No 16074/10803/20.12.2010 of the President of Parliament (Government Gazette B' 2123/31.12.2010), Article 1(2), as amended by Decision No 3175/11.03.2013 of the President of Parliament (Government Gazette B' 675/22.03.2013) and Decision No 671/23.01.2014 of the President of Parliament (Government Gazette B' 309/12.02.2014) (Budget Office Regulations).

Law No 3871/2010 on fiscal management and responsibility («Δημοσιονομική Διαχείριση και Ευθύνη») (Government Gazette A' 141/17.08.2010).

Parliament Regulations, Article 36A, inserted by Decision No 11561/05.08.2010 of the Plenary Session of the Greek Parliament (Government Gazette A' 139/10.08.2010).

Law No 4050/2012 on the rules governing the changes to the securities issued or guaranteed by the Greek State with the consent of the bondholders (*Κανόνες τροποποιήσεως τίτλων, εκδόσεως ή εγγυήσεως του Ελληνικού Δημοσίου με συμφωνία των ομολογιούχων*) Government Gazette A' 36/23-02-2012.

Law No 4270/2014 on principles of fiscal management and oversight (incorporating Directive 2011/85/EU) and on public accounting and other provisions («Αρχές δημοσιονομικής διαχείρισης και εποπτείας (ενσωμάτωση της Οδηγίας 2011/85/ΕΕ) – δημόσιο λογιστικό και άλλες διατάξεις») (Government Gazette A' 143/28.06.2014), as amended by Law No 4337/2015 on measures implementing the agreement on fiscal targets and structural reforms («Μέτρα για την εφαρμογή της συμφωνίας δημοσιονομικών στόχων και διαρθρωτικών μεταρρυθμίσεων») (Government Gazette A' 129/17.10.2015), Article 10(4) and (13); Law No 4334/2015 on urgent measures concerning the negotiations and the conclusion of an agreement with the European Stability Mechanism («Επείγουσες ρυθμίσεις για τη διαπραγμάτευση και σύναψη συμφωνίας με τον Ευρωπαϊκό Μηχανισμό Στήριξης (Ε.Μ.Σ.)») (Government Gazette A' 80/16.07.2015), Article 1(22)(b); Law No 4336/2015 on pension reforms – ratifying the draft agreement on economic support from the European Stability Mechanism – and measures for implementing the financial assistance facility agreement («Συνταξιοδοτικές διατάξεις – Κύρωση του Σχεδίου Σύμβασης Οικονομικής Ενίσχυσης από τον Ευρωπαϊκό Μηχανισμό Σταθερότητας και ρυθμίσεις για την υλοποίηση της Συμφωνίας Χρηματοδότησης») (Government Gazette A' 94/14.08.2015), Articles 2(2)(D.10) and 39(3).

Wales

The Well-Being of Future Generations (Wales) Act 2015 (anaw 2).

CHAPTER ONE: INTRODUCTION

The readers of this short introduction are well-familiar with the timeline of the Euro crisis. The Greek tragedy and the economic woes of other crisis-hit countries featured in the news almost every night. What normally did not receive much attention were the various rules which were enacted to combat the crisis. These have largely flown under the radar of most ordinary citizens in the street, not least because of their highly technical nature.

There is a general sense that the crisis-induced measures mostly concern banking, financial regulation, and financial supervision. There is a further category of measures: EU rules on public finances, budgetary policy, and general economic policy. The EU's response to the crisis has given rise to a complex body of rules, which drastically reduce the fiscal leeway left to national executives and parliaments in many ways. Though in formal terms fiscal sovereignty lies with the Member States, the new EU economic rules have redistributive effects in European societies and encroach on very sensitive areas of national policy.

In terms of legal scholarship, there is already a voluminous bibliography on the optimum regulatory response to the financial crisis and the constitutional implications of the Euro crisis. These concern all EU Member States. The EU's response to the crisis has already altered the legal and institutional landscape within the Union. The crisis-induced legal, institutional and economic developments are of constitutional and structural significance for the EU and its Member States.

Most (but not all) authors in this area have either focused on doctrinal issues pertaining to national constitutions, or have analysed specific crisis-related legal developments in the EU. The novelty of this thesis is that it aims to bring these levels of analysis together and examine the constitutional implications of the Eurozone crisis for both the EU and its Member States. A tripartite structure will be employed, through which the thesis will examine legal implications at three different levels: the EU; the Member States which grant financial assistance to other States through various schemes; and the Member States which are in receipt of financial assistance. When discussing the crisis-induced developments at Member State level, the discussion will primarily focus on Germany and Greece. The thesis will also draw on material from other jurisdictions where appropriate.

The principal focus in this thesis is on political and legal accountability in Economic and Monetary Union (EMU). This triadic structure (lenders, borrowers, and the EU) will be employed to analyse three distinct, albeit interrelated, sets of issues: the revised EU economic governance framework and its bearing on Member States; the respective roles of the EU and national institutions within this framework; and emerging issues in relation to judicial mechanisms of enforcement at national and EU level. These three dimensions are closely related and are all integral to a thorough appreciation of the constitutional implications of the Euro crisis.

Moreover, a twin focus on the EU and its Member States should cast better light on the various issues examined in this thesis. In a multi-level system of economic governance such as the EMU there is complementarity between direct accountability via the European Parliament and indirect accountability via national elected officials.

Further, there is a division of labour between the EU courts and national courts. A thorough appreciation of political and legal accountability in EU economic governance can only be achieved through looking at both sides.

The thesis will be structured in the following manner. Chapters 2 and 3 will look at the emergence of a new constitutional and governance architecture. Chapters 4 and 5 will examine the institutional implications of the Euro crisis and the appropriate level and type of accountability that should be involved in the development of the EU's governance structures. Chapters 6 and 7 will look at judicial review of economic measures. What follows is perforce merely a general indication of the content covered within the thesis.

Chapter 2 of the thesis looks at the crisis-induced legal, institutional and economic developments within the EMU, and their bearing on the EU economic governance framework and on the ongoing process of economic integration. It consists of two parts. First, there will be a brief sketch of the crisis-related developments. These include the setting-up of financial mechanisms, the European Central Bank's interventions to combat the crisis, the enhanced oversight of national fiscal and economic policy, and the increased supervision over the financial sector. Second, there will be a 'first assessment' of the constitutional and structural implications flowing from these developments for the EU. This part does not purport to be an exhaustive analysis of all the emerging issues in this complex area, many of which will be dealt with in the subsequent chapters. Instead, two sets of issues will be examined here: issues of legal principle; and the bearing of the enacted measures on European economic integration.

Three key arguments will be made in this chapter. First, it will be argued that the measures enacted to combat the crisis have led to legislative fragmentation and have

exacerbated problems of transparency and complexity which already existed in this area. Second, it will be shown that the chosen form of action has consequences for institutional balance in the EU, democratic control, and judicial review. Third, it will be argued that the enactment of measures which are only applicable to Euro area Member States has served to deepen economic integration within the Euro area and to further differentiate it from economic integration in non-Euro area Member States. Further, certain areas of the single market have integrated more deeply in the Euro area. It will be concluded that, notwithstanding the issues of legal principle which have been mentioned above, or any divergent views that might reasonably exist in relation to the effectiveness of these norms, the various reforms which have been implemented have strengthened the EU economic governance framework from a legal, institutional and economic perspective.

Chapter 3 of the thesis looks at the effects of the crisis-induced legal and economic developments on the Member States, most notably in relation to their fiscal, economic and social policy. The analysis of the effects of EU discipline on national economic policy will form the cornerstone of our assessment of the democratic legitimacy of the new economic governance architecture.

This chapter consists of four main parts. The first section of this chapter will analyse the substance and scope of the new EU economic rules. It will be argued that all EU Member States are now subject to more stringent fiscal rules as a result of 'six-pack' legislation. Moreover, Euro area Member States are subject to further restraints flowing from 'six-pack' legislation, 'two-pack' legislation, and the Fiscal Compact. Furthermore, the Eurozone crisis has *de facto* curtailed the fiscal sovereignty of the States that granted financial assistance to crisis-hit countries, in that the lender States have less money to

spend for other purposes. Last, the crisis-hit Euro area countries are experiencing a further loss of their economic sovereignty through the conditionality attached to the financial assistance which was granted to them.

The second section of this chapter will look at the important changes that the newly-adopted EU legislation has brought about in EU economic surveillance. Some of these concern all EU Member States. First, the Union co-legislators have taken steps to ensure that the broad economic policy and employment guidelines (Articles 121(2) and 148(2) TFEU) exert influence on national policy-making. Second, the scope of EU monitoring has been widened, thereby now covering general economic policy. Third, the 'six-pack' legislation on national budgetary frameworks makes inroads into the Member States' substantive and procedural budgetary autonomy.

As regards Euro area Member States, it will be shown that the Union co-legislators have stepped up the application of sanctions for breaches of the Stability and Growth Pact (SGP). Moreover, it will be argued that the Fiscal Compact makes inroads into national budgetary processes. Furthermore, it will be argued that 'two-pack' legislation broadens economic surveillance beyond fiscal policy and that it brings the cycle of domestic budgetary policy within the framework of EU monitoring.

In view of these developments, it will be argued that the Union institutions now possess the tools that would enable them to closely monitor the economic, financial and fiscal developments in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. It will be further argued that the new EU economic rules have redistributive effects in European societies and encroach on very sensitive areas of national policy.

The third section of this chapter will look at the implementation of EU economic rules and assess the rigorousness of EU and independent national fiscal oversight. The principal default line is between lender States and borrower States. First, we will examine the bearing of the crisis-induced economic developments on the lender Member States, as well as the EU economic guidance addressed to them in the context of the European Semester. It will be argued that the EU economic guidance addressed to Germany serves to illustrate that the Commission does not 'go easy' on stronger EU economies. Second, we will examine the bailout terms agreed with Greece in the context of the first two rescue packages. It will be shown that these terms mandate far-reaching economic and social policy reforms, from which grave social repercussions could potentially flow. In addition, it will be argued that there is very rigorous EU and independent national assessment of the progress Greece is making in relation to its economic adjustment programme.

The remainder of this chapter will look at the latest developments in Greece and the agreement reached on a third macroeconomic adjustment programme. It will be shown that the new programme shares some features with the previous two bailout agreements but is also unique in some respects.

Chapter 4 of the thesis shifts the focus to democracy, legitimacy, and accountability in Euro crisis management. The discussion begins with the main critiques of the EU's response to the crisis. It will be shown that scholars in this area castigate the EMU governance framework for its shortcomings in terms of input, output and social legitimacy. The focus then shifts to the main arguments in favour of increased democratic controls and intense inter-institutional dialogue in the functioning of the EMU. It will be

argued that the rationale for more democratic input into the EMU's policies is manifold. The impact of economic policy choices in the EU on people's rights and the welfare state, the effects of national policy-making on the interests of the Union and other EU Member States, and the need to safeguard the effectiveness of this multi-level system of economic governance, mandate that serious thought be given to the democratic credentials of the EMU.

Moreover, it will be shown that the crisis-induced developments in the EU have impacted on the horizontal and vertical distribution of power in the EU and its Member States. First, more powers were conferred on the Commission, the Council, and the Eurogroup in the measures enacted to combat the crisis. Though the European Parliament was heavily involved in norm production and had a pretty good strike rate in getting its amendments included in the final legislation, its role in policy implementation has remained minimal. Second, the EU legislature put much of its reforming faith in a new recruit to strengthen democratic control in the EMU – the national parliaments of the Member States. These do not have a veto over proposed EU legislation, but have a role to play in enforcing national fiscal rectitude. Further, the crisis-induced legal and economic developments have circumscribed their budgetary sovereignty in many ways, but it should not escape our notice that many of the newly-enacted rules serve to empower parliaments vis-à-vis the executive. Third, the *de facto* division between borrower and lender Member States might have a bearing on the intra-institutional balance of power in the EU, and the emerging patterns of geographical fragmentation threaten the unity of the EU-28.

It will be further argued that transparency and accountability could be enhanced in a number of ways. The Commission should carry out impact assessments prior to the adoption of key legislative instruments and could enhance citizen participation through online consultation exercises. Moreover, rather than acting outside the formal confines of the EU Treaties, the EU institutions and creditor States could make use of the new 'two pack' legislation, thereby bringing economic surveillance within the normal EU process. Furthermore, the EU and national officials need to better explain to citizens the rationale for the continued existence of rules that greatly impact on their lives and rights. More transparency in the workings of the Euro area and ESM bodies might prove instrumental in this respect.

Chapter 5 of the thesis looks at the division of power and accountability structures in the European Banking Union (EBU), the principal emphasis being on political accountability. The discussion begins with the division of competence between the national and EU authorities in the EBU. This is followed by examination of the role of the European and national parliaments, as well as the Council and Eurogroup, in holding the European Central Bank (ECB), the Single Resolution Board (SRB) and the national supervisory and resolution authorities to account for their actions in this area. The focus then shifts to the intra-institutional balance of power and the emerging patterns of geographical fragmentation. The penultimate section of the chapter focuses on access to information, which is crucial for all forms of accountability. The final section of this chapter offers a snapshot of some of the features of the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) which may hamper the EBU's effectiveness and place its output legitimacy in jeopardy.

Chapter 6 of the thesis seeks to unpack access to EU courts in the area of EMU, the emphasis being on the challenges facing austerity-hit litigants wishing to put their substantive case before the CJEU. The discussion will proceed as follows. First, it will be shown that aggrieved individuals might not always be able to locate a formally binding EU law measure which could form the basis of a direct or indirect challenge before the EU courts. Second, it will be seen that the judicial doors to an Article 263 TFEU challenge are, nevertheless, firmly shut as most, if not all, private persons will normally not be able to overcome the admissibility hurdles of direct and individual concern. Third, all Article 267 TFEU challenges have so far been declared inadmissible, which begs the question as to the legal quality of the bailout terms and its ripple effect on the scope of application of the EU Charter of Fundamental Rights. Fourth, though aggrieved individuals could in principle bring an Article 340 TFEU action for damages before the EU courts, litigants are likely to face an uphill struggle in trying to convince the Court that the relevant requirements for liability of the EU institutions for damages for breach of EU law were met. The final section of this chapter will focus on the scope of application of the EU Charter of Fundamental Rights, which has formed the basis of many (unsuccessful, thus far) challenges to austerity measures that were enacted to combat the crisis.

Chapter 7 of the thesis examines the jurisprudence of national courts on crisis-related measures. This chapter could not realistically cover all the case law and material that is, directly or indirectly, related to the sovereign debt and financial crisis in Europe. It will primarily focus on the case law of the Bundesverfassungsgericht on EU measures enacted to combat the Euro crisis; and social challenges to bailout measures enacted to

combat the Greek crisis and the relevant case law of the Greek Council of State. The chapter will further draw on examples from other jurisdictions where appropriate.

The material presented in this chapter will be divided into two parts. First, this chapter will examine some of the most important judgments delivered by courts in lender States during the Euro crisis, the emphasis being on the jurisprudence of the Bundesverfassungsgericht. These cases primarily focus on the effects of financial assistance mechanisms and revised EU fiscal governance rules on the principle of democracy, parliamentary prerogatives, and national budgetary powers. Second, this chapter will look at review by national courts in borrower States, the principal focus being on social challenges brought by austerity-hit litigants in Greece. Space precludes detailed treatment of the kind found in domestic literature. However, the comparative analysis, drawing on this literature, can shed light on the different types of challenge facing courts in borrower and lender States during the Euro crisis, as well as the different starting points and the subtle differences in the reasoning provided by courts in their judgments. As regards borrower States in particular, the twin challenge in this chapter is to examine to what extent litigants had any success in challenging in national courts the bailout conditions; and the extent to which arguments about social rights had purchase at national level.

The remainder of the chapter looks at review by national courts in other jurisdictions, as well as review by supranational and international courts or bodies. It further puts forward a number of ideas on fundamental rights adjudication in times of economic crisis, falling short of advancing a fully-fledged theory of judicial review in this context. Developing such a theory falls outside the scope of this thesis, but it is

nevertheless intellectually tempting to draw ‘first conclusions’ from the case law and other material examined in the thesis.

The concluding chapter will be used to draw together the preceding implications of the Euro crisis for the EU and its Member States and to critically evaluate the shortcomings of the Treaty schema in terms of political and legal accountability. This chapter will put forward a number of proposals as to how to address these shortcomings, the dividing line being between those proposals that could be implemented without a Treaty amendment and those reforms that would indeed require a comprehensive Treaty revision.

CHAPTER TWO: THE CRISIS-INDUCED DEVELOPMENTS IN THE ECONOMIC AND MONETARY UNION

Introduction

This chapter looks at the crisis-induced legal, institutional and economic developments within the Economic and Monetary Union, and their bearing on the EU economic governance framework and on the ongoing process of economic integration. It consists of two parts. First, there will be a brief sketch of the crisis-related developments. These include the setting-up of financial mechanisms, the European Central Bank's interventions to combat the crisis, the enhanced oversight of national fiscal and economic policy, and the increased supervision over the financial sector. Second, there will be a 'first assessment' of the constitutional and structural implications flowing from these developments for the EU. This part does not purport to be an exhaustive analysis of all the emerging issues in this complex area, many of which will be dealt with in the subsequent chapters. Instead, two sets of issues will be examined here: issues of legal principle; and the bearing of the enacted measures on European economic integration. Three key arguments will be made in this chapter. First, it will be argued that the measures enacted to combat the crisis have led to legislative fragmentation and have exacerbated problems of transparency and complexity which already existed in this area. Second, it will be shown that the chosen form of action has consequences for institutional balance in the EU, democratic control, and judicial review. Third, it will be argued that the enactment of measures which are only applicable to Euro area Member States has

served to deepen economic integration within the Euro area and to further differentiate it from economic integration in non-Euro area Member States. Further, certain areas of the single market have integrated more deeply in the Euro area. It will be concluded that, notwithstanding the issues of legal principle which have been mentioned above, or any divergent views that might reasonably exist in relation to the effectiveness of these norms, the various reforms which have been implemented have strengthened the EU economic governance framework from a legal, institutional and economic perspective.

An overview of the crisis-induced developments

Since the commencement of the Eurozone crisis in 2010, there have been a number of measures enacted to combat it. Based on their substance, the various measures taken are divided in the academic literature into two groups: those designed to provide financial assistance to the ailing Euro area Member States; and those aimed at enhancing EU supervision over national economic policy and the financial sector.[1] This part will discuss four categories of measures enacted to combat the crisis: the setting-up of financial mechanisms; the ECB's interventions to meet the crisis; enhanced oversight of national fiscal and economic policy; and increased supervision over national financial institutions.

The setting-up of financial mechanisms

Prior to the Eurozone crisis, no mechanism existed for providing emergency financial assistance to an ailing Euro area Member State. Member States could only have recourse

[1] Kaarlo Tuori, 'The European Financial Crisis – Constitutional Aspects and Implications' (2012) EUI Law Working Papers No. 28, 11-21; Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' (The Constitutionalization of European Budgetary Constraints: A Comparative and Interdisciplinary Perspective conference, Tilburg, May 2013), 2-9.

to Articles 122(2) and 143 TFEU. More specifically, according to Article 122(2) TFEU, Union financial assistance may be granted to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. Its application in the context of an economic crisis was not straightforward. Furthermore, Article 143 TFEU provides for the granting of mutual financial assistance to a non-Euro area Member State experiencing or seriously threatened with difficulties as regards its balance of payments.[2] Consequently, using Article 143 TFEU for the purpose of providing financial assistance to a Euro area Member State was not an option.

Since the commencement of the Euro crisis, the EU Member States have sought to establish financial mechanisms which would administer assistance to the ailing Euro area Member States through various financial instruments, thereby safeguarding the financial stability of both the EU or the Euro area as a whole, and of its Member States. Three such mechanisms have come into existence: the European Financial Stabilisation Mechanism; the European Financial Stability Facility; and the European Stability Mechanism.

The European Financial Stabilisation Mechanism

The European Financial Stabilisation Mechanism (EFSM) was established by Council Regulation 407/2010.[3] Article 122(2) TFEU served as the legal basis for its creation.

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2 Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1.

3 Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1. See also Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism [2015] OJ L210/1.

According to the preamble to the Regulation, exceptional occurrences beyond a Member State's control may also be caused by 'a serious deterioration in the international economic and financial environment', which has led to 'a severe deterioration of the borrowing conditions of several Member States beyond what can be explained by economic fundamentals'.[4]

Union financial assistance under the EFSM may take the form of a loan or a credit line granted to the Member State concerned. To this end, the Commission is empowered on behalf of the EU to conduct borrowings on the capital markets or with financial institutions.[5] The Member State seeking EFSM assistance submits a draft economic and financial adjustment programme.[6] The granting of such assistance is decided by the Council, which also lays down the general economic policy conditions attached to the 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'.[7] A Memorandum of Understanding (MoU) is then concluded between the Commission and the Member State concerned, detailing the above-mentioned general economic policy conditions.[8] The loan is disbursed in instalments and the release of further instalments shall only take place following verification by the Commission that

4 Council Regulation (EU) 407/2010 (n 3), preamble recitals 1-4.

5 ibid Article 2(1).

6 ibid Article 3(1).

7 ibid Article 3(2)-(3).

8 ibid Article 3(5).

the economic policy of the beneficiary Member State accords with its adjustment programme and with the conditions laid down by the Council.[9]

The EFSM's financial firepower is €60 billion, to be borrowed by the Commission on behalf of the Union under an implicit EU budget guarantee. The EFSM has been activated for Ireland and Portugal, granting a total of €46.8 billion (€22.5 billion for Ireland and €24.3 billion for Portugal).[10] It was further used to provide short-term assistance ('bridge loan') of €7.16 billion to Greece during the summer of 2015.

The European Financial Stability Facility

The European Financial Stability Facility (EFSF) is a *société anonyme* incorporated in Luxembourg. It was founded on 7 June 2010. Its shareholders are the Euro area Member States. A Framework Agreement was concluded between them and the EFSF, setting out the terms and conditions upon which the EFSF may provide financial assistance.[11]

Financial assistance to a Euro area Member State under the EFSF may consist of facilities for the purchase of bonds on the primary or secondary market, precautionary facilities or facilities to finance the re-capitalisation of its financial institutions.[12] EFSF finances its lending operations by issuing or entering into bonds, notes, commercial

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9 ibid Article 4(1)-(3).

10 European Commission, 'European Financial Stabilisation Mechanism (EFSM)' (1 July 2016) <http://ec.europa.eu/economy_finance/eu_borrower/efsm/> accessed 22 November 2016.

11 EFSF Framework Agreement (as amended with effect from the Effective Date of the Amendments) between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland and European Financial Stability Facility <https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 18 January 2017.

12 ibid Article 2(1)(b) and (c).

paper, debt securities or other financing arrangements which are backed by irrevocable and unconditional guarantees of the Euro area Member States.[13] The Commission, acting in liaison with the ECB and the International Monetary Fund (IMF), negotiates the MoU with the Member State concerned. Once such MoU is concluded, a Financial Assistance Facility Agreement is signed by the EFSF and the beneficiary Member State.[14]

The EFSF's financial firepower is €440 billion.[15] The EFSF has granted financial assistance to Ireland, Portugal and Greece, granting a total of €174.6 billion (€17.7 billion for Ireland, €26 billion for Portugal and €130.9 billion for Greece).[16] 'Although the EFSF continues to operate, it may no longer engage in new financing programmes or enter into new loan facility agreements'.[17] These tasks are now performed by the European Stability Mechanism. The remaining tasks of the EFSF are as follows:

13 ibid preamble recital 4 and Article 2(2)-(7).

14 ibid Article 2(1)(a).

15 ibid preamble recital 2.

16 European Financial Stability Facility, 'Lending Operations' <http://www.efsf.europa.eu/about/operations/index.htm> accessed 22 November 2016.

17 European Stability Mechanism, 'FAQ on the Accession of Lithuania to the ESM' <http://www.esm.europa.eu/pdf/FAQ%20on%20accession%20of%20Lithuania.pdf> accessed 22 November 2016.

- receive loan payments from beneficiary countries;
- make interest and principal payments to holders of EFSF bonds;
- roll over outstanding EFSF bonds, as the maturity of loans provided to Ireland, Portugal and Greece is longer than the maturity of bonds issued by the EFSF.[18]

The European Stability Mechanism

The European Stability Mechanism (ESM) is a permanent stability mechanism set up by an international treaty concluded between the Euro area Member States.[19] It is designed to provide financial support to Euro area Member States which are experiencing, or threatened by, severe problems, if it is thought indispensable to safeguard the financial stability of the Euro area as a whole and of its Member States.[20] The existence of such a mechanism shows, as is rightly pointed out, that 'even with the new economic governance system in place, the possibility of a clear and present threat of a sovereign default in the euro area has not been ruled out for the future'.[21]

The EU Member States have also amended the EU Treaties, in order to explicitly provide for the establishment of such a financial mechanism. The TFEU was amended by

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18 European Stability Mechanism, 'Before the ESM: EFSF – The Temporary Fiscal Backstop' <https://www.esm.europa.eu/efsf-overview> accessed 28 March 2017.

19 Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (ESM Treaty) <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en_1.pdf> accessed 18 January 2017.

20 ESM Treaty, Article 3.

21 Fabian Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 746.

European Council Decision 2011/199/EU[22] and a third paragraph was added to Article 136 TFEU, which provides that:

> The Member States whose currency is the euro may establish a stability mechanism 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.

Decision 2011/199 entered into force on 1 May 2013.[23] However, the ESM Treaty was signed on 2 February 2012 and entered into force on 27 September 2012. The ESM was inaugurated on 8 October 2012, following ratification by all Euro area Member States.[24] Consequently, Article 136(3) TFEU cannot have served as the legal basis for the establishment of the ESM.[25] This was confirmed by the Court in *Pringle*, which gave the green light to the ESM.[26]

The ESM is run by a Board of Governors and a Board of Directors, as well as a Managing Director.[27] The Board of Governors consists of the Ministers of Finance of the

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22 European Council Decision 2011/199/EU 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] OJ L91/1.

23 European Parliament, 'Table on the Ratification Process of Amendment of Art. 136 TFEU, ESM Treaty and the Fiscal Compact' <http://www.europarl.europa.eu/webnp/cms/pid/1833> accessed 8 February 2014.

24 European Stability Mechanism, 'Frequently Asked Questions on the European Stability Mechanism' <http://www.esm.europa.eu/pdf/FAQ%20ESM%2030012014.pdf> accessed 8 February 2014, 2.

25 Paul Craig (n 1) 4.

26 See Case C-370/12 (Full Court) *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] OJ C26/15, paras 72-73: '…Article 136(3) TFEU … confirms that Member States have the power to establish a stability mechanism… That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty.'

27 ESM Treaty, Article 4(1).

Euro area Member States[28] and is currently chaired by the President of the Euro Group. The Commission and the ECB may participate in the meetings of the Board of Governors as observers.[29] The IMF, too, may be invited.[30] The membership of the Board of Governors is currently identical to the one of the Eurogroup. Furthermore, the Board of Directors is composed of the same national officials participating in the Eurogroup Working Group.[31] Each Governor appoints one Director and one alternate Director 'from among people of high competence in economic and financial matters'.[32] The Commission and ECB may also appoint one observer each.[33] The meetings are chaired by the Managing Director, who also participates in the meetings of the Board of Governors.[34]

ESM financial assistance can take the form of precautionary financial assistance, a loan, a loan for the specific purpose of recapitalising the financial institutions of the ESM Member concerned, or a purchase of bonds on the primary or secondary market.[35] There is also a direct recapitalisation instrument for Euro area financial institutions,

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28 ibid Article 5(1).

29 ibid Article 5(3).

30 ibid Article 5(5).

31 European Stability Mechanism, 'Board of Directors and Alternate Director' <https://www.esm.europa.eu/esm-governance/board-directors-and-alternate-director> accessed 28 March 2017.

32 ESM Treaty, Article 6(1).

33 ibid Article 6(2).

34 ibid Article 7(3).

35 ibid Articles 14-18.

which ‘allows the ESM to recapitalise a systemic and viable euro area financial institution directly under specific circumstances as a last resort measure’.[36]

The Board of Governors may decide to grant stability support to an ailing ESM Member[37] and the Commission –in liaison with the ECB and, whenever possible, together with the IMF– subsequently negotiates a MoU with the ESM Member concerned, detailing the conditionality attached to the assistance.[38] A Financial Assistance Facility Agreement detailing the financial aspects of the stability support to be granted is then approved by the Board of Directors.[39]

The ESM has an authorised capital stock of €700 billion, divided into paid-in and callable shares.[40] Its initial maximum lending volume is €500 billion.[41] It is empowered to borrow on the capital markets for the performance of its purpose.[42] To date, the ESM has disbursed a total of €41.3 billion to the Spanish government for the recapitalisation of the country’s banks.[43] Moreover, the ESM has disbursed €6.3 billion to Cyprus.[44] It will further provide up to €86 billion for the (ongoing) third rescue package for Greece.[45]

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36 European Stability Mechanism, ‘ESM Direct Bank Recapitalisation Instrument Adopted’ <http://www.esm.europa.eu/press/releases/esm-direct-bank-recapitalisation-instrument-adopted.htm> accessed 22 November 2016; European Stability Mechanism, ‘Guidance on Financial Assistance for the Direct Recapitalisation of Institutions’ (8 December 2014) <https://www.esm.europa.eu/sites/default/files/20141208_guideline_on_financial_assistance_for_the_direct_recapitalisation_of_institutions.pdf> accessed 18 January 2017.

37 ESM Treaty, Article 13(2).

38 ibid Article 13(3).

39 ibid Article 13(5).

40 ibid Article 8(1)-(2).

41 ibid Article 39.

42 ibid Article 21(1).

43 European Stability Mechanism, ‘ESM Programme for Spain (Concluded)’ <http://www.esm.europa.eu/assistance/spain/index.htm> accessed 22 November 2016.

The ECB's interventions to tackle the crisis

The ECB has played a tremendously important role in combating the Euro crisis. It has used a number of different monetary policy instruments to weather the financial storm and save the euro. The primary default line is between bond-buying programmes and other monetary policy instruments.

Bond-buying programmes

To understand the role of the Securities Markets Programme (SMP) and Outright Monetary Transactions (OMTs), it is crucial to provide a rough sketch of what the ECB normally does and a brief explanation of the transmission mechanism.

The ECB normally engages in 'open market operations'. The Eurosystem assesses the total liquidity needs of the banking sector, banks seeking liquidity offer to pay interest, and the amount of liquidity offered is allotted through a competitive tender. Banks also have to provide eligible collateral when they borrow money from the Eurosystem.[46]

'The transmission mechanism is the way in which monetary policy decisions affect the economy in general and the price level in particular.'[47] The ECB seeks to

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44 European Stability Mechanism, 'ESM Programme for Cyprus (Concluded)' <http://www.esm.europa.eu/assistance/cyprus/index.htm> accessed 22 November 2016.

45 European Stability Mechanism, 'ESM Programme for Greece' <http://www.esm.europa.eu/assistance/Greece/index.htm> accessed 22 November 2016.

46 European Central Bank, 'The Monetary Policy Instruments – Non-Standard Measures' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_010.en.html> accessed 8 February 2014.

47 European Central Bank, 'Transmission Mechanism – from Interest Rates to Prices' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_007.en.html> accessed 8 February 2014.

influence prices in the entire Euro area through, among other instruments, its interest rates. '[S]hould this mechanism be disrupted by dysfunctional market segments and the ECB's rate signal not be transmitted evenly to all parts of the euro area, the ECB could intervene by buying, on the secondary market (i.e. from banks and against market prices), the securities that it normally accepts as collateral'.[48] This is the case with the SMP and OMTs.

The SMP was established by Decision 2010/281.[49] On 9 May 2010, the Governing Council of the ECB decided that, in view of the then 'exceptional circumstances in the financial markets, characterised by severe tensions in certain market segments which [were] hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy', a 'temporary' securities markets programme should be initiated.[50] Its objective was to 'address the malfunctioning of security markets and restore an appropriate monetary policy transmission mechanism'.[51] Under the programme, the Euro area national central banks and the ECB were authorised to purchase, on the secondary market, debt instruments issued by the central governments or public entities of the Euro area Member States and, on the primary and secondary markets, debt instruments issued by private entities incorporated in the Euro area.[52] No

48 European Central Bank, 'Outright Monetary Transactions' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_011.en.html> accessed 8 February 2014.

49 Decision 2010/281/EU of the European Central Bank of 14 May 2010 establishing a securities markets programme [2010] OJ L124/8.

50 ibid preamble recital 2.

51 ibid preamble recital 3.

52 ibid Article 1.

conditionality was attached to these purchases, though the Governing Council of the ECB 'took note' of the statement of the Euro area Member State governments that they would take all measures needed to meet their fiscal targets.[53] Under the programme, the ECB purchased debt instruments worth some €218 billion.[54]

The SMP was terminated in September 2012 and it was replaced by OMTs. These involve outright transactions in secondary sovereign bond markets which aim at 'safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'.[55] In contrast with the SMP, 'strict and effective conditionality' is a prerequisite for the conduct of OMTs, 'in order to preserve the primacy of the ECB's price stability mandate and to ensure that governments retain the right incentive to implement required fiscal adjustments and structural reforms'.[56]

In its first ever reference to the CJEU, the German Federal Constitutional Court (Bundesverfassungsgericht) questioned whether the OMT programme fell within the ECB's mandate and whether it breached the prohibition of monetary financing of national budgets (Article 123 TFEU).[57] The CJEU gave the green light to the OMT programme

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53 ibid preamble recital 4.

54 European Central Bank, 'Details on Securities Holdings Acquired under the Securities Markets Programme' (21 February 2013) <http://www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html> accessed 19 April 2014.

55 European Central Bank, 'Technical Features of Outright Monetary Transactions' (6 September 2012) <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 8 February 2014.

56 European Central Bank (n 48).

57 BVerfG, 2 BvR 2728/13 of 14 January 2014.

subject to certain conditions,[58] and the Bundesverfassungsgericht followed the CJEU's preliminary ruling.[59]

Other monetary policy instruments

The emphasis thus far on bond-buying programmes risks overlooking the fact that the ECB also employed other monetary policy instruments to combat crisis. For example, in the early days of the crisis, the ECB switched to a policy of full allotment and fixed rates.[60] This meant that the ECB decided in advance to allot the full amount of liquidity that banks requested, namely it accommodated all bids at a fixed interest rate.[61] Furthermore, the ECB widened the range of eligible collateral and lengthened the maturity of loans to banks.[62] Moreover, it reduced the required reserve ratio that banks needed to hold from 2% to 1%, 'thus freeing up collateral and supporting money market activity'.[63] Further, it reduced its interest rates,[64] which were eventually pushed into negative territory.

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58 Case C-62/14 (Grand Chamber) *Peter Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400.

59 BVerfG, 2 BvR 2728/13 of 21 June 2016.

60 European Central Bank, 'The ECB's response to the crisis (1)' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_012.en.html> accessed 1 February 2014.

61 European Central Bank (n 47).

62 European Central Bank, 'The ECB's response to the crisis (3)' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_014.en.html> accessed 1 February 2014.

63 ibid.

64 European Central Bank, 'The ECB's response to the crisis (4)' (1 January 2014) <http://www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_015.en.html> accessed 1 February 2014.

Under its expanded asset purchase programme (APP), the ECB purchases private and public sector securities 'to address the risks of a too prolonged period of low inflation'.[65] Monthly net purchases amount to €80 billion on average. From April 2017 onwards, they will amount to €60 billion on average. These purchases 'are intended to be carried out until the end of 2017 and in any case until the Governing Council [of the ECB] sees a sustained adjustment in the path of inflation that is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term'.[66]

Enhanced oversight of national fiscal and economic policy

There has been a host of legal developments in relation to economic surveillance since the commencement of the Euro crisis. The perceived failure of the EU economic governance framework to prevent the crisis has led to a number of important changes, ranging from the fine-tuning of existing instruments to the adoption of new legislation. 'Six-pack' legislation,[67] 'two-pack' legislation[68] and the Fiscal Compact[69] have all sought

65 European Central Bank, 'Asset Purchase Programmes' <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html> accessed 28 March 2017.

66 ibid.

67 Regulation (EU) 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 [2011] OJ L306/12; Council Regulation (EU) 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] OJ L306/33; Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation (EU) 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] OJ L306/1; Regulation (EU) 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] OJ L306/8.

68 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013]

to enhance EU oversight of national fiscal and economic policy, thereby amending the Stability and Growth Pact; creating a new excessive imbalances procedure; introducing uniform requirements for budgetary frameworks; and providing for enhanced economic coordination and surveillance in the Euro area. These developments will now be examined in turn.

The amendments to the Stability and Growth Pact

The Stability and Growth Pact (SGP) consists of Council Regulation 1466/97,[70] Council Regulation 1467/97,[71] and a Resolution of the European Council.[72] Regulations 1466/97 and 1467/97 were amended by Regulations 1055/2005[73] and 1056/2005[74] respectively.

OJ L140/1; Regulation (EU) 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 [2013] OJ L140/11.

69 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden <http://www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/> accessed 18 January 2017.

70 Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1.

71 Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

72 Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact [1997] OJ C236/1.

73 Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2005] OJ L174/1.

74 Council Regulation (EC) 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L174/5.

Regulations 1466/97 and 1467/97 were amended once again by Regulations 1175/2011[75] and 1177/2011.[76] The changes these instruments brought about will now be examined in turn.

The amendments to the preventive arm of the SGP

In light of the '[e]xperience gained and mistakes made during the first decade of the economic and monetary union',[77] Regulation 1175/2011 explicitly shifts the focus to 'financial stability'.[78] The explicit legislative intention was to provide for 'more stringent forms of surveillance'[79] and an 'improved economic governance in the Union', built upon 'a stronger national ownership of commonly agreed rules and policies' and 'a more robust framework at the level of the Union for the surveillance of national economic policies'.[80]

Regulation 1175/2011 introduces a 'policy surveillance and coordination cycle'[81] called the 'European Semester'.[82] This includes the following steps: the formulation of broad economic policy (Article 121(2) TFEU) and employment (Article 148(2) TFEU) guidelines; the submission and assessment of stability and convergence programmes and

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75 Regulation (EU) 1175/2011 (n 67).

76 Council Regulation (EU) 1177/2011 (n 67).

77 Regulation (EU) 1175/2011 (n 67), preamble recital 8.

78 ibid preamble recital 3.

79 ibid preamble recital 4.

80 ibid preamble recital 8.

81 ibid preamble recital 14.

82 Council Regulation (EC) 1466/97, as currently in force, Section 1-A.

national reform programmes; and the surveillance to prevent and correct macroeconomic imbalances.[83] Following the assessment of these programmes, the Council shall address guidance to Member States, 'in order to provide timely and integrated policy advice on macrofiscal and macrostructural policy intentions'.[84] Member States shall take due account of the guidance addressed to them in the development of their economic, employment and budgetary policies before taking key decisions on their national budgets for the succeeding years.[85] Failure to act upon the guidance received may result in further recommendations to take specific measures, a warning by the Commission or measures under the preventive and corrective arms of the SGP or Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances.[86]

The other major change brought about by Regulation 1175/2011 is that it lays down principles for the adjustment path towards the medium-term budgetary objective.[87] Member States are not just required to ensure rapid convergence towards their respective medium-term budgetary objectives but are also instructed how to do so. These principles are predicated on certain economic assumptions concerning the desired relationship between the growth path of government expenditure and that of government revenue.

More specifically, for Member States which have achieved their medium-term budgetary objective, annual expenditure growth may not exceed a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue

83 ibid Article 2-a(2).

84 ibid first subparagraph of Article 2-a(3).

85 ibid second subparagraph of Article 2-a(3).

86 ibid third subparagraph of Article 2-a(3).

87 Regulation (EU) 1175/2011 (n 67), preamble recital 18.

measures (e.g. tax increases). For Member States which have not yet reached their medium-term budgetary objective, annual expenditure may not exceed a rate *below* a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures. In addition, for Member States which have not yet reached their medium-term budgetary objective, discretionary reductions of government revenue items should be matched either by expenditure reductions or by discretionary increases in other government revenue items.[88] It should be noted that Regulation 1175/2011 not only defines a Member State's 'expenditure aggregate',[89] but it also provides that the reference medium-term rate of potential GDP growth is calculated on the basis of a commonly agreed method.[90] Moreover, it provides for a faster rate of fiscal adjustment for Member States faced with a debt level exceeding 60% of GDP or with pronounced risks of overall debt sustainability.[91]

Furthermore, it should be noted that the Council's assessment of a Member State's adjustment path towards its medium-term budgetary objective now includes a 'consideration of the accompanying path for debt ratio'. As such, it explicitly brings debt considerations within the preventive arm of the SGP.[92]

Moreover, Regulation 1175/2011 lays down detailed rules on the Union's response to a significant deviation of a Member State's budget figures from the

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88 Council Regulation (EC) 1466/97, as currently in force, third subparagraph of Articles 5(1) and 9(1)

89 ibid fourth subparagraph of Articles 5(1) and 9(1).

90 ibid sixth subparagraph of Articles 5(1) and 9(1).

91 ibid second subparagraph of Articles 5(1) and 9(1).

92 ibid first subparagraph of Articles 5(1) and 9(1).

adjustment path towards its medium-term budgetary objective. If such deviation occurs, the Commission shall address a warning to the Member State concerned. Within one month of the warning, the Council shall adopt a recommendation on the necessary policy measures, which shall set a deadline of no more than five months for addressing the deviation. The Member State concerned shall report to the Council on action taken in response to the recommendation. If it fails to take appropriate action, the Commission shall immediately recommend to the Council to adopt, by qualified majority, a decision establishing that no effective action has been taken. It may also recommend to the Council to adopt a revised recommendation on necessary policy measures. If the Council does not adopt this decision, the Commission shall again recommend to the Council to adopt a decision, which shall be deemed to be adopted unless the Council decides, by simple majority, to reject the recommendation within ten days of its adoption by the Commission.[93] Regulation 1175/2011 also lays down specific numerical rules for assessing whether a deviation from the medium-term budgetary objective (or the adjustment path towards it) is 'significant'.[94] There is therefore now more limited leeway in answering that particular question.

Lastly, Regulation 1175/2011 takes steps to ensure that 'multilateral surveillance is based on sound and independent statistics'.[95] Member States shall ensure the professional independence of national statistical authorities.[96] Regulation 1175/2011 also provides for surveillance missions to be carried out by the Commission 'for the purpose

93 ibid Articles 6(2) and 10(2).

94 ibid Articles 6(3) and 10(3).

95 ibid Article 10(a).

96 ibid Article 10(a).

of the assessment of the economic situation in the Member State and the identification of any risks or difficulties in complying with the objectives of this Regulation'.[97] The Commission may also undertake 'enhanced surveillance missions' in Member States with a significant observed deviation from the adjustment path towards their medium-term budgetary objective 'for the purposes of on-site monitoring'.[98] For euro area or ERM2 Member States, the Commission may also invite representatives of the ECB to participate in the surveillance mission.[99]

The amendments to the corrective arm of the SGP

In turn, Regulation 1177/2011 aims to strengthen the rules on budgetary discipline, 'in particular by giving a more prominent role to the level and evolution of debt and to overall sustainability', and to strengthen the mechanisms to ensure compliance with, and enforcement of, those rules. [100] It also 'step[s] up the application of the financial sanctions ... so that they constitute a real incentive for compliance'.[101]

Regulation 1177/2011 brings about many important changes to the corrective arm of the SGP. First, it explicitly provides that compliance with budgetary discipline is to be examined on the basis of government deficit *and government debt criteria*.[102] Second, it defines when the debt-to-GDP ratio shall be considered as 'sufficiently diminishing and

97 ibid Article 11(1).

98 ibid Article 11(2).

99 ibid Article 11(3).

100 Council Regulation (EU) 1177/2011 (n 67), preamble recital 12.

101 ibid preamble recital 21.

102 Council Regulation (EC) 1467/97, as currently in force, Article 1(1).

approaching the reference value at a satisfactory pace' (Article 126(2)(b) TFEU), thereby setting a numerical benchmark against which to assess this development.[103] Third, it lays down in much greater detail than before the factors to be taken into account by the Commission when preparing its report pursuant to Article 126(3) TFEU.[104] In this connection, the 'developments in the medium-term government debt position' and 'its dynamics and sustainability' feature quite prominently.[105] Fourth, it provides that, following a Council recommendation (Article 126(7) TFEU) or notice (Article 126(9) TFEU), Member States shall report on their 'targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side', as well as on 'the measures taken and the nature of those envisaged to achieve the targets'.[106] Fifth, it provides for surveillance missions to be carried out by the Commission, in similar vein to Regulation 1175/2011.[107] Sixth, it changes the rules on sanctions, in that the default position now is the imposition of *fines*, rather than of a non-interesting-bearing deposit.[108]

The new legislation on macro-economic imbalances

Based on Article 121(6) TFEU, Regulation 1176/2011 supplements the SGP by laying down detailed rules for the prevention and correction of macroeconomic imbalances. It

103 ibid Article 2(1a).

104 ibid Article 2(3).

105 ibid Article 2(3)(c).

106 ibid Articles 3(4a) and 5(1a).

107 ibid Article 10a.

108 ibid Articles 11-12.

provides that 'surveillance of the economic policies of the Member States should be broadened beyond budgetary surveillance'. Accordingly, it should include a 'framework to prevent excessive macroeconomic imbalances and to help the Member States affected to establish corrective plans before divergences become entrenched'.[109]

The Regulation sets out detailed rules for the detection of macroeconomic imbalances, as well as for the prevention and correction of excessive macroeconomic imbalances when these occur.[110] It establishes an *alert mechanism* to facilitate the early identification and the monitoring of imbalances. In this context, the Commission shall prepare an annual report containing a qualitative economic and financial assessment based on a scoreboard with a set of indicators the values of which are compared to their indicative thresholds.[111] The annual report shall identify the Member States which may be affected by, or may be at risk of being affected by, imbalances.[112] The Council shall discuss and carry out an overall assessment of the Commission's annual report. The Eurogroup shall also discuss the report insofar as it relates to Euro area Member States.[113]

Taking due account of the discussions within the Council and the Eurogroup, the Commission shall undertake an in-depth review for each Member State that it considers it may be affected by, or may be at risk of being affected by, imbalances.[114] If the Commission considers that a Member State is experiencing imbalances, the Council, on a

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109 Regulation (EU) 1176/2011 (n 67), preamble recital 7.

110 ibid Article 1(1).

111 ibid Article 3(1).

112 ibid Article 3(3).

113 ibid Article 3(5).

114 ibid Article 5(1).

recommendation from the Commission, may address the necessary recommendations to the Member State concerned.[115] Moreover, if the Commission considers that the Member State concerned is affected by *excessive* imbalances, the Council, on a recommendation from the Commission, may adopt a recommendation establishing the existence of an excessive imbalance and recommending that the Member State concerned take corrective action.[116] The Member State concerned shall submit a corrective action plan setting out the specific policy actions it has implemented or intends to implement, including a timetable for those actions.[117] The Council, on a basis of a Commission report, shall assess the corrective action plan[118] and it may request a new plan.[119] The task of monitoring the corrective action taken is conferred on the Commission, which may also carry out surveillance missions.[120] The Council shall assess whether the Member State concerned has taken the recommended corrective action.[121] In the event of non-compliance, it shall adopt a decision establishing non-compliance, together with a recommendation setting new deadlines for taking corrective action.[122]

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115 ibid Article 6(1).

116 ibid Article 7(1)-(2).

117 ibid Article 8(1).

118 ibid Article 8(2).

119 ibid Article 8(3).

120 ibid Article 9.

121 ibid Article 10(1).

122 ibid Article 10(4).

Uniform requirements for budgetary frameworks

Directive 2011/85 lays down detailed rules concerning the characteristics of national budgetary frameworks, in order to ensure Member States' compliance with the Treaty obligation to avoid excessive government deficits.[123] It brings about many important changes, which will now be discussed in turn.

First, Directive 2011/85 lays down *rules for accounting and statistics*.[124] It provides that Member States shall have in place public accounting systems comprehensively and consistently covering all sub-sectors of general government and containing the information needed to generate accrual data with a view to preparing data based on the ESA 95 standard. Those public accounting systems shall be subject to internal control and independent audits.[125] Member States shall also ensure timely and regular public availability of fiscal data for all sub-sectors of general government.[126]

Second, the Directive lays down *rules for macroeconomic and budgetary forecasts*.[127] According to these rules, Member States shall ensure that fiscal planning is based on realistic macroeconomic and budgetary forecasts using the most up-to-date information. Budgetary planning shall be based on the most likely macrofiscal scenario or on a more prudent one. The Member States' forecasts shall be compared with the Commission's forecasts and those of other independent bodies. Reasons shall be provided

123 Council Directive 2011/85/EU (n 67) Article 1.

124 ibid Chapter II.

125 ibid Article 3(1).

126 ibid Article 3(2).

127 ibid Chapter III.

in the event of a significant divergence of the chosen macrofiscal scenario from the Commission's forecasts.[128]

Third, the Directive puts Member States (with the exception of the United Kingdom)[129] under an obligation to have in place *numerical fiscal rules,*[130] in order to promote compliance with the reference values on deficit and debt over a multiannual horizon.[131] These rules shall also provide for effective and timely monitoring, based on reliable and independent analysis carried out either by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States, as well as for consequences in the event of non-compliance.[132] The annual national budget legislation shall reflect the country-specific numerical fiscal rules in force.[133]

Fourth, Directive 2011/85 provides for *medium-term budgetary frameworks.*[134] More specifically, Member States shall establish a medium-term budgetary framework providing for the adoption of a fiscal planning horizon of at least three years, to ensure that national fiscal planning follows a multiannual perspective.[135] The twin rationale provided by the Union legislature is that national fiscal planning can only be consistent with the SGP if it adopts a multiannual perspective and pursues the achievement of

128 ibid Article 4(1).

129 ibid Article 8.

130 ibid Chapter IV.

131 ibid Article 5.

132 ibid Article 6(1)(b)-(c).

133 ibid Article 7.

134 ibid Chapter V.

135 ibid Article 9(1).

medium-term budgetary objectives,[136] and that most fiscal measures adopted in the annual budget legislation have budgetary implications that go well beyond the annual budgetary cycle.[137] Medium-term budgetary frameworks shall include procedures for establishing the following items: multiannual budgetary objectives in terms of the general government deficit, debt and expenditure, ensuring that these are consistent with the country's numerical fiscal rules; projections of each major expenditure and revenue item; a description of medium-term policies envisaged with an impact on general government finances; and an assessment as to how the policies envisaged are likely to affect the long-term sustainability of public finances.[138] Annual budget legislation shall be consistent with the provisions of the medium-term budgetary framework.[139]

Fifth, the Directive contains *rules on the transparency of general government finances and the scope of budgetary frameworks*.[140] Member States shall ensure that measures taken in compliance with all the above-mentioned obligations cover all sub-sectors of general government and ensure the consistency of the applicable accounting rules and procedures.[141] Member States shall also identify and present all general government bodies and funds which do not form part of the regular budgets at sub-sector

136 ibid preamble recital 19.

137 ibid preamble recital 20.

138 ibid Article 9(2).

139 ibid Article 10.

140 ibid Chapter VI.

141 ibid Article 12.

level and their combined impact on general government balances and debts.[142] Moreover, they shall publish information on contingent liabilities.[143]

Enhanced economic coordination and surveillance in the Euro area

Apart from the above-mentioned legislation, viz. the revised SGP, the new legislation on macroeconomic imbalances, and the 'six-pack' directive establishing uniform requirements for budgetary frameworks, which is applicable to *all* EU Member States, there are certain rules on economic coordination and budgetary surveillance which are only applicable to *Euro area* Member States. These concern the enforcement of the SGP; the correction of excessive macroeconomic imbalances; the obligation to balance the budget; the enhanced surveillance of ailing Euro area Member States; and the enhanced budgetary surveillance in the Euro area. They will now be examined in turn.

Enhanced enforcement of the SGP in the Euro area

Regulation 1173/2011 sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the SGP in the Euro area.[144] These sanctions aim to 'provide sufficient incentives for the Member States whose currency is the euro to comply with the fiscal framework of the Union'[145] and to 'enhance the credibility of the fiscal surveillance framework of the Union'.[146]

142 ibid Article 14(1).

143 ibid Article 14(3).

144 Regulation (EU) 1173/2011 (n 67) Article 1(1).

145 ibid preamble recital 22.

146 ibid preamble recital 13.

The Regulation provides for sanctions in relation to both the preventive and the corrective arms of SGP. As regards the former, if the Council adopts a decision establishing that the Member State has failed to take action in response to its recommendation, the Commission *shall*, within twenty days of the Council's decision, recommend that the Council require the Member State concerned to lodge an interest-bearing deposit with the Commission.[147] As regards the latter, if the Council decides that an excessive deficit exists in a Member State which has previously lodged an interest-bearing deposit with the Commission, or if the Commission has identified particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission *shall*, within twenty days of the Council's decision, recommend that the Council require the Member State concerned to lodge a non-interest-bearing deposit with the Commission.[148] Moreover, if the Council decides that a Member State has not taken effective action to correct its excessive deficit, the Commission *shall*, within twenty days of that decision, recommend that the Council impose a fine.[149] In all three cases, the decision imposing the sanction shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within ten days from its adoption by the Commission.[150]

Furthermore, Regulation 1173/2011 provides for sanctions concerning the manipulation of statistics. The Council, acting on a recommendation by the Commission,

147 ibid Article 4(1).

148 ibid Article 5(1).

149 ibid Article 6(1).

150 ibid Articles 4(2), 5(2) and 6(2).

may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents its deficit and debt figures.[151]

The correction of excessive macroeconomic imbalances in the Euro area

Regulation 1174/2011 lays down a system of sanctions for the effective correction of excessive macroeconomic imbalances in the Euro area.[152] It provides for the imposition of interest-bearing deposits and fines by the Council, acting on a recommendation from the Commission.[153] Again, the Union legislature sought to construe the sanctions regime in such a way that 'the application of the sanctions to those Member States would be the rule and not the exception'.[154] Accordingly, Regulation 1174/2011 provides that the decision to impose a sanction shall be deemed to be adopted by the Council unless it decides, by qualified majority, to reject the Commission's recommendation within ten days of its adoption.[155]

The balanced budget rule

Apart from primary and secondary EU legislation governing this complex area, there are also public international law instruments laying down rules on economic coordination and surveillance in the Eurozone. The ESM Treaty, through which the ESM was established, has already been examined. The Treaty on Stability, Coordination and

151 ibid Article 8(1).

152 Regulation (EU) 1174/2011(n 67) Article 1(1).

153 ibid Article 3(1)-(2).

154 ibid preamble recital 16.

155 ibid Article 3(3).

Governance in the Economic and Monetary Union (TSCG),[156] also known as the 'Fiscal Compact', is another such instrument. It aims to 'strengthen the economic pillar of the economic and monetary union' through the adoption of a set of rules 'intending to foster budgetary discipline through a fiscal compact, to strengthen the coordination of [the Member States'] economic policies and to improve the governance of the euro area'.[157] It is an international treaty signed on 2 March 2012 by all the then-seventeen Euro area Member States and eight other EU Member States. United Kingdom and the Czech Republic were the only two EU countries of the then-twenty seven Member States which did not sign the TSCG. The TSCG entered into force on 1 January 2013. All twenty five Contracting Parties have deposited their instrument of ratification to the General Secretariat of the Council of the EU.[158] The Czech Republic adopted and ratified the TSCG in 2014.[159] Croatia has not signed the TSCG.[160]

The EU Member States initially sought to amend the EU Treaties in order to enshrine the TSCG precepts in EU primary law. This was, however, prevented by the UK veto at the meeting of the European Council in December 2011.[161] The EU Member

156 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (n 69).

157 ibid Article 1.

158 See the ratification details on <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2012008&doclang=EN> accessed 29 April 2014.

159 Jost Angerer, 'Fact Sheets on the European Union: A New Framework for Fiscal Policies' (September 2016) <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.2.1.html> accessed 24 November 2016.

160 ibid.

161 European Council, 'Statement by the Euro Area Heads of State or Government' (Brussels, 9 December 2011)

States which wished to press forward with the envisaged reforms then went on to sign the TSCG.[162] The Contracting Parties have expressly stated their intention to incorporate the provisions of the TSCG 'as soon as possible' into the EU Treaties.[163]

The TSCG sets out *the balanced budget rule,* according to which the budgetary position of the general government of a Contracting Party shall be either balanced or in surplus.[164] This rule shall be deemed to be respected if the cyclically-adjusted balance of the general government is at its country-specific medium-term objective, as defined in the SGP, with a lower limit of a 0.5% deficit-to-GDP ratio. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the Commission taking into consideration country-specific sustainability risks.[165] It should be noted that the SGP provides for a lower limit of a cyclically-adjusted deficit of 1%,[166] rather than the 0.5% limit set out in the TSCG. Consequently, the TSCG rule is more stringent than the one in the revised SGP.

<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf> accessed 10 February 2014, 7.

162 For an analysis of the political background to the TSCG see Paul Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 E.L. Rev. 231, 232-33; Steve Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?' (2012) 8 EuConst 404, 406-07.

163 TSCG, preamble recital 7. See also ibid Article 16.

164 ibid Article 3(1)(a).

165 ibid Article 3(1)(b).

166 Council Regulation (EC) 1466/97, as currently in force, second subparagraph of Article 2a.

The Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it in exceptional circumstances,[167] similar to the ones in the SGP.[168] Moreover, the lower limit of the country-specific medium-term objective may reach a cyclically-adjusted deficit of 1% where the debt-to-GDP ratio is significantly below 60% and risks in terms of long-term sustainability of public finances are low.[169]

Furthermore, in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, *a correction mechanism* shall be triggered automatically. This mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time. [170]

The balanced budget rule and the correction mechanism shall take effect in the national law of the Contracting Parties 'through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. The Contracting Parties shall put in place at national level the correction mechanism on the basis of common principles. These must govern *inter alia* the nature, size and time-frame of the corrective action to be undertaken by the Contracting Parties and the role and

167 TSCG, Article 3(1)(c).

168 ibid Article 3(3)(b).

169 ibid Article 3(1)(d).

170 ibid Article 3(1)(e).

independence of the institutions responsible at national level for monitoring compliance with the balanced budget rule.[171]

The TSCG provisions on the balanced budget rule and the correction mechanism are only applicable to the Euro area Contracting Parties. They will apply to the other Contracting Parties if they adopt the single currency, unless they declare their intention to be bound by them at an earlier date.[172]

Enhanced surveillance of ailing Euro area Member States

Regulation 472/2013 lays down provisions for strengthening the economic and budgetary surveillance of Euro area Member States experiencing or threatened with serious difficulties with respect to their financial stability or to the sustainability of their public finances, and of Euro area Member States which request or receive financial assistance.[173] This aims to ensure the ailing Member State's 'swift return to a normal situation' and to 'prevent contagion ... to the rest of the euro area and, more broadly, to the Union as a whole'.[174]

According to these rules, the Commission *may* decide to subject to enhanced surveillance a Member State experiencing or threatened with serious difficulties with respect to its financial stability.[175] It *shall* also subject to enhanced surveillance Member

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171 ibid Article 3(2). See Communication from the Commission COM(2012) 342 final Common principles on national fiscal correction mechanisms [2012].

172 TSCG, Articles 1(2) and 14(5).

173 Regulation (EU) 472/2013 (n 68), Article 1(1).

174 ibid preamble recitals 3 and 5.

175 ibid Article 2(1).

States which are in receipt of financial assistance on a precautionary basis.[176] The Member State concerned shall adopt measures aimed at addressing the sources of its difficulties, after consulting, and in cooperation with, the Commission, acting in liaison with the ECB, the European Supervisory Authorities (ESAs), the European Systemic Risk Board (ESRB), and, where appropriate, the IMF.[177] It shall communicate information on developments in its financial system to the relevant Union authorities and carry out stress tests to analyse the resilience of the financial sector to macroeconomic and financial shocks.[178] The Commission, in liaison with the ECB and the relevant ESAs, and, where appropriate, with the IMF, shall conduct regular review missions in the Member State concerned, in order to assess the progress made by that Member State.[179] If the Commission concludes that further measures are needed, the Council may recommend that the Member State concerned adopt precautionary corrective measures or prepare a draft macroeconomic adjustment programme.[180]

Furthermore, when a Member State intends to request financial assistance, it shall immediately inform the EU institutions[181] and prepare, in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment programme.[182] This programme shall aim at 'rapidly re-

176 ibid Article 2(3).

177 ibid Article 3(1).

178 ibid Article 3(3)-(4).

179 ibid Article 3(5).

180 ibid Article 3(7).

181 ibid Article 5.

182 ibid first subparagraph of Article 7(1).

establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets'.[183] The macroeconomic adjustment programme is then approved by the Council.[184] The Commission, in liaison with the ECB and, where appropriate, the IMF, shall monitor the implementation of the adjustment programme.[185] In the event of a 'significant gap between macroeconomic forecasts and realised figures', the Council may effectuate changes in the programme.[186]

In case of significant deviations from the macroeconomic adjustment programme, the Council may adopt a decision establishing non-compliance.[187] The Member State concerned shall then take the necessary measures.[188] Member States 'experiencing insufficient administrative capacity or significant problems in the implementation of the programme' shall seek technical assistance from the Commission, which may constitute groups of experts composed of members from other Member States and other Union institutions or from relevant international institutions. Such assistance may include the establishment of a resident representative and supporting staff to advise the national authorities on the implementation of the programme.[189] The ailing Member State is also put under an obligation to take measures 'aiming to reinforce the efficiency and

183 ibid second subparagraph of Article 7(1).

184 ibid Article 7(2).

185 ibid Article 7(4).

186 ibid Article 7(5).

187 ibid first subparagraph of Article 7(7).

188 ibid third subparagraph of Article 7(7).

189 ibid first subparagraph of Article 7(8).

effectiveness of revenue collection capacity and the fight against tax fraud and evasion'.[190]

Regulation 472/2013 also provides that a Member State shall be under *post-programme surveillance* until a minimum of 75% of the financial assistance received is repaid. The Council may extend the duration of the post-programme surveillance in the event of a persistent risk to the financial stability or fiscal sustainability of the Member State concerned.[191] Such surveillance includes regular review missions and recommendations to adopt corrective measures.[192]

Enhanced budgetary surveillance in the Euro area

Regulation 473/2013 sets out provisions for enhanced monitoring of budgetary policies in the Euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the European Semester.[193] It sets up *a common budgetary timeline*,[194] according to which Member States shall make public their medium-term fiscal plans preferably by 15 April and no later than 30 April each year. Such plans shall be consistent with the general guidance and the recommendations issued by the Commission and the European Council in the context of the SGP and the annual cycle of surveillance, including the macroeconomic imbalances procedure, and

190 ibid Article 9.

191 ibid Article 14(1).

192 ibid Article 14(3) and (4).

193 Regulation (EU) 473/2013 (n 68), Article 1(1).

194 ibid preamble recital 12.

with opinions on economic partnership programmes.[195] The draft budget for the central government and the main parameters of the draft budgets for all the other sub-sectors of the general government shall be made public no later than 15 October.[196] The budget for the central government shall be adopted or fixed upon no later than 31 December, together with the updated parameters for the other sub-sectors of the general government.[197] National medium-term fiscal plans and draft budgets shall be based on independent macroeconomic forecasts[198] and Member States shall have in place independent bodies for monitoring compliance with the Union budgetary framework.[199]

Furthermore, Regulation 473/2013 lays down *an obligation on Member States to submit to the Commission and to the Eurogroup their draft budgetary plan for the forthcoming year* by 15 October. Again, the draft budgetary plan shall be consistent with the recommendations issued in the context of the SGP and the annual cycle of surveillance, including the macroeconomic imbalances procedure, and with opinions on economic partnership programmes.[200] The specification of the content of the draft budgetary plan is set out in a harmonised framework established by the Commission.[201]

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195 ibid first subparagraph of Article 4(1).

196 ibid Article 4(2).

197 ibid Article 4(3).

198 ibid Article 4(4).

199 ibid Article 5.

200 ibid Article 6(1).

201 ibid Article 6(5). See the Two Pack Code of Conduct – 'Specifications on the implementation of the Two Pack and Guidelines on the format and content of draft budgetary plans, economic partnership programmes and debt issuance reports', endorsed by ECOFIN on July 9, 2013, and amended on November 7, 2014 and on 8 November 2016 <http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/coc/2014-11-07_two_pack_coc_amended_en.pdf> accessed 18 January 2017; Communication from the

The Commission shall adopt an opinion on the draft budgetary plan. If it identifies particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission shall adopt an opinion requesting that the Member State concerned submit a *revised* draft budgetary plan.[202] The Eurogroup shall discuss opinions on draft budgetary plans, as well as the budgetary situation and prospects in the Euro area as a whole on the basis of an overall assessment made by the Commission.[203]

Furthermore, acknowledging that 'budgetary measures might be insufficient to ensure a lasting correction of the excessive deficit', Regulation 473/2013 introduces *economic partnership programmes*. [204] In the wake of a Council decision establishing the existence of an excessive deficit, the Euro area Member State concerned shall present to the Commission and the Council an economic partnership programme describing the policy measures and structural reforms that are needed to ensure an effective and lasting correction of its excessive deficit.[205] The Council, acting on a proposal from the Commission, shall adopt an opinion on the programme.[206] The task of monitoring the implementation of the programme by the Member State concerned is conferred on the

Commission replacing the Communication from the Commission on Harmonized framework for draft budgetary plans and debt issuance reports within the euro area (COM(2013) 490 final) COM(2014) 675 final (Brussels, 28 October 2014) <http://eur-lex.europa.eu/resource.html?uri=cellar:11541026-5e94-11e4-9cbe-01aa75ed71a1.0008.01/DOC_1&format=PDF> accessed 18 January 2017.

202 Regulation (EU) 473/2013 (n 68), Article 7(1)-(2).

203 ibid Article 7(5).

204 ibid preamble recital 28.

205 ibid Article 9(1).

206 ibid Article 9(4).

Council and the Commission.[207] Moreover, the decision establishing the existence of an excessive deficit triggers extra reporting requirements for the Member State concerned, including a comprehensive assessment of the in-year budgetary execution and an independent audit of the public accounts.[208] Lastly, in case of a risk of non-compliance with the deadline to correct the excessive deficit, the Commission shall address a recommendation to the Member State concerned, requesting either the full implementation of the measures provided for in the relevant Council recommendation or notice, or the adoption of additional measures.[209]

Enhanced financial market regulation and supervision

The discussion thus far has focused on measures aimed at providing assistance to the crisis-hit Euro area Member States or enhancing EU oversight over their economic and fiscal policies. The focus now shifts to financial regulation and supervision. The financial crisis has served to highlight the need for better regulation and supervision over the financial sector. The Union legislator has been very active on both the supervision and regulation fronts. On the one hand, various measures have been enacted to provide for a more robust regulatory framework and to enhance supervision over national financial institutions. These rules are applicable to *all* EU Member States. On the other hand, the Union co-legislators have provided for the centralised delivery of such rules to *Euro area* Member States.

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207 ibid Article 9(6).

208 ibid Article 10.

209 ibid Article 11(2).

The common financial framework for all EU Member States

Enhanced oversight of the financial system

Three European Supervisory Authorities (ESAs) have been established since the commencement of the financial crisis: the European Banking Authority (EBA);[210] the European Securities and Markets Authority (ESMA);[211] and the European Insurance and Occupational Pensions Authority (EIOPA).[212] All three form part of the European System of Financial Supervision (ESFS), whose main task is 'to ensure that the rules applicable to the financial sector are adequately implemented' so as 'to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services'.[213] These supervisory authorities shall supervise financial institutions and market participants operating in the Union.[214] Furthermore, a European Systemic Risk Board (ESRB), also forming part of the ESFS, has been established.[215] The ESRB is responsible for the macro-prudential oversight of the

210 Regulation (EU) 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] OJ L331/12.

211 Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L331/84.

212 Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L331/48.

213 ESA Regulations, Article 2(1).

214 ESA Regulations, Article 2(5).

215 Regulation (EU) 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] OJ L331/1.

financial system within the Union, 'in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union'.[216]

The enhanced Union regulatory framework

The European Council of 18/19 June 2009 recommended 'establishing a European single rule book applicable to all financial institutions in the Single Market'.[217] 'The rulebook is a corpus of legislative texts covering all financial actors and products: banks have to comply with one single set of rules across the single market.'[218] It 'aims at a far-reaching uniformity by means of directives, regulations, implementing acts, standards, guidance, and other similar non-binding instruments'.[219] This rulebook primarily rests on three pillars: stronger prudential requirements for banks;[220] rules on deposit guarantee schemes;[221] and a framework on bank recovery and resolution.[222] It also comprises rules on hedge funds, short selling and credit default swaps, derivatives, and credit ratings.[223]

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216 ibid Article 3(1).

217 Council of the European Union, 'Brussels European Council 18/19 June 2009 Presidency Conclusions' 11225/2/09 REV 2 CONCL 2 (10 July 2009) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf> accessed 22 February 2014, [20].

218 European Commission, 'A Comprehensive EU Response to the Financial Crisis: Substantial Progress towards a Strong Financial Framework for Europe and a Banking Union for the Eurozone' MEMO/14/57 (24 January 2014) <http://europa.eu/rapid/press-release_MEMO-14-57_en.htm> accessed 22 February 2014, 3.

219 Brigitte Haar, 'Organizing Regional Systems: The EU Example' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) ch 6, 170.

220 Regulation (EU) 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] OJ L176/1; 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] OJ L176/338.

221 European Commission, 'Commissioner Barnier Welcomes Agreement between the European Parliament and Member States on Deposit Guarantee Schemes' MEMO/13/1176 (17 December

The Banking Union[224]

Apart from the above-mentioned common regulatory framework for all EU Member States, the Union legislator has now established a Banking Union in the Euro area, which comprises 'single centralised mechanisms for supervision and restructuring of banks'.[225] According to the European Commission, the rationale for this initiative was as follows.

2013) <http://europa.eu/rapid/press-release_MEMO-13-1176_en.htm?locale=en> accessed 22 February 2014; Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes (recast) [2014] OJ L173/149.

222 European Commission, 'New Crisis Management Measures to Avoid Future Bank Bail-Outs' IP/12/570 (6 June 2012) <http://europa.eu/rapid/press-release_IP-12-570_en.htm?locale=en> accessed 22 February 2014; European Commission, 'Bank Recovery and Resolution Proposal: Frequently Asked Questions' MEMO/12/416 (6 June 2012) <http://europa.eu/rapid/press-release_MEMO-12-416_en.htm> accessed 22 February 2014; European Commission, 'Commissioner Barnier Welcomes Trilogue Agreement on the Framework for Bank Recovery and Resolution' MEMO/13/1140 (12 December 2013) <http://europa.eu/rapid/press-release_MEMO-13-1140_en.htm> accessed 22 February 2014; Directive 2014/59/EU of the European Parliament and of the Council 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] OJ L173/190.

223 European Commission (n 218) 6.

224 This section partly draws on Menelaos Markakis, 'Political and Legal Accountability in the European Banking Union: A First Assessment' in Marcel Szabó, Petra Lea Láncos and Réka Varga (eds), *Hungarian Yearbook of International Law and European Law 2016* (Eleven Publishing 2017) ch 32.

225 European Commission (n 218) 7.

> Uncoordinated national responses to the failure of banks have reinforced the link between banks and sovereigns and led to a worrying fragmentation of the Single Market in lending and funding. This fragmentation is particularly damaging within the euro area, where monetary policy transmission is impaired and the ring-fencing of funding impedes efficient lending to the real economy and thus growth. Swift progress towards a Banking Union ... is indispensable to ensure financial stability and growth in the euro area.[226]

The Banking Union is often described as the most ambitious project in the EU since the introduction of the single currency. The prevailing view holds that it ought to have three main building blocks, of which only two are currently in place: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The 'key rationale' for transferring supervisory and resolution powers to the EU level 'is to strengthen an unbiased, neutral approach to bank oversight and resolution, thus mitigating forbearance and moral hazard, and to break the fatal link between sovereigns and their banks'.[227]

The Single Supervisory Mechanism

The Single Supervisory Mechanism Regulation (or 'SSM Regulation'), which was adopted on the basis of Article 127(6) TFEU, has conferred specific supervisory tasks on the European Central Bank (ECB).[228] The latter is now responsible for the supervision of 125 'significant' banks or cross-border groups that are established in Euro area Member

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226 ibid 7.

227 Jeffrey Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) 115 Columbia Law Review 1297, 1306.

228 Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation), Articles 4 and 6(4)-(5).

States.[229] These tasks are listed and explicated in the SSM Regulation[230] and are carried out by the Supervisory Board, which is an internal body of the ECB.[231] The Union legislator helpfully explains that:

> As a first step towards a banking union, a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations.[232]

Supervisory tasks not conferred on the ECB shall remain with the national authorities ('national competent authorities' or NCAs).[233] The national supervisory authorities shall be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB's supervisory tasks, including, in particular, the on-going day-to-day assessment of a credit institution's situation and related on-site verifications.[234] The ECB may further require, by means of instructions, that they use their powers under national law, where the SSM Regulation does not confer such powers on the ECB.[235] The national authorities shall further remain

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229 European Central Bank, 'Single Supervisory Mechanism' <https://www.bankingsupervision.europa.eu/about/thessm/html/index.en.html> accessed 18 January 2017; European Central Bank, 'List of Supervised Entities' (1 January 2017) <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_201701.en.pdf?5500372ba5354abf248e44237ec95aed> accessed 30 March 2017.

230 SSM Regulation, Articles 4, 5 and 9-18.

231 ibid Article 26(1).

232 ibid recital 12.

233 ibid recital 28 and fifth subparagraph of Article 1.

234 ibid recital 37 and Article 6(2)-(3).

235 ibid third subparagraph of Article 9(1).

competent to supervise 'less significant' banks or branches,[236] which number over 3,000. However, it should be noted that the banks supervised by the ECB account for '85 per cent of Euro area banking assets'.[237]

The framework for the cooperation between the ECB and NCAs is laid down in the SSM Framework Regulation.[238] Notably, the SSM Framework Regulation provides that a Joint Supervisory Team (JST) shall be established for the supervision of each significant supervised entity or significant supervised group in participating Member States. Each JST shall be composed of staff members from the ECB and from the NCAs, working under the coordination of a designated ECB staff member and one or more NCA sub-coordinators.[239]

The Single Resolution Mechanism

The Single Resolution Mechanism Regulation (or 'SRM Regulation'), which was adopted on the basis of Article 114 TFEU, leads to 'centralisation of decision making in the field of resolution'.[240] It was preceded by the Bank Recovery and Resolution Directive (BRRD), which harmonised the rules relating to the resolution of banks across

236 ibid Article 6(6).

237 Brigitte Haar (n 219) 170.

238 Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities [2014] OJ L141/1.

239 ibid Articles 3-6.

240 Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ 2014 L 225/1 (SRM Regulation), recital 10.

the Union and provided for cooperation among national authorities when dealing with the failure of cross-border banks.[241] However, that Directive established minimum harmonisation rules and did not lead to centralisation of decision making in the field of resolution. It essentially provided for common resolution tools and resolution powers available for the national authorities of every Member State, but left discretion to national authorities in the application of these tools and in the use of national financing arrangements in support of resolution procedures.[242] As such, the BRRD did not eliminate the risk that separate national authorities might take potentially inconsistent decisions with respect to the resolution of cross-border groups, which may increase the overall costs of resolution. Moreover, as it provided for national financing arrangements, it did not sufficiently reduce the dependence of banks on support from national budgets and did not completely prevent different approaches by Member States to the use of such financing arrangements.[243]

For those Member States that are participating in the Banking Union (which are, so far, only the Euro area states), 'a centralised power of resolution is established and entrusted to the Single Resolution Board […] and to the national resolution authorities'.[244] The Single Resolution Board (SRB or 'the Board'), which is a new Union agency,[245] is now fully operational and has taken over responsibility from national resolution authorities for the resolution of 'significant' entities or groups, entities and

241 Directive 2014/59/EU (n 222) (BRRD).

242 SRM Regulation, recital 10.

243 ibid recital 10.

244 ibid recital 11.

245 ibid Article 42(1).

groups directly supervised by the ECB, as well as other cross-border groups.[246] The Union co-legislators helpfully explain that '[s]upervision and resolution are two complementary aspects of the establishment of the internal market for financial services whose application at the same level is regarded as mutually dependent'.[247] Separate tasks are also conferred on the Council and Commission within this complex governance structure. The resolution activities of the SRB are backed by the Single Resolution Fund (SRF or 'the Fund'), which is financed by bank contributions.[248] These bank levies are collected at the national level and then pooled at the Union level pursuant to an Intergovernmental Agreement that was signed by 26 EU Member States (bar the United Kingdom and Sweden).[249]

The national resolution authorities (NRAs) shall assist the SRB in resolution planning and in the preparation and implementation of measures taken pursuant to the SRM Regulation.[250] They shall further exercise all resolution tasks in relation to 'less

246 ibid Articles 2 and 7(2); Single Resolution Board, 'List of Other Cross-Border Groups' (6 June 2016) <https://srb.europa.eu/sites/srbsite/files/annex_ii_list_of_other_cross_border_06062016.pdf> accessed 30 March 2017.

247 SRM Regulation, recitals 11 and 15-17.

248 ibid recital 19.

249 Agreement between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland on the transfer and mutualisation of contributions to the Single Resolution fund <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> accessed 30 March 2017.

250 SRM Regulation, recital 28, Articles 29(1) and 31(1).

significant' credit institutions, unless the resolution action requires the use of the SRF.[251] The SRB may also at any time 'step in their shoes' and decide to exercise directly all of the relevant powers under the SRM Regulation with regard to any of these entities or groups falling under the responsibility of the NRAs 'where necessary to ensure the consistent application of high resolution standards'.[252]

The 'main tool for cooperation' between the SRB and the NRAs is the Internal Resolution Team (IRT). 'These enable the authorities to carry out resolution activities for banks under the SRB's direct responsibility'. The functioning of these teams is explicated in the draft Cooperation Framework with the NRAs and in the Resolution Planning and Crisis Management Manuals, which were developed by the SRB.[253] In principle, there could have been one IRT for each bank falling within the SRB's remit, but the SRB has 'bundled' more banks under a single IRT, 'taking into account different rationales (e.g. geographical footprint, business model, ownership structure, size)'.[254]

The legal implications of the crisis-induced developments

The discussion thus far has focused on the various measures enacted to combat the financial and public debt crisis. The focus now shifts to the legal, institutional and economic implications of the crisis-induced developments. This chapter does not purport to examine all crisis-related implications which are of constitutional and structural

251 ibid Article 7(3).

252 ibid Article 7(4).

253 Single Resolution Board, *2015 Annual Report* (Publications Office of the European Union 2016) 14.

254 ibid 14 and fn 2.

significance for the EU. Here, we will be focusing on two sets of issues. First, there are issues of legal principle, which primarily concern the doctrinal legal form through which change was effectuated in the EU during the crisis and the problems of legislative fragmentation and complexity which exist in this area. Second, there are varying degrees of economic integration within the EU, which are caused by the existence of a separate body of rules which are only applicable to Euro area Member States.

Issues of legal principle

The problem of legislative fragmentation and the varying legal form of Union action

Perhaps the most obvious, though largely unintended, consequence of the crisis-induced legal developments is *the problem of legislative fragmentation*.[255] Sionaidh Douglas-Scott has accurately described legislative action in this area as 'ad hoc and fragmented'.[256] It took nine different pieces of EU legislation (the EFSM Regulation, and 'six-pack' and 'two-pack' legislation) and four non-EU law instruments (the EFSF Framework Agreement, the Euro Plus Pact, the ESM Treaty, and the TSCG) to revise the EU economic governance framework and to set up mechanisms for providing assistance to ailing Member States. Moreover, it took over forty proposals and legislative instruments to reform the financial sector and to create a banking union, and the work on the financial regulation front is not quite done yet.[257]

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255 Kaarlo Tuori (n 1) 46-47.

256 Sionaidh Douglas-Scott, 'Justice and Pluralism in the EU' (2012) 65 Current Legal Problems 83, 97.

257 European Commission, 'A New Financial System for Europe: Financial Reform at the Service of Growth' (24 March 2014) <http://ec.europa.eu/internal_market/publications/docs/financial-reform-for-growth_en.pdf> accessed 21 April 2014.

This is not to say that the relevant legislation could have easily been boiled down to a more easily digestible form. In the EU institutions' defence, the Union legislator had to react promptly to a financial and public debt crisis which was threatening the integrity of the Eurozone and perhaps the very existence of the single currency or of the EU. Furthermore, economic policy and financial regulation are complex fields, and the relevant EU rules will almost invariably be long, detailed and difficult for a non-economist to comprehend. However, it is accurate to say that the relevant area has become a lot more complex and now includes a plethora of different instruments, the meaning of which can sometimes be difficult to grasp. In this connection, it is perhaps of no surprise that Allan Rosas, the Finnish Judge at the Court of Justice, has noted that '[e]ven experts struggle to fully comprehend the new EU legislation aimed to tackle the European debt crisis'.[258] Simple and stable rules would be more likely to give rise to 'positive learning effects' on the part of citizens, thereby shaping their expectations and inducing greater respect for such rules in the future. They would also go some way in addressing the 'disconnect' between EU officials and ordinary citizens, which is at least partly generated by a lack of profound understanding of the EU's byzantine structure and the arcane machinery of EMU law.

Moreover, one should also note *the form through which these measures have taken effect*. The primary default line is between measures which took legal effect as norms of EU law and those which took effect as non-EU legal measures.[259] The EFSM Regulation, the ECB's decisions, the 'six-pack' and 'two-pack' legislation and the

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258 Matti Ylonen, 'The EU Debt Crisis Shifts Power to the EU Commission' (16 January 2012) <http://www.helsinki.fi/news/archive/1-2012/16-13-52-37.html> accessed 21 April 2014.

259 Paul Craig (n 1) 10-12.

revised financial framework all consist of, or constitute, Union acts and thus fall within the first category. On the other hand, the EFSF Framework Agreement, the ESM Treaty, the TSCG and the agreement concluded between the Member States participating in the SRM constitute intergovernmental agreements, which were concluded outside the formal contours of the EU Treaties. To be sure, this is not a zero-sum game. Kenneth Armstrong rightly argues that:

> [C]hanges in EU economic governance cannot meaningfully be understood as mere switches from "soft" to "hard" law, from intergovernmentalism to supranationalism, or from the "open" method to the "Community" method. Rather, and building on their coexistence prior to the crisis, rules-based and co-ordination based governance techniques form "hybrid" normative grids and accountability frameworks.[260]

One has to agree with Armstrong that the revised economic governance framework is a 'hybrid' one, in the sense outlined above. However, this mix of intergovernmental and supranational instruments raises distinct issues, to which our attention now turns.

Problems of transparency and complexity

There are at least three different senses in which the revised legislative framework could be said to be complex and intransparent: the multiplicity of layers; the significant overlap between different instruments; and the increasing complexity of the rules themselves in terms of their substance. For the reasons provided below, the author agrees with Bruno De Witte that 'some of the complex "rule-work" emerging from the Eurozone crisis failed to meet the rule-of-law requirements of clarity and predictability', but is also

[260] Kenneth Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 E.L. Rev. 601, 603.

optimistic that 'this could be a temporary lapse rather than a structural decline of constitutional integrity'.[261]

The varying legal forms through which change was effectuated in the EU during the crisis have exacerbated problems of transparency and complexity which already existed in this area. Among many others, Paul Craig argues that the various measures enacted 'will exacerbate problems of transparency and complexity that already beset this area, even for those skilled at navigating this complex terrain'.[262] This is because, in his opinion, intergovernmental agreements made outside the formal confines of the Lisbon Treaty and contractual arrangements proposed in the Four Presidents' Report add two extra layers to the existing body of rules governing national economic policy.[263] Consequently, if one were to list the different types of norms comprising the revised economic governance framework, one would note that the EU economic governance framework now consists of Treaty articles,[264] protocols annexed to the Treaties,[265] declarations concerning Treaty provisions,[266] secondary EU legislation,[267] and

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261 Bruno De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 EuConst 434, 452. See further Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 1.

262 Paul Craig (n 1) 17.

263 ibid 18.

264 Articles 119-144 TFEU.

265 Protocol (No 4) on the statute of the European System of Central Banks and of the European Central Bank; Protocol (No 12) on the excessive deficit procedure; Protocol (No 13) on the convergence criteria; Protocol (No 14) on the Euro Group; Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; Protocol (No 16) on certain provisions relating to Denmark; Protocol (No 17) on Denmark; Protocol (No 18) on France.

266 Declaration on Article 126 of the Treaty on the Functioning of the European Union.

267 Notably, the SGP; Council Regulation 332/2002; Council Regulation (EC) 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty

intergovernmental agreements.[268] Furthermore, EU-wide or country-specific economic rules and objectives can also be found in stability and convergence programmes; general guidance, recommendations and opinions issued by the Commission, the Council and the European Council in the context of the SGP and the annual cycle of surveillance; macroeconomic adjustment programmes or Memoranda of Understanding; economic partnership programmes; and opinions on economic partnership programmes or draft national budgets. This is very complex terrain indeed.

Moreover, Craig rightly argues that 'there is in relation to the TSCG very significant overlap between the obligations incumbent on states through the six-pack and two-pack of EU legislation, and those in the TSCG'.[269] The TSCG balanced budget rule bears a strong resemblance to the SGP precepts.[270] As we have seen, the balanced budget rule laid down in the TSCG shall be deemed to be respected if the cyclically-adjusted balance of the general government is at its country-specific medium-term objective, as defined in the SGP.[271] The only difference between these two instruments is that they provide for a different lower limit of the cyclically-adjusted deficit (0.5% under the

establishing the European Community (Codified version) [2009] OJ L145/1; EFSM Regulation; the ECB's bond-buying programmes; 'six-pack' legislation; 'two-pack' legislation; SSM Regulation; SRM Regulation. There are of course very many other soft or hard law instruments which were adopted pursuant to these acts.

268 EFSF Framework Agreement; TSCG; ESM Treaty; the SRM intergovernmental agreement.

269 Paul Craig (n 1) 18.

270 Paul Craig (n 162) 4.

271 TSCG, Article 3(1)(b).

TSCG, 1% pursuant to the SGP).[272] However, a lower limit of 1% applies under the TSCG to Member States with a low debt-to-GDP ratio.[273]

It is true that, unlike the TSCG, secondary EU legislation does not provide for the adoption of a 'correction mechanism' at national level. However, the whole point of 'six-pack' and 'two-pack' legislation is to induce –and sometimes coerce– the Member States to exercise budgetary discipline and to take the necessary corrective measures when they run into trouble. Moreover, the TSCG obligation incumbent on Member States with a debt-to-GDP ratio exceeding 60% to reduce their debt at an average rate of one twentieth per year as a benchmark is identical to the one in the revised SGP.[274] The same goes for economic partnership programmes,[275] the obligation to report *ex ante* on public debt issuance plans,[276] and the obligation to discuss *ex ante* all major economic policy reforms.[277] Consequently, the TSCG can be largely seen, in my opinion, as a strong political (and of course legal) commitment to respect the revised SGP and as a prelude to 'two-pack' legislation.

Last, measured on their substance, the revised rules for monitoring and enforcing fiscal discipline are incredibly complex. They use both a 'top-down' and 'bottom-up' approach to assess whether the Member State concerned has taken effective action in

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272 TSCG, Article 3(1)(b) of the TSCG; second subparagraph of Article 2a of Regulation 1466/97, as currently in force.

273 TSCG, Article 3(1)(d).

274 TSCG, Article 4; Regulation 1467/97, as currently in force, Article 2(1a).

275 TSCG, Article 5; Regulation 473/2013, Article 9.

276 TSCG, Article 6; Regulation 473/2013, Article 8.

277 TSCG, Article 11; Regulation 473/2013, last subparagraph of Article 6(3).

response to a recommendation; and the structural effort depends on a variable which is unobservable (potential output). As such, potential output estimates 'fluctuate enormously' and are subject to revisions which are sometimes larger than the previous estimate itself.[278] What is more, the EU Court of Auditors rightly notes that: '[t]he increased complexity of the rules for assessing effective action has widened the Commission's scope for interpretation and discretion. As a result its analyses have become less transparent.'[279] To make things worse, most of the information that is used by the Commission in order to calculate the requisite structural effort is not made public and was not even shared with the Member States concerned until very recently.[280]

The inflexibilities of the EU's governance architecture and the institutional implications of the chosen methods of action

We have already examined the varying legal form through which change was effectuated in the EU during the crisis. Some of the measures enacted to combat the crisis took the form of EU norms, whereas other measures were enacted outside the formal confines of the EU Treaties. Public international law instruments offered an extra option to Member States willing to press forward with the envisaged reforms whenever a Treaty revision was blocked by a veto or simply deemed too cumbersome a decision-making procedure. It was readily acknowledged in the Four Presidents' Report that '[s]ome intergovernmental agreements [had] been created as a result of the shortcomings of the

278 European Court of Auditors, *Special Report No 10/2016: Further Improvements Needed to Ensure Effective Implementation of the Excessive Deficit Procedure* (Publications Office of the European Union 2016) 59-61 paras 91-94.

279 ibid 61 para 95.

280 ibid 61-62 paras 96-98.

previous architecture'.[281] In this connection, Kenneth Armstrong argues that the EU's response to the financial and public debt crisis 'may also illustrate the rigidities and inflexibilities of the European Union's constitutional and governance architecture, whether in the form of procedural constraints on treaty revision or more substantive constraints relating to the categorisation and exercise of EU competences'.[282] In his opinion, 'the historic focus on constitutionalising and containing the Community method may well have produced a paradoxical mismatch between limited EU governance capacities and expanding EU normative ambitions'.[283] Hence the pursuit of these ambitions outside the EU legal order.

I agree with Kenneth Armstrong that the enactment of rules outside the confines of the EU framework might serve to cast light on the 'rigidities' of the EU's constitutional and governance architecture. However, there are also a number of reasons to be cautious about this practice of having recourse to intergovernmental agreements.[284] The analysis of these objections will be undertaken in the subsequent chapters. Suffice it to say for present purposes that the choice between enacting EU legislation and having recourse to intergovernmental agreements determines which EU institutions and Member States have a say on the proposed rules. On the one hand, recourse to

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281 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, 'Towards a Genuine Economic and Monetary Union' (5 December 2012) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf> accessed 21 April 2014, 17 (Four Presidents' Report).

282 Kenneth Armstrong (n 260) 606.

283 ibid 606.

284 Paul Craig, '*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263.

intergovernmentalism inevitably means that the Member States which do not form part of the 'coalition of the willing' are left with limited options to influence the content of the relevant provisions. This is so notwithstanding the fact that they might be able to observe the proceedings of the intergovernmental conference.[285] On the other hand, recourse to intergovernmental arrangements also means that some of the EU institutions cannot voice any concerns that they might have about the envisaged precepts through the normal EU rulemaking processes. In this connection, Chiti and Teixeira argue that:

> The shift from one EU method of action to another ... redefines the specific balance of supranational, multinational and intergovernmental voices formalized by the Lisbon Treaty. It breaks with a well-rooted historical tradition, as the balance of voices encapsulated in the EU institutional architecture has been gradually developed throughout fifty years of European history. It develops a peculiar form of intergovernmentalism, relying more and more on the interactions of a multiplicity of intergovernmental institutions, allowing differences in their composition (plenary or restricted to the euro area Member States).[286]

As regards the debate on 'intergovernmentalism vs supranationalism', I very much agree with Bruno De Witte that '[p]ower relations between the institutions have shifted in various and partially opposite directions' during the Euro crisis, 'which makes it difficult to identify "overall winners and losers"'.[287] As will be further shown in Chapters 4 and 5, '[m]uch depends on which aspects of the euro crisis reforms one focuses on.'[288] De Witte argues that:

> Whereas it is undeniable that the European Council, its president and its satellite intergovernmental bodies (especially the Eurogroup) have taken a

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285 This was the case with United Kingdom and the TSCG: Steve Peers (n 162) 407.

286 Edoardo Chiti and Pedro Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CML Rev. 683, 689.

287 Bruno De Witte (n 261) 449-50.

288 ibid 449.

> leading role during the 'hot' phase of the crisis, often staking out in great detail the route to be followed, it is also true that the 'Community method' of codecision was used to put in place the main long-term legislative reforms, namely the six-pack, the two-pack and the Banking Union, and the European Parliament was able to impose some of its preferences in that process. The implementation of the new economic governance regime is marked by a strengthening of the surveillance role of the European Commission, which is less dependent on member state control than before. The European Central Bank, from its side, has used its monetary policy competences to address the fiscal policy crisis, and has recently been given a major new role in banking supervision. All in all, it would seem that the changes in the institutional balance defy any easy definition.[289]

Moreover, as will be explained in Chapters 6 and 7, the choice of instrument (international treaty or EU law) is important for the possibilities of judicial review in this area. This is more especially so in those cases where the intergovernmental agreements between the EU or Euro area Member States have set up their own institutional structure (e.g., the ESM Treaty). Further, the choice of instrument is important for the purposes of national and European parliamentary control – a point that will be further developed in Chapter 4.

Furthermore, as regards the expected 'longevity' of the revised EMU governance framework, it should be noted that:

> In the field of financial policy … there is evidence that the lessons of the past can be easily forgotten. Financial policy moves in cycles, as institutional solutions developed in times of crisis are eroded away under more benign market conditions, before a new crisis is triggered and the cycle begins again.[290]

However, this might not be the case for the EMU governance framework. The choice of legal instrument markedly affects the prospects of legal and institutional

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289 ibid 449.

290 Simon Deakin, 'The Evolution of Theory and Method in Law and Finance' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) ch 1, 33-34.

reform, as EU primary law or intergovernmental treaties are clearly harder to change. EU secondary law, too, was the result of hard-fought battles, and reaching an agreement on new rules could be a tall order. According to some commentators, the existing rules are not strictly enforced by the EU 'Executive', therefore it does not really matter whether the Fiscal Compact, for example, will indeed stay in place or not. However, this argument should not mask the possibility of these rules being employed in the future, when the timing is right. The recent awakening of the EU's rule of law framework so suggests.

The varying degree of economic integration within the EU

The discussion thus far has provided a 'first assessment' of the legal and institutional developments during the Euro crisis. The focus now shifts to the significance of Euro crisis developments from the standpoint of economic integration. This is not an attempt to delve into the complex field of economics. The point that I seek to make here is simply that the crisis-induced developments have served to deepen economic integration within the Euro area and further differentiate it from economic integration in non-Euro area Member States. Moreover, certain areas of the single market have integrated more deeply in the Euro area.

The deepening of economic integration in the Euro area

It is common ground that the EU Member States have integrated their economies to varying degrees. To illustrate this point, it is first necessary to recall the possible degrees of economic integration:

1. A preferential trading area (with reduced customs tariffs between certain countries)
2. A free trade area (with no internal tariffs on some or all goods between the participating countries)
3. A customs union (with the same external customs tariffs for third countries and a common trade policy)
4. A common market (with common product regulations and free movement of goods, capital, labour and services)
5. Economic and monetary union (a single market with a single currency and monetary policy)
6. Complete economic integration (all the above plus harmonised fiscal and other economic policies).[291]

All EU Member States form a single market. However, only 19 states have thus far adopted the single currency, while the other 9 have retained their national currencies. The EU has exclusive competence in the area of monetary policy for the 19 Euro area Member States,[292] whereas each of the 9 non-Euro area Member States has a national central bank which conducts its own monetary policy. Consequently, 'the degree of economic integration within EMU is a hybrid of steps 4 and 5 in the list above'.[293] Euro area Member States are part of the single market, have adopted a single currency and have a single monetary policy conducted by the European System of Central Banks (ESCB), which is governed by the decision-making bodies of the ECB.[294] Non-Euro area Member States form part of the single market but have retained their own currencies and conduct their own monetary policies.

It is readily apparent from the discussion in the first part of this chapter that certain rules forming part of the revised economic governance framework are only

291 European Commission, *One Currency for One Europe: The Road to the Euro* (Publications Office of the European Union 2014) 1.

292 Article 3(1)(c) TFEU.

293 European Commission (n 291) 1.

294 Article 129(1) TFEU.

applicable to *Euro area* Member States, the salient point for present purposes being that there is a 'further differentiation of the legal framework applicable to the euro area'.[295] In light of all these new instruments which only concern the Eurozone and the proposals to further reform or 'deepen' the EMU which will be outlined below, it is argued here that economic integration within the Euro area is gradually evolving towards *a hybrid of steps 4, 5 and (a bit of) 6* in the list above. At the same time, the non-Eurozone periphery of the EU28 remains a hybrid of a common market and elements of EMU. This differentiated integration is of the utmost constitutional significance.

From the standpoint of economics, it is indeed the case that there are valid reasons for the Eurozone states to integrate their economies more deeply than non-Euro states. For one, 'Member States whose currency is the euro are particularly subject to spill-over effects from each other's budgetary policies.'[296] At some point down the road (and perhaps not *that* far down this path of integration and convergence), the Eurozone faces 'a crucial choice between ... the surveillance model, where Member States continue to maintain all taxing power and fiscal authority and where the EU has a corrective role as an enforcer of discipline, and the classic fiscal federalism model, where the European Union acquires taxing power, its own independent sphere of fiscal authority, and thus its own fiscal tools for macroeconomic stabilisation'.[297] As will be explained in Chapter 3, '[t]he danger is that, in an effort to avoid what may be perceived as the radical changes that come with a move towards classic fiscal federalism, the euro area may have started

295 Kaarlo Tuori (n 1) 20.

296 Regulation (EU) 473/2013 (n 68) recital 19.

297 Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 CML Rev. 1621, 1641.

to edge slowly towards the surveillance model, without the necessary awareness of the consequences that this evolution may have in the long run'.[298]

The next steps in the ongoing process of strengthening economic integration were first laid down in the Four Presidents' Report, 'Towards a Genuine Economic and Monetary Union,' which was endorsed by the European Council on 13/14 December 2012.[299] This document should be read together with the Commission's 'Blueprint for a Deep and Genuine EMU'.[300] According to the Four Presidents' Report, 'a well-defined and limited fiscal capacity' for the Euro area should be established, in order to 'improve the absorption of country-specific economic shocks', taking the form of 'an insurance-type system between euro area countries'.[301] It was readily acknowledged in the report that this 'would require a further degree of convergence between economic structures and policies of the Member States', in order to improve the adjustment capacity of the national economies concerned and to avert the risk of moral hazard inherent to any such system.[302] It was further argued that that stage 'could also build on an increasing degree of common decision-making on national budgets and an enhanced coordination of

298 ibid 1641-42.

299 European Council, 'European Council 13/14 December 2012 Conclusions' EUCO 205/12 CO EUR 19 CONCL 5 (14 December 2012) <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST+205+2012+INIT> accessed 21 April 2014, 1-5.

300 Communication from the Commission, 'A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate' COM(2012) 777 final/2 (Brussels, 30 November 2012) <http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf> accessed 30 March 2017.

301 Four Presidents' Report (n 281) 5, 11-12.

302 ibid 9-10.

economic policies, in particular in the field of taxation and employment'.[303] In the meantime, 'limited, temporary and flexible financial incentives could be provided to Member States to promote structural reforms' agreed upon in the context of economic partnership programmes.[304]

The foregoing proposals to create an EMU fiscal capacity[305] and to provide financial incentives for implementing structural reforms demonstrate *a clear link between deeper economic integration and enhanced forms of mutual assistance*. The more the Eurozone's capacity to deal with asymmetric shocks and structural imbalances increases, the stronger the influence that Union (or Euro area) institutions and other Member States are able to exert over national fiscal and economic policy.

Greater integration in the arrangements for supervising and resolving banks

The revised fiscal and economic policy rules are only part of the picture. We have seen that the Union legislator has established the SSM and SRM for the centralised delivery of the single rulebook for banks established in Member States participating in the Banking Union (which are currently only the Euro area Member States). In this connection, Chiti and Teixeira have rightly argued that '[t]he autonomization of the EMU, therefore, takes place even with regard to areas of the single market, which as a result is likely to integrate more deeply than outside the euro area'.[306] In the area of Banking Union, 'two-tier harmonisation' is now a cognisable reality. This is readily apparent in the field of

303 ibid 5.

304 ibid 10.

305 For a philosophical defence of a similar insurance-type scheme, see Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 OJLS 1.

306 Edoardo Chiti and Pedro Gustavo Teixeira (n 286) 694.

bank resolution: the Bank Recovery and Resolution Directive applies to all Member States; and the SRM Regulation applies only to entities established in Member States participating in the Banking Union. The latter instrument '"implements" for the Banking Union' the content of the former instrument, 'adapting the BRR Directive to the specificities of the SRM'.[307]

What next for the EMU? The Five Presidents' Report

The Five Presidents' Report is the most recent document produced from the EU institutions collectively on the future of EMU.[308] The report notes that the previous Four Presidents' Report and the Commission's 'Blueprint for a Deep and Genuine EMU' 'remain essential references for completing EMU', and so does the 2015 Analytical Note on 'Preparing for Next Steps on Better Economic Governance in the Euro Area'.[309] The Five Presidents' Report argues that progress must be made on four fronts:

> …[F]irst, towards a **genuine Economic Union** that ensures each economy has the structural features to prosper within the Monetary Union. Second, towards a **Financial Union** that guarantees the integrity of our currency across the Monetary Union and increases risk-sharing with the private sector. This means completing the Banking Union and accelerating the Capital Markets Union. Third, towards a **Fiscal Union** that delivers both fiscal sustainability and fiscal stabilisation. And finally, towards a **Political Union** that provides the foundation for all of the above through

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307 See Alberto De Gregorio Merino, 'Institutional Report' in Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016), section D.5 ('The SRM and the Internal Market').

308 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (Five Presidents' Report).

309 ibid 2; Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem and Mario Draghi, 'Preparing for Next Steps on Better Economic Governance in the Euro Area: Analytical Note' (Informal European Council, 12 February 2015) <https://ec.europa.eu/commission/sites/beta-political/files/analytical_note_en.pdf> accessed 30 March 2017.

> genuine democratic accountability, legitimacy and institutional strengthening.[310]

These reforms are to be sequenced over two consecutive stages. In the first stage, 'the EU institutions and euro area Member States would build on existing instruments and make the best possible use of the existing Treaties'.[311] In the second stage, 'concrete measures of a more far-reaching nature would be agreed to complete EMU's economic and institutional architecture',[312] the assumption being that a comprehensive Treaty revision would be necessary.

The key reforms proposed in the Five Presidents' Report are as follows:

310 Five Presidents' Report (n 308) 4-5.

311 ibid 5.

312 ibid 5.

STAGE 1 1 JULY 2015 – 30 JUNE 2017

IMMEDIATE STEPS

Economic Union

- **A new boost to convergence, jobs and growth**

- Creation of a euro area system of Competitiveness Authorities;
- Strengthened implementation of the Macroeconomic Imbalance Procedure;
- Greater focus on employment and social performance;
- Stronger coordination of economic policies within a revamped European Semester.

Financial Union

- **Complete the Banking Union**

- Setting up a bridge financing mechanism for the Single Resolution Fund (SRF);
- Implementing concrete steps towards the common backstop to the SRF;
- Agreeing on a common Deposit Insurance Scheme;
- Improving the effectiveness of the instrument for direct bank recapitalisation in the European Stability Mechanism (ESM).

- **Launch the Capital Markets Union**
- **Reinforce the European Systemic Risk Board**

Fiscal Union

- **A new advisory European Fiscal Board**

- The board would provide a public and independent assessment, at European level, of how budgets – and their execution – perform against the economic objectives and recommendations set out in the EU fiscal framework. Its advice should feed into the decisions taken by the Commission in the context of the European Semester.

Democratic accountability, legitimacy and institutional strengthening

- **Revamp the European Semester**

- Reorganise the Semester in two consecutive stages, with the first stage devoted to the euro area as a whole, before the discussion of country specific issues in the second stage.

- **Strengthen parliamentary control as part of the European Semester**

- Plenary debate at the European Parliament on the Annual Growth Survey both before and after it is issued by the Commission; followed by a plenary debate on the Country-Specific Recommendations;
- More systematic interactions between Commissioners and national Parliaments both on the Country-Specific Recommendations and on national budgets;
- More systematic consultation and involvement by governments of national Parliaments and social partners before the annual submission of National Reform and Stability Programmes.

- **Increase the level of cooperation between the European Parliament and national Parliaments**
- **Reinforce the steer of the Eurogroup**
- **Take steps towards a consolidated external representation of the euro area**
- **Integrate into the framework of EU law the Treaty on Stability, Coordination and Governance; the relevant parts of the Euro Plus Pact; and the Inter-governmental Agreement on the Single Resolution Fund**

Source: Five Presidents' Report, Annex 1, 20-21.

Conclusion

The foregoing analysis has given the reader a glimpse into the constitutional and structural significance of the crisis-induced developments in the field of economic and fiscal governance for the EU. First, the crisis has led to the setting-up of various financial mechanisms (the EFSM, the EFSF, and the ESM), all of which have enabled the EU to react to adverse economic developments whenever the existing mechanisms of crisis prevention failed. Second, we discussed the active role of the ECB, which has sought to assist in efforts to weather the financial storm through the use of various policy instruments. Third, in an effort to prevent a future crisis or to respond to it more swiftly at an early stage of its development, the newly-adopted legislation has enhanced the oversight of national budgetary and economic policy, which is now backed by a sanctions regime for Euro area Member States. Fourth, there has been much fine-tuning in relation

to the EU's financial regulation and supervision framework, including a Banking Union for the Euro area (and potentially beyond).

We have also seen how the measures enacted to combat the crisis prompt inquiry concerning various issues of legal principle. Most notably, there were varying legal forms through which change was effectuated in the EU economic governance framework during the crisis, the principal default line being between norms of EU law and non-EU legal measures. This 'hybrid' governance framework existed prior to the crisis, but there have been plenty of notable additions. These have led to a worrying legislative fragmentation and have exacerbated problems of transparency and complexity which already existed in that area. What is more, we have seen that there is a significant overlap between the obligations incumbent on Member States through the EU legislation and those incumbent on them pursuant to intergovernmental agreements.

Recourse to intergovernmentalism might as well serve to illustrate the 'rigidities' and 'inflexibilities' of the EU's constitutional and governance architecture,[313] but it does have an important institutional dimension. The Member States which did not form part of the 'coalition of the willing' were left with limited options to voice their concerns over the desired precepts, notwithstanding the fact that such developments might as well condition the future development of the EU as a whole. This also applies to some of the Union institutions, which would have otherwise been able to voice their concerns (if any) through the normal EU rulemaking processes. The MEPs' desire to 'get the system within

313 Kenneth Armstrong (n 260) 606.

the normal EU process'[314] is directly pertinent to our present inquiry and will be further explored in the subsequent chapters.

Furthermore, one should not lose sight of the crisis-induced economic developments in the EMU. These are also of constitutional and structural significance for the EU. We have seen that there is a large body of newly-enacted rules which are only applicable to Euro area Member States. These norms have served to deepen economic and fiscal integration within the Euro area and to further differentiate it from economic integration in non-Euro area Member States. Furthermore, there is now greater integration in the arrangements for supervising and resolving banks in the Eurozone; hence, this area of the single market has integrated more deeply in the Euro area. In view of all these economic developments, the EMU's identity as a 'community of benefits and risk-sharing', though predating the crisis, is now more readily apparent than ever.[315]

In view of all the above, it has been rightly argued that the Eurozone crisis 'has led to a strengthening of the EU economic governance framework'.[316] In similar vein, Sionaidh Douglas-Scott has described these developments as 'the most comprehensive reinforcement of economic governance in the EU and the Eurozone since the launch of EMU'.[317] In my opinion, notwithstanding the issues of legal principle examined above, or any divergent views that might reasonably exist in relation to the effectiveness of these

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314 Committee on Economic and Monetary Affairs, 'MEPs anticipate end of Troika' (16 January 2014) <http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32420/html/MEPs-anticipate-end-of-the-Troika> accessed 22 April 2014.

315 Edoardo Chiti and Pedro Gustavo Teixeira (n 286).

316 Four Presidents' Report (n 281) 15.

317 Sionaidh Douglas-Scott (n 256) 95.

norms and their application by the EU 'Executive',[318] the various reforms implemented thus far have served to strengthen the EU economic governance framework from a legal, institutional and economic perspective. Never before had the EU and its Member States been capable of administering financial assistance to an ailing Euro area Member State through a permanent mechanism such as the ESM, or of fostering structural reforms through the macroeconomic imbalance procedure. Furthermore, a single rulebook for all financial actors and products has started to emerge, and the Member States have established a handful of European Supervisory Authorities for the financial sector, including a Single Supervisory Mechanism and a Single Resolution Mechanism for banks established in participating Member States. Other things being equal, the foregoing developments have served to strengthen the EU economic governance framework and to supplement it with a strong banking pillar. It remains of course to be seen whether the problems of transparency and complexity, or the alleged problems of institutional fragmentation and democratic accountability, will have a bearing on the effectiveness of the enacted norms. It also remains to be seen whether the revised EU economic governance framework will be effective in preventing a future crisis or at least in mitigating its adverse effects.

318 See notably European Court of Auditors (n 278).

CHAPTER THREE: THE IMPLICATIONS OF THE REVISED EU ECONOMIC GOVERNANCE FRAMEWORK FOR NATIONAL ECONOMIC POLICY

Introduction

The discussion thus far has focused on the crisis-induced developments in the Economic and Monetary Union (EMU) and their bearing on the ongoing process of economic integration. So far we have concentrated on the changes that the new EU economic rules have brought about in the EU economic governance framework and on their significance for the EMU architecture. The focus now shifts to the effects of the crisis-induced legal and economic developments on the *Member States,* most notably in relation to their fiscal, economic and social policy. The twin challenge is 'to evaluate the modalities and effects of EU discipline on national fiscal and budgetary processes as this new governance architecture is put into practice' and 'to address the constitutional legality and democratic legitimacy of the new governance of fiscal discipline'.[1] The analysis of the effects of EU discipline on national economic policy will form the cornerstone of our assessment of the democratic legitimacy of the new economic governance architecture, which formally belongs to the next chapter.

This chapter consists of four main parts. The first section of this chapter will analyse the substance and scope of the new EU economic rules. It will be argued that all EU Member States are now subject to more stringent fiscal rules as a result of 'six-pack'

[1] Kenneth Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 E.L. Rev. 601, 617.

legislation. Moreover, Euro area Member States are subject to further restraints flowing from 'six-pack' legislation, 'two-pack' legislation, and the Fiscal Compact. Furthermore, the Eurozone crisis has *de facto* curtailed the fiscal sovereignty of the States that granted financial assistance to crisis-hit countries, in that the lender States have less money to spend for other purposes. Last, the crisis-hit Euro area countries are experiencing a further loss of their economic sovereignty through the conditionality attached to the financial assistance which was granted to them.

The second section of this chapter will look at the important changes that the newly-adopted EU legislation has brought about in EU economic surveillance. Some of these concern all EU Member States. First, the Union co-legislators have taken steps to ensure that the broad economic policy and employment guidelines (Articles 121(2) and 148(2) TFEU) exert influence on national policy-making. Second, the scope of EU monitoring has been widened, thereby now covering general economic policy. Third, the 'six-pack' legislation on national budgetary frameworks makes inroads into the Member States' substantive and procedural budgetary autonomy. The United Kingdom is exempt from some of these rules.

As regards Euro area Member States, it will be shown that the Union co-legislators have stepped up the application of sanctions for breaches of the Stability and Growth Pact (SGP). Moreover, it will be argued that the Fiscal Compact makes inroads into national budgetary processes. Furthermore, it will be argued that 'two-pack' legislation broadens economic surveillance beyond fiscal policy and that it brings the cycle of domestic budgetary policy within the framework of EU monitoring.

In view of these developments, it will be argued that the Union institutions now possess the tools that would enable them to closely monitor the economic, financial and fiscal developments in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. It will be further argued that the new EU economic rules have redistributive effects in European societies and encroach on very sensitive areas of national policy.

The third section of this chapter will look at the implementation of EU economic rules and assess the rigorousness of EU and independent national fiscal oversight. The principal default line is between lender States and borrower States. First, we will examine the bearing of the crisis-induced economic developments on the lender Member States, as well as the EU economic guidance addressed to them in the context of the European Semester. It will be argued that the EU economic guidance addressed to Germany serves to illustrate that the Commission does not 'go easy' on stronger EU economies. Second, we will examine the bailout terms agreed with Greece in the context of the first two rescue packages. It will be shown that these terms mandate far-reaching economic and social policy reforms, from which grave social repercussions could potentially flow. In addition, it will be argued that there is very rigorous EU and independent national assessment of the progress Greece is making in relation to its economic adjustment programme.

The remainder of this chapter will look at the latest developments in Greece and the agreement reached on a third macroeconomic adjustment programme. It will be shown that the new programme shares some features with the previous two bailout

agreements but is also unique in some respects. Overall, it reinforces pre-existing trends and escalates the force of the preceding argument.

The revised EU economic rules and their bearing on Member States

It is axiomatic that the EU rules on national fiscal and economic policy make inroads into the Member States' fiscal and economic sovereignty. Their precise legal form is not an issue here. Whether enshrined in secondary EU legislation or adopted through the use of public international law instruments, these rules serve to limit the available policy options in this area, or indeed require that a national government adopt specific measures to lower the public deficit or debt. We have seen in the preceding chapter that the principal default line is between measures which are applicable to all EU Member States and rules that are only applicable to Euro area Member States. Accordingly, some of these rules have a bearing on the economic policy of all 28 Member States, whereas other rules only impact on the fiscal and economic policy of Euro area Member States. These will now be examined in turn.

EU-wide restrictions on national economic policy

Measured on their substance, the newly-adopted EU rules which are applicable to all EU Member States can be divided into three categories: revised fiscal policy rules; new macroeconomic policy rules; and new rules governing national budgetary frameworks. First, the Union legislator has amended the SGP through two regulations forming part of 'six-pack' legislation.[2] Second, the Union legislator has created a new 'macroeconomic

[2] Regulation (EU) 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 [2011] OJ

imbalances' procedure to prevent and correct macroeconomic imbalances in the EU Member States.[3] Third, there is new legislation governing national budgetary frameworks, also forming part of the 'six-pack'.[4] Since these rules and processes are all embedded in a form of meta-coordination ('European Semester'), the divide is not pristine, but it does serve to illustrate that these rules cover different areas of economic policy.

The rules which are only applicable to Euro area Member States

The Member States which form part of the Eurozone are subject to further restraints flowing from 'six-pack' legislation, 'two-pack' legislation, and the Fiscal Compact. First, there is a separate sanctions regime that is only applicable to Euro area Member States. 'Six-pack' legislation sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the SGP in the Euro area.[5] It further provides for sanctions for excessive macroeconomic imbalances.[6] Second, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[7] lays down

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L306/12; Council Regulation (EU) 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] OJ L306/33.

3 Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

4 Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

5 Regulation (EU) 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] OJ L306/1.

6 Regulation (EU) 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] OJ L306/8.

7 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal

the balanced budget rule and provides for the adoption of a 'correction mechanism' at national level. Non-Euro area Contracting Parties will only be bound by the Fiscal Compact when they join the Eurozone, unless they declare their intention to be bound by it at an earlier date.[8] Third, 'two-pack' legislation provides for enhanced economic and budgetary surveillance, again only in the Euro area.[9]

The changing nature and scope of EU monitoring

The discussion thus far has focused on the scope of application and the substance of EU economic rules. We have seen that some of these measures, which involve far-reaching economic restraints, are only applicable to Euro area Member States, whereas other measures apply to both Euro area and non-Euro area Member States. The focus now shifts to the bearing of these measures on the nature and scope of EU monitoring of national policies.

First, the Union co-legislators have taken steps to ensure that the broad economic policy and employment guidelines (Articles 121(2) and 148(2) TFEU) exert influence on national policy-making. This is achieved through the European Semester for economic

Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf> accessed 30 September 2014.

8 ibid Articles 1(2) and 14(5).

9 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Regulation (EU) 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 [2013] OJ L140/11.

policy coordination. The revised SGP sets a deadline for the submission of stability and convergence programmes,[10] which seeks to ensure that these are submitted by the national authorities and assessed by the Union institutions and bodies 'before key decisions on the national budgets for the succeeding years are taken'.[11] Following the assessment of these programmes, the Council addresses guidance to the Member States, making full use of the legal instruments provided for in Articles 121 and 148 TFEU, in the preventive part of the SGP, and in Regulation 1176/2011 on macroeconomic imbalances, 'in order to provide timely and integrated policy advice on macrofiscal and macrostructural policy intentions'.[12] In turn, 'Member States shall take due account of the guidance addressed to them in the development of their economic, employment and budgetary policies before taking key decisions on their national budgets for the succeeding years.'[13]

Second, the scope of EU monitoring has been widened, thereby now covering general economic policy. This was achieved through the new legislation on the prevention and correction of macroeconomic imbalances (Regulation 1176/2011). In this connection, Kaarlo and Klaus Tuori argue that:

> Simultaneously, the scope of monitoring has been enlarged. The Stability and Growth Pact put the emphasis of the multilateral surveillance procedure under Art. 121 TFEU on fiscal policy. By contrast, the excessive imbalances procedure aims to cover all the main sources of

10 Regulation 1466/97, Articles 4(1) and 8(1), as amended by Regulation 1175/2011.

11 Regulation 1175/2011, preamble recital 7.

12 Regulation 1466/97, first subparagraph of Article 2-a(3), as amended by Regulation 1175/2011.

13 Regulation 1466/97, second subparagraph of Article 2-a(3), as amended by Regulation 1175/2011.

> economic imbalances and opens surveillance towards general economic policy.[14]

In similar vein, Alicia Hinarejos argues that:

> …[T]here has been an extension of formal EU surveillance, in that formal surveillance mechanisms created through measures of EU law now apply not just in the budgetary area, but also to broader economic policy: there is, for the first time, formal surveillance of certain aspects of Member States' economic policies to avoid macroeconomic imbalances, through a mechanism created as part of the Six-Pack.[15]

It is true that, upon the adoption of 'six-pack' legislation on macroeconomic imbalances, economic surveillance covers a broader area. Moreover, one should not lose sight of the implications of the identification of imbalances and/or the opening of an excessive imbalance procedure for the national economy concerned. The Council, on a recommendation from the Commission, may address recommendations on appropriate policy responses to the Member State concerned.[16] In turn, the Member State concerned 'should use all available policy instruments under the control of public authorities'.[17] 'The policy response should … cover the main economic policy areas, potentially including fiscal and wage policies, labour markets, product and services markets and financial sector regulation.'[18] Consequently, the implications flowing from the identification of macroeconomic imbalances can be quite far-reaching for the national economy concerned. The measures proposed or enacted by the national government

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14 Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 190.

15 Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 CML Rev. 1621, 1631.

16 Regulation 1176/2011, Articles 6(1) and 7(2).

17 Regulation 1176/2011, preamble recital 20.

18 ibid.

concerned with a view to bringing this situation to an end can cover different areas of national policy, including such sensitive areas as wage policy, collective labour law, and product and services markets.

Third, the 'six-pack' legislation on national budgetary frameworks makes inroads into the Member States' substantive and procedural budgetary autonomy. Prior to the crisis, Article 3 of Protocol (No 12) on the Excessive Deficit Procedure, which is annexed to the EU Treaties, provided that '[t]he Member States shall ensure that national procedures in the budgetary area enable them to meet their obligations in this area deriving from these Treaties.' However, there was no secondary EU legislation expanding on this obligation. This has now changed. Directive 2011/85, which forms part of the 'six-pack', provides that Member States (with the exception of United Kingdom) shall have in place numerical fiscal rules that promote compliance with 'the reference values on deficit and debt set in accordance with the TFEU' and 'the Member State's medium-term budgetary objective'.[19] The annual budget legislation of the Member States shall reflect their country-specific numerical fiscal rules in force.[20] Consequently, these rules have a bearing on the substantive content of national budgets, thereby obliging national Executives and parliaments to take EU fiscal rules seriously. They are also believed 'to increase the ownership of fiscal rules', which is perceived to be 'one of the key requirements for the success of EMU'.[21]

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19 Directive 2011/85, Articles 5 and 8.

20 ibid Article 7.

21 Alexandre de Streel, 'EU Fiscal Governance and the Effectiveness of its Reform' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 97.

Moreover, Directive 2011/85 makes inroads into the procedural budgetary autonomy of the Member States. Member States are put under an obligation to adopt medium-term budgetary frameworks, which shall provide for a fiscal planning horizon of at least three years.[22] What is more, the Directive lays down rules governing the scope of the obligations and processes set out therein, most notably in relation to the scope of budgetary frameworks.[23]

In view of all the above, Kaarlo and Klaus Tuori rightly argue that:

> Another characteristic of the incrementalist reinforcement of European economic governance has been increased intrusion into the procedural and substantive budgetary autonomy of the Member States.[24]

Fourth, we have seen that the Union co-legislators have sought to step up the application of sanctions for breaches of the SGP in the Euro area. Regulation 1173/2011 now provides for sanctions within the preventive arm of the SGP where a Member State has failed to take action in response to a Council recommendation for the necessary policy measures for addressing a significant observed deviation from the adjustment path towards the medium-term budgetary objective.[25] According to conventional wisdom, recommendations have no binding force (Article 288 TFEU).[26] However, there are now sanctions for 'breaches' of 'soft law' instruments, or indeed a turn into hard(er) law. In

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22 Directive 2011/85, Article 9(1).

23 ibid Articles 12-14.

24 Kaarlo Tuori and Klaus Tuori (n 14) 105.

25 Regulation 1173/2011, Article 4(1).

26 For an exegesis of EU soft law instruments, see among others Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 107-08.

this connection, Sonja Bekker rightly argues that '[t]his is a step on the continuum towards obligation of countries to comply with their own budgetary objectives.'[27]

'Breaches' of soft law instruments within the preventive arm of the SGP also have a bearing on the sanctions (if any) imposed within the confines of the excessive deficit procedure (i.e. the corrective arm of the SGP). These sanctions existed prior to the crisis, but now they have been amplified. If the Council decides that an excessive deficit exists in a Member State which had previously lodged an interest-bearing deposit for breach of the preventive arm of the SGP, the Commission shall recommend that the Council require the Member State concerned to lodge a non-interest bearing deposit.[28] Regulation 1173/2011 further provides for the imposition of a fine in the event of a Member State's failure to take effective action in response to a Council recommendation (Article 126(8) TFEU),[29] thereby bringing forward the sanctions in the corrective part of the SGP.

In view of all these changes in the enforcement of the SGP in the Euro area, Sonja Bekker rightly argues that 'more soft as well as hard law elements have been introduced in the SGP, thus further developing its hybrid coordination constellation, but also taking steps on the continuum towards more precision, obligation and delegation'.[30] It remains to be seen whether the Commission would be willing to recommend that such sanctions be imposed on recalcitrant Member States.

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27 Sonja Bekker, 'The EU's Stricter Economic Governance: A Step Towards More Binding Coordination of Social Policies?' (2013) WZB Working Paper SP IV 2013-501 <http://bibliothek.wzb.eu/pdf/2013/iv13-501.pdf> accessed 30 September 2014, 6.

28 Regulation 1173/2011, Article 5(1).

29 ibid Article 6(1).

30 Sonja Bekker (n 27) 6. See also Alicia Hinarejos (n 15) 1632.

Fifth, the TSCG obligation to establish a correction mechanism, which shall be triggered automatically in the event of significant observed deviations from the medium-term objective or the adjustment path towards it,[31] also makes inroads into national budgetary processes. As mandated by the TSCG,[32] the European Commission has established common principles for national fiscal correction mechanisms.[33] According to these principles, 'the correction, in terms of size and timeline, shall be made consistent with possible recommendations addressed to the concerned Member State under the Stability and Growth Pact'.[34] Again, these recommendations are soft law instruments, which normatively piggyback on hard law instruments, and hence the Member State concerned is expected to follow them.

Though leaving considerable leeway to national authorities, these principles seek to (re)shape national fiscal frameworks. Notably, they provide that:

> The size and timeline of the correction shall be framed by pre-determined rules. Larger deviations from the medium-term objective or the adjustment path towards it shall lead to larger corrections. ... At the onset of the correction, Member States shall adopt a corrective plan that shall be binding over the budgets covered by the correction period.[35]

31 TSCG, Article 3(1)(e).

32 ibid Article 3(2).

33 Communication from the Commission COM(2012) 342 final Common principles on national fiscal correction mechanisms [2012].

34 ibid principle (No 2).

35 ibid principle (No 4).

These principles further provide for the creation of independent bodies (or bodies with functional autonomy), which shall monitor the implementation of the TSCG precepts at national level.[36] We will return to these later in our analysis.

Sixth, we have seen that 'two-pack' legislation provides for enhanced forms of economic and budgetary surveillance in the Euro area. Space precludes a detailed exegesis of these instruments, which formally belongs to the preceding chapter. Instead we will highlight certain features which are of particular importance.

Under Regulation 472/2013, the Commission may decide to subject to enhanced surveillance a Member State experiencing or threatened with serious difficulties with respect to its financial stability.[37] It shall also subject to enhanced surveillance a Member State which is in receipt of financial assistance on a precautionary basis.[38] The Member State concerned 'shall, after consulting, and in cooperation with, the Commission, acting in liaison with the ECB, the ESAs, the ESRB and, where appropriate, the IMF, adopt measures' to address its difficulties.[39] Moreover, where a Member State requests financial assistance from other Member States, third countries, the EU financial mechanisms, or the IMF, it shall prepare, 'in agreement with the Commission, acting in liaison with the ECB, and, where appropriate, with the IMF', a draft macroeconomic adjustment programme.[40]

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36 ibid principle (No 7).

37 Regulation 472/2013, Article 2(1).

38 ibid Article 2(3).

39 ibid Article 3(1).

40 ibid Article 7(1).

Regulation 473/2013, also forming part of the 'two-pack', provides for a common budgetary timeline,[41] and for the monitoring and assessment of draft budgetary plans by the Commission and the Eurogroup.[42] In the event of particularly serious non-compliance with the SGP precepts, the Commission would request a revised budgetary plan.[43] Regulation 473/2013 also provides for economic partnership programmes 'describing the policy measures and structural reforms that are needed to ensure an effective and lasting correction of the excessive deficit'.[44]

In view of the above, it is readily apparent that Regulations 472/2013 and 473/2013 broaden economic surveillance beyond fiscal policy. This is achieved through enhanced surveillance and economic partnership programmes.[45] Moreover, Regulation 473/2013 makes decisive inroads into national budgetary autonomy and goes much further than Directive 2011/85 in this respect.[46] In this connection, Kenneth Armstrong rightly argues that:

> …for Eurozone States, EU influence over the budgetary process is exerted more directly through the extension of the technique of multilateral surveillance pioneered in the context of economic policy co-ordination to the budget-setting process itself. This is the effect of Regulation 473/2013 adopted under the "two pack". Regulation 473/2013 brings the cycle of

41 Regulation 473/2013, Article 4.

42 ibid Articles 6-7.

43 ibid Article 7(2).

44 ibid Article 9(1).

45 Kaarlo Tuori and Klaus Tuori (n 14) 112.

46 ibid 192.

domestic budgetary policy within the framework of monitoring under the European semester.[47]

Fundamentally, 'two-pack' legislation now enables the EU institutions to 'get the system within the normal EU process', as the MEPs have often demanded.[48] 'Getting the system within the normal EU process' connotes the idea that the Union institutions themselves, rather than non-EU or external institutions, should be in charge of administering financial assistance to the ailing Euro area Member States and monitoring their economic and fiscal policies. The assumption here is that, if the EU institutions were acting within the scope of EU law, then the European Parliament would have more say on economic surveillance, and transparency and accountability would be improved in various ways. The preceding analysis serves to illustrate that the EU institutions now possess the tools that will enable them to closely monitor the economic, financial and fiscal developments in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. There exist clear gains to EU monitoring over the current state of affairs in terms of its democratic legitimacy, transparency and accountability. These will be examined in the next chapter.

Overall, there are three issues here which are of particular importance. First, there is a 'shift towards direct interference with the distribution and redistribution of resources'.[49] This is readily apparent from the principles governing the adjustment path

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47 Kenneth Armstrong (n 1) 616.

48 See, e.g., Committee on Economic and Monetary Affairs, 'MEPs Anticipate End of the Troika' (16 January 2014) <http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32420/html/MEPs-anticipate-end-of-the-Troika> accessed 2 October 2014.

49 Alicia Hinarejos (n 15) 1632 fn 36.

towards the medium-term budgetary objective,[50] as well as from the Council recommendations addressed to the Member States in the context of the European Semester, which will be examined below. Second, '[v]ia the backdoor of economic governance the EU moreover enters domains of national sovereignty, such as unemployment, labour cost and wage bargaining',[51] with the grave social repercussions that could potentially flow therefrom. In this connection, the European Trade Union Confederation has expressed its fear 'that the Commission seeks new ways to intervene in areas such as collective bargaining and labour market institutions'.[52] To be sure, these policy areas are important from a macroeconomic perspective.[53] Third, as regards the EMU architecture, [t]he danger is that, in an effort to avoid the radical changes that come with a classic fiscal federalism model, the euro area may be slowly edging towards the surveillance model (or rather, progressing along its spectrum) without the necessary awareness and debate.'[54]

The implementation of the revised EU economic rules

So far we have concentrated on the revised EU economic governance framework and its bearing on national economic and budgetary policy. We have examined the inroads that

50 Regulation 1466/97, third subparagraph of Articles 5(1) and 9(1), as amended by Regulation 1175/2011.

51 Sonja Bekker and Ivana Palinkas, 'The Impact of the Financial Crisis on EU Economic Governance: A Struggle between Hard and Soft Law and Expansion of the EU Competences?' (2012) 17 Tilburg Law Review 360, 366.

52 ibid 363.

53 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2012) 173 final Towards a job-rich recovery [2012] 20.

54 Alicia Hinarejos (n 15) 1640.

these legal instruments make into national fiscal and economic policy. We now turn to consider the implementation of these rules. It has been rightly argued that '[i]t is one thing to write down obligations, whether in Treaty provisions, legislation, other international Treaties or contracts. It is quite another to enforce them.'[55] The challenge in this section is to assess the rigorousness of EU and independent national economic oversight.

Again, the principal default line in our analysis is between borrower and lender States. To shed light on the implementation of these measures, we will be focusing on Greece and Germany. As regards crisis-hit countries, it will be argued that the EU institutions seek to steer national economic policy in great detail. The bailout terms agreed upon in the context of the two Greek rescue packages involved a detailed prescription of a large number of economic and social policy measures through which it was hoped that Greece would enhance its competitiveness and secure sound and sustainable public finances. On the contrary, country-specific recommendations to Germany usually stop short of suggesting how to achieve the aims set out therein.

The lender States

This section will focus on the bearing of the crisis-induced economic developments on the lender Member States, as well as on the EU economic guidance addressed to them in the context of the European Semester, most notably in the form of (i) country-specific recommendations; (ii) in-depth reviews under Regulation 1176/2011 on the prevention

[55] Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 37.

and correction of macroeconomic imbalances; and (iii) Commission opinions on draft budgetary plans. These will now be examined in turn.

The crisis-induced economic developments and their bearing on lender States

It is almost trite to say that the budgetary sovereignty of the States which granted financial assistance to the ailing Euro area countries has been *de facto* curtailed, in that the lender States have less money to spend for other purposes.[56] For example, Germany's contribution to the first Greek rescue package was approximately €22.4 billion.[57] It also agreed to contribute up to €147.6 billion (€123 billion + 20%) to the European Financial Stability Facility (EFSF).[58] Germany's total contribution to the first Greek rescue package and the EFSF was approximately €170 billion, which was much higher than the biggest item in the budget and considerably exceeded half of the federal budget.[59] What is more, the total value of Germany's paid-in shares in the authorised capital stock of the European Stability Mechanism (ESM) is €21.71712 billion, and the total value of its callable shares is €168.30768 billion. Accordingly, the Federal Ministry of Finance is

56 Paul Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' (2014) Oxford Legal Studies Research Paper 1/2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517434> accessed 2 May 2015, 30; Kaarlo Tuori, 'The European Financial Crisis – Constitutional Aspects and Implications' (2012) EUI Working Paper LAW 2012/28, 40-43.

57 Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik (Währungsunion-Finanzstabilitätsgesetz - WFStG) vom 7. Mai 2010 (BGBI I S. 537), § 1 Abs. 1.

58 Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus (Euro-Stabilisierungsmechanismus-Gesetz) vom 22. Mai 2010 (BGBI I S. 627), § 1 Abs. 1 und Abs. 6.

59 BVerfG, 2 BvR 987/10 vom 7.9.2011 <135>.

authorised to grant to the ESM up to €168.30768 billion in the form of guarantees.[60] Germany's exposure to the Euro crisis has raised concerns over the budgetary autonomy of the *Bundestag*.[61] Similar concerns have been raised in Finland.[62]

Country-specific recommendations, in-depth reviews, and opinions on draft budgetary plans: The example of Germany

We now turn to consider recommendations and opinions issued in the context of the European Semester, as well as in-depth reviews carried out within the same framework. It is recalled that the European Semester is 'the EU's calendar for economic policy coordination'.[63] The detailed structure of the European Semester is as follows:

> The Semester begins with the **Annual Growth Survey in November**, where the Commission suggests EU-wide economic priorities for the following 12-18 months. At the same time, the Commission screens Member States for potential economic imbalances in the Alert Mechanism Report, and follows up with further analysis of selected economies in March. The AGS and AMR are discussed by Member States in the winter, and used as a basis for agreeing EU-wide economic priorities in March. These are taken into account in their annual budget and reform plans (submitted in April). The plans are analysed by the Commission to prepare the **country-specific recommendations each spring**. There is also a new budgetary timetable for the **euro area**, where draft budgetary plans are assessed by the Commission and discussed in the Eurogroup before final budgets are adopted in December.[64]

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60 Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz), as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9048; 17/10126), § 1.

61 BVerfG, 2 BvR 987/10 vom 7.9.2011; BVerfG, 2 BvR 1390/12 vom 12.9.2012.

62 Kaarlo Tuori and Klaus Tuori (n 14) 195-99.

63 European Commission, 'Q&A: Country-Specific Recommendations 2014' MEMO/14/388 (2 June 2014) <http://europa.eu/rapid/press-release_MEMO-14-388_en.htm> accessed 2 October 2014, 8.

64 ibid.

'Country-specific recommendations (CSRs) offer tailored advice to Member States on how to boost growth and jobs, while maintaining sound public finances.'[65] The CSRs are 'the product of extensive and objective technical analysis, validated by thorough discussion between EU leaders and ministers'.[66] They 'focus on what can realistically be achieved in the next 12-18 months to make growth stronger, more sustainable and more inclusive, in line with the Europe 2020 strategy, the EU's long-term growth and jobs plan'.[67]

The breadth of CSRs is striking. These can potentially cover four main areas: 'public finances'; the 'financial sector'; 'structural reforms'; and 'employment and social policies'. These are further divided into a large number of sub-categories. For example, recommendations about public finances can potentially concern the need to secure or maintain 'sound public finances', 'pension and healthcare systems', the 'fiscal framework' of the Member State concerned, or 'taxation'. Not all EU countries receive recommendations on each of these issues every year. Rather, as shown in the following graph, policy advice is tailored to the perceived needs of each country.[68]

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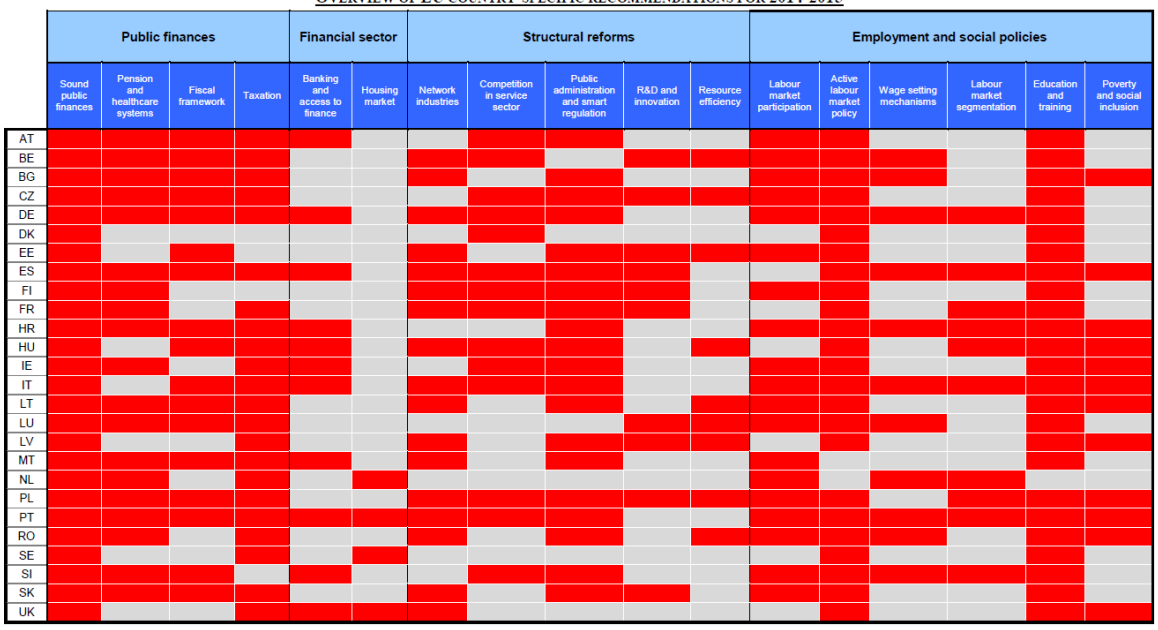
65 ibid 1.

66 ibid 9.

67 ibid 1.

68 European Commission, 'Overview of EU Country-Specific Recommendations for 2014-2015' <http://ec.europa.eu/europe2020/pdf/csr2014/overview_recommendations_2014_by_member_state.pdf> accessed 2 October 2014.

OVERVIEW OF EU COUNTRY-SPECIFIC RECOMMENDATIONS FOR 2014-2015



Previous research in this area suggests that CSRs addressed to Member States have both increased in number and become much more detailed over the last few years.[69] 'They have become more precise, contain deadlines and at times make detailed policy suggestions, sometimes referring to specific national programmes instead of to broad policy themes.'[70]

One might have expected that the CSRs which are addressed to stronger economies would be rather general, laconic, or abstract in terms of their content. This is not the case. The 2014 CSRs to Germany serve to illustrate this point. Upon criticising the German Republic for the limited progress it had made, in its opinion, in various policy areas since the 2013 CSRs, the Commission recommended that the Council make four recommendations to Germany. As shown in the graph above, these covered almost all policy areas (see 'DE' for *Deutschland*). For the most part, the CSRs addressed to

69 Sonja Bekker (n 27) 15-16.

70 ibid 17.

Germany only set out *the objectives* that the German authorities should pursue. They almost always stopped short of prescribing *the means* to achieve those objectives. Be that as it may, their level of detail was striking:

1. Pursue growth-friendly fiscal policy and preserve a sound fiscal position, ensuring that the medium-term budgetary objective continues to be adhered to throughout the period covered by the Stability Programme and that the general government debt ratio remains on a sustained downward path. In particular, use the available scope for increased and more efficient public investment in infrastructure, education and research. Improve the efficiency of the tax system, in particular by broadening the tax base, notably on consumption, by reassessing the municipal real estate tax base, by improving the tax administration and by reviewing the local trade tax, also with a view to foster private investment. Make additional efforts to increase the cost-effectiveness of public spending on healthcare and long-term care. Ensure the sustainability of the public pension system by (1) changing the financing of new non-insurance/extraneous benefits ("*Mütterrente*") to funding from tax revenues, also in order to avoid a further increase of social security contributions, (ii) increasing incentives for later retirement, and (iii) increasing the coverage in second and third pillar pension schemes. Complete the implementation of the debt brake consistently across all *Länder*, ensuring that monitoring procedures and correction mechanisms are timely and relevant. Improve the design of fiscal relations between the federation, *Länder* and municipalities also with a view to ensuring adequate public investment at all levels of government.
2. Improve conditions that further support domestic demand, inter alia by reducing high taxes and social security contributions, especially for low-wage earners. When implementing the general minimum wage, monitor its impact on employment. Improve the employability of workers by further raising the educational achievement of disadvantaged people and by implementing more ambitious activation and integration measures in the labour market, especially for the long-term unemployed. Take measures to reduce fiscal disincentives to work, in particular for second earners, and facilitate the transition from mini-jobs to forms of employment subject to full mandatory social security contributions. Address regional shortages in the availability of fulltime childcare facilities and all-day schools while improving their overall educational quality.
3. Keep the overall costs of transforming the energy system to a minimum. In particular, monitor the impact of the Renewable Energy Act reform on the cost-effectiveness of the support system for renewable energies. Reinforce efforts to accelerate the expansion of

the national and cross-border electricity and gas networks. Step up close energy policy coordination with neighbouring countries.

4. Take more ambitious measures to further stimulate competition in the services sector, including certain professional services, also by reviewing existing regulatory approaches and converging towards best practices across *Länder*. Identify the reasons behind the low value of public contracts open to procurement under EU legislation. Increase efforts to remove existing planning regulations which restrict new entries in the retail sector. Take action to remove the remaining barriers to competition in the railway markets. Pursue consolidation efforts in the *Landesbanken* sector, including by improving the governance framework.[71]

These recommendations were the result of the in-depth review of the German economy which was carried out by the Commission. It is recalled that the Commission screens the EU Member States for potential macroeconomic imbalances on the basis of a scoreboard of indicators and carries out an in-depth review of the macroeconomic situation in a Member State where it is established that further examination of the emerging issues is warranted.[72] In 2014, the Commission identified imbalances in Belgium, Bulgaria, Germany, Ireland, Spain, France, Croatia, Italy, Hungary, the Netherlands, Slovenia, Finland, Sweden, and the United Kingdom. As regards these countries, the Commission was of the view that Croatia, Italy and Sweden were experiencing excessive imbalances.[73]

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71 Commission Recommendation COM(2014) 406 final Recommendation for a Council recommendation on Germany's 2014 national reform programme and delivering a Council opinion on Germany's 2014 stability programme [2014] <http://ec.europa.eu/europe2020/pdf/csr2014/csr2014_germany_en.pdf> accessed 2 October 2014.

72 Regulation (EU) 1176/2011 (n 3).

73 Communication from the Commission to the European Parliament, the Council and the Eurogroup COM(2014) 150 final Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances [2014] 12.

Again, one might be misguided in believing that the German authorities would get an easier ride from the Commission than other Member States. The existing evidence suggests otherwise. The in-depth review for Germany resulted in a 124-page report which scrutinised Germany's current account surplus, household consumption and savings, private investment dynamics, corporate sector savings, public investment, and the banking sector.[74] The Commission was overtly critical of Germany's large and persistent current account surplus and recommended that Germany strengthen domestic demand, thereby enhancing the economy's growth potential.[75] The Commission noted that '[a]n increase in aggregate demand in Germany ... would also entail the additional benefit of helping the economic recovery in the euro area'.[76] 'Spillovers from higher domestic demand in Germany could support overall aggregate demand in the euro area.'[77] The executive summary of the results of the in-depth review of Germany was as follows:

> **Germany** is experiencing *macroeconomic imbalances, which require monitoring and policy action*. In particular, the current account has persistently recorded a very high surplus, which reflects strong competitiveness while a large amount of savings were invested abroad. It is also a sign that domestic growth has remained subdued and economic resources may not have been allocated efficiently. Although the current account surpluses do not raise risks similar to large deficits, the size and persistence of the current account surplus in Germany deserve close attention. The need for action so as to reduce the risk of adverse effects on the functioning of the domestic economy and of the euro area is particularly important given the size of the German economy.
> More specifically, relatively low private and public sector investment together with subdued private consumption over a longer period

74 European Commission, *Macroeconomic Imbalances: Germany 2014* (EUROPEAN ECONOMY Occasional Paper 174/2014, European Union 2014).

75 ibid 13.

76 ibid 14.

77 ibid.

> contributed to modest growth, falling trend growth, increased dependence of the economy on external demand and the build-up of the external surplus. The challenge is, therefore, to identify and implement measures that help strengthen domestic demand and the economy's growth potential. Higher investment in physical and human capital, and promoting efficiency gains in all sectors of the economy, including by unleashing the growth potential of the services sector, which would also contribute to further strengthening of labour supply, are central policy challenges.[78]

Last, as regards the common budgetary timeline established by Regulation 473/2013, Member States must submit annually to the Commission and to the Eurogroup a draft budgetary plan for the forthcoming year by 15 October. This plan must be consistent with the recommendations issued in the context of the SGP and, where applicable, with recommendations issued in the context of the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011 and with opinions on economic partnership programmes.[79]

Germany submitted on 15 October 2013 a Draft Budgetary Plan for 2014,[80] and the Commission adopted an opinion on it.[81] The Commission noted that 'Germany [was] subject to the preventive arm of the SGP and should preserve a sound fiscal position which ensure[d] compliance with the medium-term objective.'[82] 'As the debt ratio

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78 ibid 3.

79 Regulation 473/2013, Article 6.

80 Federal Ministry of Finance, 'Draft Budgetary Plan According to Regulation (EU) No 473/2013' (October 2013) <http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/dbp/de_2013-10-15_dbp_en.pdf> accessed 6 October 2014.

81 Commission Opinion C(2013) 8001 final of 15.11.2013 on the Draft Budgetary Plan of Germany [2013].

82 ibid consideration no 4.

exceeded 60% of GDP and stood at 80% of GDP in 2011 … Germany [was] subject to the transitional arrangements as regards compliance with the debt criterion.'[83]

In the Commission's view, '[t]he macroeconomic scenario underlying the Draft Budgetary Plan [was] plausible and broadly in line with the Stability Programme's macroeconomic scenario. It was also broadly in line with the Commission['s] 2013 Autumn Forecast…'[84] However, 'Germany's federal budget and fiscal projections at the level of general government [were] based on the federal government's own macroeconomic forecast which … [was] not formally endorsed by an independent body as defined in Regulation (EU) No 473/2013.'[85] This conclusion was tempered by the fact that 'the preparation of the government's projections involve[d] the independent Joint Economic Forecast issued twice a year by leading research institutes and used as a benchmark for the government forecast'.[86]

The Commission further noted that the draft budgetary plan 'project[ed] a balanced general government budget for 2013, which [was] a slight improvement compared to the Stability Programme's deficit target of ½% of GDP'.[87] Moreover, in the Commission's view, '[t]he budgetary targets [were] broadly in line with the Commission['s] 2013 Autumn Forecast and appear[ed] overall realistic.'[88] Furthermore,

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83 ibid.

84 ibid consideration no 5.

85 ibid consideration no 6.

86 ibid.

87 ibid consideration no 7.

88 ibid consideration no 8.

the Commission noted that '[t]he Draft Budgetary Plan project[ed] a diminishing debt-to-GDP ratio in 2013 and 2014' which '[was] broadly in line with the Stability Programme and also with the Commission['s] Autumn 2013 Forecast'.[89] Consequently, 'Germany's debt ratio [was] declining appropriately, which [would] ensure compliance with the debt rule at the end of the transition period in 2014'.[90] In addition, '[a]ccording to the information provided in the Draft Budgetary Plan, Germany [was] expected to continue to comply with its medium-term objective'.[91]

As regards Council recommendations issued to Germany in the context of the 2013 European Semester, the Commission argued that:

> The Draft Budgetary Plan does not address the Council recommendations issued to Germany in the context of the 2013 European Semester with respect to enhancing the cost-effectiveness of public spending on healthcare and long-term care, improving the efficiency of the tax system, using the available scope for increased and more efficient spending on education and research, completing the implementation of the constitutional balanced-budget rule at *Länder* level, reducing high taxes and social security contributions, especially for low-wage earners; and removing disincentives for second earners.[92]

The Commission concluded its opinion on the 2014 German draft budgetary plan as follows:

> Overall, based on the 2013 Autumn Forecast, the Commission is of the opinion that the Draft Budgetary Plan of Germany submitted on 15 October 2013 is compliant with the rules of the SGP. The Commission is also of the opinion that Germany has made no progress with regard to the structural part of the fiscal recommendations issued by the Council in the

89 ibid consideration no 9.

90 ibid consideration no 10.

91 ibid consideration no 11.

92 ibid consideration no 12.

> context of the 2013 European Semester and thus invites the authorities to accelerate progress.[93]

Overall, the Commission's opinion on the German draft budgetary plan was quite short (that is, only 3 pages long) and did not go into too much detail. This can be readily explained by the fact that the Commission has very little time to scrutinise national budgets.[94] The Commission's opinion primarily examined the *prima facie* compatibility of the draft budgetary plan with the SGP precepts (most notably in relation to public deficit, the volume of debt, and the medium-term budgetary objective) on the basis of the information provided by the German authorities. Moreover, the macroeconomic scenario and forecasts on which the budget was premised also featured quite prominently in the Commission's opinion, and their compatibility with the Commission's own forecast was thoroughly examined. In this connection, it is particularly noteworthy that the Commission highlighted the fact that the federal government's own macroeconomic forecast had not been endorsed by an independent body within the meaning of Regulation 473/2013. It is further worth highlighting the fact that the Commission noted at some length that the draft budget '[did] not address' many of the Council recommendations addressed to Germany in the context of the 2013 European Semester.

The crisis-hit Euro area countries: The example of the Greek bailout terms

Apart from the economic restraints flowing from the revised EU economic governance framework, the crisis-hit Euro area Member States are experiencing a further loss of their fiscal and economic sovereignty through the conditionality attached to the financial

93 ibid consideration no 13.

94 Regulation 473/2013, Article 7(1).

assistance which was granted to them.[95] The crisis-hit countries had to implement various reforms in return for financial assistance. In their case, the creditors possessed a much more credible 'enforcement mechanism'. The loans granted to the ailing Euro area Member States were disbursed in instalments, and the release of further instalments was made conditional upon verification by the creditors that the economic policy of the beneficiary country accorded with its macroeconomic adjustment programme.

A comprehensive elucidation of these far-reaching implications for national economic and social policy is only possible through recourse to the Memoranda of Understanding which were signed by the bailed-out countries. Space precludes a detailed exegesis of all the Memoranda of Understanding which were signed by the crisis-hit Euro area countries. Instead, we will be focusing on the Greek bailout terms. These have been described by one commentator as 'the most drastic intervention in a Member State's economic and social policy ever decided by the EU'.[96] To be sure, the Greek authorities agreed to those terms, though one might want to argue that a State on the brink of bankruptcy has much less bargaining power than its creditors.

'To avoid duplication with measures set out in the Economic Adjustment Programme, there are no additional recommendations for Greece.'[97] Moreover, '[f]or the Member States that are subject to macroeconomic adjustment programmes and benefiting from financial assistance, the surveillance of their imbalances and monitoring of

95 See among others Kaarlo Tuori (n 56) 39-40.

96 Ronald Bieber, 'Observer – Policeman – Pilot? On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the European Union' EUI Working Paper LAW 2011/16, 4.

97 European Commission, 'European Semester 2014' (3 September 2014) <http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm> accessed 2 October 2014.

corrective measures will take place in the context of their programmes.'[98] Furthermore, as regards the common budgetary timeline which was established by Regulation 473/2013, '[i]n order to avoid a multiplying of reporting requirements, Regulation 473/2013 explicitly makes exception for Member States subject to a macroeconomic adjustment programme.'[99]

The first Greek Memorandum of Understanding

The first Greek Memorandum of Understanding was signed in 2010 and consisted of four documents: a letter sent from the Greek Minister of Finance and the Governor of the Bank of Greece to the President of the Eurogroup, the Commissioner for Economic and Monetary Affairs and the Euro, and the President of the ECB, through which Greece requested financial assistance from the Euro area Member States;[100] a Memorandum of Economic and Financial Policies (MEFP), which outlined the economic and financial policies that the Greek Government and the Bank of Greece would implement during the remainder of 2010 and in the period 2011-2013;[101] a Memorandum of Understanding on Specific Economic Policy Conditionality (MoU), which specified detailed economic policy measures that would serve as benchmarks for assessing policy performance in the

98 European Commission, Report from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee COM(2013) 790 final Alert Mechanism Report 2014 (13 November 2013) <http://ec.europa.eu/europe2020/pdf/2014/amr2014_en.pdf> accessed 2 October 2014, 4.

99 European Commission, 'Draft Budgetary Plans of Euro Area Member States' (19 May 2014) <http://ec.europa.eu/economy_finance/economic_governance/sgp/budgetary_plans/index_en.htm> accessed 6 October 2014.

100 This can be found in European Commission, *The Economic Adjustment Programme for Greece* (EUROPEAN ECONOMY Occasional Paper 61/2010, European Union 2010) 37-38. A 'parallel request for financial assistance' was sent to the International Monetary Fund.

101 ibid 37.

context of the quarterly reviews under the financial assistance programme;[102] and a Technical Memorandum of Understanding (TMU), which set out 'the understandings regarding the definitions of the indicators subject to quantitative targets' and described 'the methods to be used in assessing the program performance and the information requirements to ensure adequate monitoring of the targets'.[103]

The MEFP provided that the main objectives of the programme were 'to correct fiscal and external imbalances and restore confidence'.[104] These were seen to require 'a major reorientation in the economy', which would be achieved through the use of 'all available fiscal, financial and structural policies'.[105] These will now be examined in turn.

As regards fiscal policy, the MEFP provided that government expenditure should be cut by 7% of GDP.[106] This was to be achieved through the reduction of 'wage and entitlement program costs', as well as through 'other reductions in government spending, including by replacing over time only 20 percent of retiring employees, and by consolidating municipalities and local councils'.[107] Consequently, the MEFP had a bearing on *public sector pay*, *social benefits*, *the public sector's hiring policy*, and even

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102 ibid 37.

103 ibid 85.

104 ibid 40.

105 ibid 40.

106 ibid 43.

107 ibid 43.

on *the administrative division of Greece*. Further cuts targeted 'investment spending' and 'the organization of public administration'.[108]

Moreover, according to the MEFP, government revenues should be increased by 4% of GDP.[109] This should be achieved through various *tax increases*, as well as 'other measures to combat tax evasion' and to improve 'collection efficiency'.[110]

What is more, the MEFP moved beyond 'these direct fiscal steps for the budget', and required that the Greek Government 'initiat[e] a series of important structural fiscal reforms'.[111] Notably, the MEFP provided that the Greek Government should undertake substantial *pension reforms*, which included a merger of the existing pension funds into three funds; an increase of the normal retirement age to 65 years; restrictions on early retirement; a reduction in the number of 'heavy and arduous professions' which are treated more favourably in this respect; and the introduction of 'a means-tested social pension for all citizens'.[112] Moreover, the Greek Government would implement *reforms in the health sector*, which primarily concerned new accounting rules for hospitals, 'improvements in pricing and costing mechanisms', and a merger of the health funds.[113] The Greek Government was further put under an obligation to reform *tax administration*, and the MEFP outlined a strategy to be followed by the revenue authority. This involved,

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108 ibid 43.

109 ibid 43.

110 ibid 43.

111 ibid 44.

112 ibid 44.

113 ibid 44.

inter alia, 'collecting on the large stock of tax arrears', 'substantially improving enforcement operations', as well as 'developing and maintaining a comprehensive compliance risk management framework'.[114] The MEFP even went as far as requiring the Greek Government to 'prosecut[e] the worst offenders',[115] thereby making inroads into Greek criminal law.

The 'structural fiscal reforms' provided for in the MEFP also required that the Greek Government amend the country's *budgetary framework*. The far-reaching reforms mandated by the MEFP were as follows:

> …[T]he government will introduce standardized commitment control procedures for all public entities to prevent the re-emergence of arrears; ensure that all budgets are prepared within a medium-term fiscal strategy for the general government and presented before the start of the fiscal year; introduce top-down budgeting with expenditure ceilings, a sufficient contingency reserve, and a medium-term expenditure framework for the State budget; require a supplementary budget for any overruns above this contingency provision; and amend the 1995 budget management law to give effect to the above. The government will continue to … make further improvements over the course of the program, including the creation of an independent fiscal agency attached to parliament.[116]

As regards the financial sector, the Government was required to establish 'a fully independent Financial Stability Fund (FSF)', which would provide equity support to ailing banks.[117] The Greek Government was also put under an obligation to reform *insolvency law*, most notably through the amendment of the '[c]orporate debt

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114 ibid 44-45.

115 ibid 44.

116 ibid 45.

117 ibid 47.

restructuring legislation' and a new 'personal debt restructuring law'.[118] Other reforms concerned *the arrangements for supervising banks*.[119]

As far as structural reforms (or 'structural policies') are concerned, the MEFP provided that:

> These will enhance the flexibility and productive capacity of the economy, ensure that wage and price developments restore and then sustain international competitiveness, and *progressively alter the economy's structure* towards a more investment and export-led growth model [emphasis added].[120]

Again, the MEFP set out in a very detailed manner the reforms to be implemented by Greece in return for financial assistance. Apart from the public sector and health care reforms outlined above, the MEFP provided for various far-reaching *labour reforms*. More specifically, the MEFP mandated that the Greek Government effectuate changes in public procurement; make private sector wages 'more flexible to allow cost moderation for an extended period of time'; 'reform the legal framework for wage bargaining in the private sector'; adopt legislation on the minimum wage 'in order to promote employment creation for groups at risk'; 'extend probationary periods'; 'recalibrate rules governing collective dismissals'; and 'facilitate greater use of part-time work'.[121] Moreover, the MEFP provided for various reforms for the purposes of '*improving the business environment and bolstering competitive markets*' [emphasis added], most notably through cuts in 'licensing and other costs for industry', the opening-up of restricted professions,

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118 ibid 47.

119 ibid 47.

120 ibid 48.

121 ibid 48.

and the progressive liberalisation of network industries, 'especially in the transport and energy sector'.[122] Other reforms concerned *state enterprises* ('most notably in the railway and public transportation'), whose financial performance had to be improved.[123] The Greek Government would also 'review the role for *divesting state assets,* including of land owned by public enterprises or the government' [emphasis added].[124]

The MEFP also included tables of quantitative performance criteria and structural benchmarks against which the Greek Government's progress in the implementation of the programme would be assessed.[125] Further, the annual impact of all the fiscal measures mandated by the programme was quantified.[126]

The Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) provided that the disbursement of the financial assistance granted to Greece would be subject to 'quarterly reviews of conditionality', the detailed criteria for which were specified in the MoU.[127] Accordingly, the MoU set out the actions required on behalf of the Greek authorities for the successive reviews until the end of 2011 and a timetable for their completion. The level of detail is unprecedented. Space precludes a comprehensive elucidation of the various reforms posited in the MoU, which were grouped into fiscal and structural reforms. Suffice it to say for present purposes that the

122 ibid 48-49.

123 ibid 49.

124 ibid 49.

125 ibid 56-57.

126 ibid 51-55.

127 ibid 59.

fiscal reforms required by the MoU for the first review of the programme were as follows:

> -Increase in VAT rates, with a yield of at least EUR 1800 million for a full year (EUR 800 million in 2010);
> -Increase in excises for fuel, tobacco and alcohol, with a yield of at least EUR 1050 million for a full year (EUR 450 million in 2010);
> -Reduction in the public wage bill by reducing the Easter, summer and Christmas bonuses and allowances paid to civil servants, with net savings amounting to EUR 1500 million for a full year (EUR 1100 million in 2010);
> -Elimination of the Easter, summer and Christmas bonuses paid to pensioners, while protecting those receiving lower pensions, with net savings amounting to EUR 1900 for a full year (EUR 1500 million in 2010);
> -Cancel budgetary appropriations in the contingency reserve with the aim of saving EUR 700 million;
> -Reduce the highest pensions with the aim of saving EUR 500 million for a full year (EUR 350 million in 2010);
> -Abolish most of the budgetary appropriation for the solidarity allowance (except a part for poverty relief) with the aim of saving EUR 400 million;
> -Reduce public investment by EUR 500 million compared to plans;
> -Parliament adopts, as planned in the stability programme of January 2010, a Law introducing a progressive tax scale for all sources of income and a horizontally unified treatment of income generated from labour and assets;
> -Parliament adopts, as planned in the stability programme of January 2010, a Law abrogating exemptions and autonomous taxation provisions in the tax system, including income from special allowances paid to civil servants. The law applies retroactively from January 1, 2010.[128]

The second Greek Memorandum of Understanding

The terms of the second Greek bailout were set out in the following four documents: a letter of intent dated 11 March 2012 which was sent by the Greek Prime Minister, the Greek Deputy Prime Minister and the Governor of the Bank of Greece to the President of the Eurogroup, the Commission Vice-President for Economic and Monetary Affairs and

[128] ibid 59-60.

the Euro, and the President of the ECB;[129] a Memorandum of Economic and Financial Policies (MEFP), which 'outline[d] the economic and financial policies that Greece [would] implement during the remainder of 2012 and in the period 2013-14';[130] a Memorandum of Understanding on Specific Economic Policy Conditionality (MoU), which 'specifie[d] additional structural policies, and se[t] a precise time frame for their implementation';[131] and a Technical Memorandum of Understanding (TMU), which 'se[t] out the understandings regarding the definitions of the indicators subject to quantitative targets (performance criteria and indicative targets), specified in the tables annexed to the Memorandum of Economic and Financial Policies' and 'describe[d] the methods to be used in assessing the program performance and the information requirements to ensure adequate monitoring of the targets'.[132]

Again, the MEFP contained very prescriptive policies. The Greek Government undertook to implement various reforms, which were grouped into 'economic policies', 'fiscal institutional reforms', 'financial sector policies', 'privatization', and 'structural reforms'. These will now be briefly examined in turn.

As regards economic reforms, the Greek Government was required to achieve a general government primary surplus of 4.5% of GDP by 2014.[133] This was to be achieved

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129 This can be found in European Commission, *The Second Economic Adjustment Programme for Greece* (EUROPEAN ECONOMY Occasional Paper 94/2012, European Union 2012) 93-94. The letter was also 'copied' to the Managing Director of the International Monetary Fund.

130 ibid 93.

131 ibid 114.

132 ibid 173.

133 ibid 96.

through *public sector wage bill reductions*, viz., 'reform of the public sector employee compensation', 'personnel reductions', and 'controls on hiring'.[134] In this connection, the MEFP further set out specific quantitative targets. For example, the Greek Government 'remain[ed] committed to reduce general government employment by at least 150,000 in the period 2011-15' and to apply a 1:5 hiring-to-attrition ratio.[135]

Moreover, the Greek Government undertook to implement far-reaching *pension, health spending and social spending reforms*. These reforms were posited in great detail. For example, the Greek Government was required to 'reduce … supplementary pensions above €200 per month', to 'reduce by 12 percent the part for main pensions exceeding €1,300 a month', and 'to reduce public spending on outpatient pharmaceuticals from 1.9 to $1^{1/3}$ percent of GDP'.[136] The MEFP further provided for a '[r]estructuring of government operations', primarily through 'closing and downsizing general government units', the outsourcing of government functions, and 'the rationalization of defence spending (without compromising defense capabilities)'.[137]

Other economic reforms included *tax reforms* (most notably, 'the elimination of several tax exemptions and preferential regimes') and *revenue administration reforms*.[138] The latter ones were set out in considerably more detail under the heading 'Fiscal

134 ibid 97.

135 ibid 97.

136 ibid 98.

137 ibid 98-99.

138 ibid 99.

Institutional Reforms'.[139] The MEFP provided that 'revenue administration … [would] need to be overhauled completely'.[140] To this end, it mandated a host of institutional reforms, most notably the setting-up of an internal affairs service for the purposes of fighting corruption; the establishment of a large taxpayer unit, a debt collection unit, and an audit department; and the appointment of a Secretary General of the revenue administration.[141] It should be further noted that the posited 'institutional reforms' made inroads into *tax law and criminal law*, mandating *inter alia* that the Greek Government 'forego any tax amnesties', restrict the suspension of criminal prosecution[s] and asset freezing for tax debt and overdue social security contributions, and transmit 'complaint reports related to confirmed unpaid tax debts arising from an audit … to the prosecution services'.[142]

The financial sector policies outlined in the MEFP primarily concerned bank recapitalisation and resolution, and the oversight of the financial sector.[143] Furthermore, the MEFP required that the Greek Government 'accomplish *a fundamental shift of public assets to private sector control*' (emphasis added), through '[t]ransferring assets in key sectors of the economy (such as ports, airports, motorways, energy, and real estate) to

139 ibid 100-03.

140 ibid 100.

141 ibid 100-01.

142 ibid 100-02.

143 ibid 103-07.

more productive uses'.[144] The MEFP even went as far as listing some of the enterprises which should be privatised, and set the target for government proceeds at €50 billion.[145]

Moreover, '[t]he government [would] formulate new policies regarding the use of assets (e.g. town planning, REITS) and set up new regulatory authorities and frameworks (e.g. for water, ports, airports, motorways)'.[146] It is particularly noteworthy that this privatisation process should be 'insulated from political pressures', through the setting-up of a Hellenic Republic Asset Development Fund, which would 'operate under a mandate to privatize assets at prevailing market conditions as soon as technically feasible and in an open and transparent manner'.[147]

Lastly, the MEFP mandated wide-ranging 'structural reforms' in relation to *labour, product and service markets*. The MEFP provided for 'a reduction in unit labor costs of about 15 percent during the program period'.[148] As regards collective bargaining, 'all collective contracts should have a maximum duration of 3 years', and 'the grace period after a contract expires [was] reduced from six to three months'.[149] Moreover, the MEFP provided for 'a freeze of "maturity" provided by law and/or collective agreements (referring to all automatic increases in wages dependent on time) until unemployment

144 ibid 107.

145 ibid 108-09.

146 ibid 109.

147 ibid 109.

148 ibid 109.

149 ibid 109.

falls below 10%', and an '[e]limination of unilateral recourse to arbitration, allowing requests for arbitration only if both parties consent'.[150]

The Greek Government further undertook to make various adjustments to wage labour costs, stating:

> We will legislate: (i) an immediate realignment of the minimum wage level determined by the national general collective agreement by 22 percent at all levels based on seniority, marital status and daily/monthly wages; (ii) its freeze until the end of the program period; and (iii) a further 10 percent decline for youth, which will apply generally without any restrictive conditions (under the age of 25) … These measures will permit a decline in the gap in the level of the minimum wage relative to peers (Portugal, Central and Southeast Europe). … Together, with social partners, we will prepare by end-July 2012 a clear timetable for an overhaul of the national general collective agreement. This will bring Greece's minimum wage framework into line with that of comparator countries…[151]

The product and service market reforms were set out in much less detail than the labour market reforms. Notably, they included the abolition of restrictions in 'highly restricted professions' – a recurring theme in Greek MoUs.[152] The Greek Government further committed 'to continue with improvements in Greece's business environment', most notably through 'fast-tracking investments, speeding up licensing procedures and facilitating electronic business registration'.[153] Environmental licensing procedures, too,

150 ibid 110.

151 ibid 110.

152 ibid 111.

153 ibid 111.

should be speeded up, and hence the MEFP made incursions into Greek environmental law.[154]

'In support of efforts to improve the business climate', Greece further aimed at 'improving *the efficiency of the judicial system*' (emphasis added).[155] The Greek Government undertook to address the case backlog in the courts, to speed up case processing, to improve the performance and accountability of courts, and to reform the Code of Civil Procedure.[156]

EU and national fiscal oversight

The discussion thus far has focused on the conditionality attached to the financial assistance which was granted to Greece. The focus now shifts to EU and independent national oversight of Greek fiscal and economic policy. EU oversight is comprised of the monitoring carried out by the Commission, in liaison with the European Central Bank (ECB) and the International Monetary Fund (IMF). These three institutions are often collectively referred to as 'the Troika' (now 'the Quadriga', which also includes the ESM). Independent national fiscal oversight is carried out, in the case of Greece, by the Parliamentary Budget Office and the recently-established Fiscal Council. These will now be examined in turn.

As regards EU oversight of Greek economic and fiscal policy, it is recalled that financial assistance to Greece is disbursed in instalments, and the release of further

154 ibid 112.

155 ibid 112.

156 ibid 112. For an overview of these reforms, see George Dellis, *Η Διοικητική Δικαιοσύνη σε αναζήτηση ταχύτητας: Ανατρέποντας το μύθο της «ωραίας κοιμωμένης»* (Nomiki Bibliothiki 2013) ch 3-4.

instalments has been made conditional upon verification by the representatives of the creditors that the economic policy of Greece accords with its adjustment programme. Accordingly, there is very rigorous assessment of the progress made by Greece with respect to its commitments. Further, there are regular surveillance missions to Greece for the purposes of on-site monitoring.

The last report on the progress made by Greece in relation to its second adjustment programme was 'based on the findings of a four-part joint Commission/ECB/IMF mission to Athens between 16-29 September 2013, 28 October-8 November 2013, 2-15 December 2013 and 24 February-17 March 2014'.[157] This gave rise to a staggering 304-page report which 'examine[d] current macroeconomic, financial and fiscal developments and assesse[d] compliance with programme conditionality'.[158]

Though more optimistic and positive-sounding than previous reports on the Greek economy, this report did not stop short of identifying the risks and uncertainties that existed, in the Commission's view, in relation to the implementation of the programme. Overall, the Commission noted that 'very sizeable challenges' remained 'in many areas'.[159] More specifically, the Commission highlighted the 'uncertainties about the extent and speed of the economic recovery in 2014', which were, in its opinion, 'significant'.[160] Further, in the Commission's view, 'improvements in the area of budget preparation' and 'very substantial improvements in public administration' were still

157 European Commission, *The Second Economic Adjustment Programme for Greece: Fourth Review – April 2014* (European Economy Occasional Paper 192/2014, European Union 2014) 1.

158 ibid 1.

159 ibid 1.

160 ibid 1.

needed, in order to 'bring Greece in line with best practices'.[161] It is particularly noteworthy that the desired improvements were posited in considerable detail in the Commission's report.[162]

As regards health care reforms, the Commission identified 'important challenges ahead' which were again explained in great detail.[163] Moreover, the Commission underlined the 'clear need for further rationalisation of the social security system' and the 'substantial' challenge that was facing the Greek authorities in relation to corruption.[164] In addition, in the Commission's view, it was 'crucial' to ensure that 'a wide range of ambitious structural reforms' would be implemented, in order to 'quickly restore and promote growth and support employment'.[165] These primarily concerned product and service markets. Furthermore, as regards judicial reform, the Commission noted that the stock of pending cases remained 'high' and outlined the measures proposed and/or implemented by the Greek Government to address the issue.[166]

Last, the Commission noted that implementation risks to the programme remained 'high'.[167] The Commission's account of these risks is worth quoting in some length, because it is indicative of the substance and tone of such reports:

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161 ibid 3.

162 ibid 3.

163 ibid 4.

164 ibid 4.

165 ibid 5.

166 ibid 6.

167 ibid 6.

> The macroeconomic recovery now seems to be more firmly established than it was expected in July 2013, but risks remain considerable, in particular in relation to perseverance in confronting vested interests. Sustained and determined reforms in the areas of product (goods and services) market, public administration and anti-corruption could clearly reduce costs for businesses and households and underpin a recovery in investment, while postponement of such reforms and incomplete implementation could perpetuate a heavy drag on the economy, making it difficult to achieve a substantial improvement in employment and productivity growth, and thus also a steady reduction of the debt-to-GDP ratio. Key reforms to revenue administration and the public administration are now beginning to bear fruit, but delays may jeopardise the generation of revenues which underpin the fiscal projections. Progress on the privatisation programme may be more significant if the heightened investor interest results in stronger participation and higher proceeds, but could also be delayed by the persistence of the significant hurdles and administrative inefficiencies still in place. Further labour market reforms would be important to complete the move towards a modern regulatory framework which is essential to attract substantial new foreign direct investment flows, but sensitivities in this area make progress in this area difficult. Finally, a lack of progress by authorities and banks in working out NPLs, cleaning and strengthening bank balance sheets with the help of private investors and management, and in improving the payment culture, could severely undermine the ability of banks to supply more credit and support strong, sustainable economic and employment growth.[168]

Apart from EU oversight over Greek economic and fiscal policy, there is also independent national fiscal oversight. This is carried out by the Budget Office of the Greek Parliament (or 'Parliamentary Budgetary Office'), which was created in 2010.[169] The Budget Office 'enjoys full independence in the exercise of its duties'[170] and is a

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168 ibid 6-7.

169 Parliament Regulations, Article 36A, inserted by Decision No 11561/05.08.2010 of the Plenary Session of the Greek Parliament (Government Gazette A' 139/10.08.2010); Law No 3871/2010 «Δημοσιονομική Διαχείριση και Ευθύνη» (fiscal management and responsibility) (Government Gazette A' 141/17.08.2010).

170 Decision No 16074/10803/20.12.2010 of the President of Parliament (Government Gazette B' 2123/31.12.2010), Article 1(2), as amended by Decision No 3175/11.03.2013 of the President of Parliament (Government Gazette B' 675/22.03.2013) and Decision No 671/23.01.2014 of the President of Parliament (Government Gazette B' 309/12.02.2014) (Budget Office Regulations).

member of the EU Network of Independent Fiscal Institutions.[171] It monitors the execution of the budget; oversees the implementation of the fiscal policies and reforms approved by the Greek Parliament (whether posited in statutory law or in the economic adjustment programme); and analyses and evaluates the budget data, the forecasts for public revenue and expenditure, and the sustainability of long-term budgetary figures.[172] It further submits reports to parliamentary committees on the attainment of the fiscal targets pursued, as posited in the medium-term fiscal framework, on the macrofiscal scenario on which budgetary planning is premised, and on the overall alignment of national fiscal policy with Law No 3871/2010 (Government Gazette A' 141/17.08.2010) on fiscal management and responsibility.[173]

The Budget Office's report for the second quarter of 2014 covered roughly the same period as the Commission report examined above.[174] The Budget Office sees its mission as one that facilitates informed decision-making by Parliament and serves to 'inform the citizens'.[175] Accordingly, it avoids being overly diplomatic and does not

171 Parliamentary Budget Office, 'First Meeting of the EU Network of Independent Fiscal Institutions (EUNIFI)' (27 November 2013) <http://www.pbo.gr/Activities/TabId/1086/ArtMID/2985/ArticleID/84/First-Meeting-of-the-EU-Network-of-Independent-Fiscal-Institutions-EUNIFI.aspx> accessed 3 October 2014; EU Independent Fiscal Institutions, 'List of Members' <http://www.euifis.eu/eng/fiscal/120/members> accessed 3 April 2017.

172 Budget Office Regulations, Article 2(1).

173 ibid Article 2(2).

174 Parliamentary Budget Office, 'Quarterly Report: April-June 2014' (28 July 2014) <http://www.pbo.gr/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=3&moduleid=5206&articleid=6001&documentid=2305> accessed 3 October 2014.

175 ibid 4.

hesitate to heavily criticise the Greek Government, the opposition, the Troika, and the economic elite in Greece. The Greek Government bears the brunt of such criticism.

Far from sugar-coating the macroeconomic situation in Greece, this 61-page report provided a long and detailed list of the uncertainties about the implementation of the adjustment programme. Though it did admit that the macroeconomic situation had improved in the last quarter of 2014,[176] the Budget Office noted that recovery was still 'weak' despite the 'slowdown of recession', and highlighted the 'many uncertainties', which primarily concerned, in its opinion, 'non-performing loans', '[d]elays in the implementation of structural reforms', '[l]ack of investments', '[d]ifficulties of the fiscal consolidation', and '[p]ublic debt'.[177] The Budget Office further noted that, even without an assistance programme, the country would still be 'under supervision', because the Troika would be 'replaced by the financial markets', and that the country might need to have recourse to the ESM for financing.[178] It is probably needless to say that this was a taboo subject in Greece, primarily because the economy had been in a severe recession for eight years.

The report did not shy away from castigating 'the absence of a minimum consensus among the major political parties in Greece', which threatened, in the opinion of the Budget Office, 'the continuity in key points of the economic and social policy'.[179] Moreover, the Budget Office noted that the IMF's public debt projections were 'based on

176 ibid 5.

177 ibid 5-6.

178 ibid 6.

179 ibid 6.

assumptions that may be defeated', thereby openly questioning the sustainability of public finances, which was another taboo subject in contemporary political discourse in Greece.[180] The Budget Office's critique of the chosen trajectory of fiscal policy was more subtle. This had, in its opinion, procyclical effects ('recessionary effects').[181] Even the Greek courts did not escape from the Budget Office's critique, because they 'vindicate[d] many of the applicants' and hence '[were] likely to cause serious trouble to the successful execution of the State budget'.[182]

As regards fiscal management, the Budget Office noted that 'the elimination of tax evasion was not given the necessary attention'.[183] In this connection, it noted the 'weird behavior of some part of the economic elite',[184] which is another thorny issue in Greece. Moreover, the Budget Office's report underlined the fact that several public entities showed 'significant deviations from their objectives'.[185] Furthermore, when commenting on the sensitivity analysis carried out in relation to several tax measures, the Budget Office noted that 'in several issues (one of which is the "sensitivity analysis", as well) developments occur[red] only under the influence of Troika' and that 'such measures did not even seem to be part of a coherent long- term plan'.[186]

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180 ibid 6.

181 ibid 7.

182 ibid 7.

183 ibid 7.

184 ibid 7-8.

185 ibid 8.

186 ibid 8.

The report moved beyond an analysis of the budgetary figures and criticised both the insufficient implementation of the laws enacted by the Greek Parliament and the country's 'major institutional problem'.[187] It even went as far as arguing that 'the opposition's [now Government's] views should be based on international practices and the belief that the country [had] to remain a member State of the European Union and the Eurozone', thereby openly criticising in some length some of the views expressed in political discourse.[188]

As regards structural reforms, the report noted, in line with the Commission's report examined above, that pension reform and the fight against corruption would 'continue to be a high priority in the future'.[189] In the Budget Office's opinion, the implementation of the privatisation plan lagged behind.[190] Furthermore, the Budget Office vehemently criticised the authorities in charge of implementing the structural reforms agreed with the creditors and sometimes criticised even the reforms themselves. It noted that 'the institutional- organization infrastructure for privatizations' was 'rather incompetent' and argued that '[i]n general, reforms implemented so far did not achieve their goal'.[191] The low rate of implementation of the agreed reforms and the perceived

187 ibid 9.

188 ibid 9-10.

189 ibid 10.

190 ibid 10.

191 ibid 11.

gap between policy and practice did not go unnoticed either.[192] Moreover, in a rather courageous statement, the Budget Office argued as follows:

> However, even if the structural reforms had been implemented as scheduled, their positive impact on the domestic economy would be limited not only because of the huge public and private debt, but also due to other factors mentioned in the beginning of the text. Lack of confidence in the Greek economy, despite any occasional statements by economic agents, should not be ignored, either. An extraordinary effort is needed to overcome this confidence crisis, which is caused by clientilism and the ever changing policy framework. All these make potential investors rather concerned about the Greek economy ... and result in an unfair distribution of the burdens.[193]

Overall, the findings of the Budget Office's report as to the uncertainties in the implementation of the economic adjustment programme largely (*though not fully*) coincided with the ones of the Commission, albeit with one important caveat: the Commission never went as far as openly questioning the effectiveness of the reforms Greece had agreed with its creditors, not least because it forms part of the Troika. Measured on its substance and tone, the Budget Office's report was heavily critical of the Government's actions in a number of areas. Again, this should be seen in the light of the Budget Office's interpretation of its own mission, part of which is, according to its own views, keeping the Greek citizens informed on economic developments.

It is further worth noting that the Greek legislator has recently established a Fiscal Council.[194] This has the status of an independent administrative authority[195] and is also a

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192 ibid 11.

193 ibid 12.

194 Law No 4270/2014 (Government Gazette A' 143/28.06.2014) on principles of fiscal management and oversight (incorporating Directive 2011/85/EU) and on public accounting and other provisions («Αρχές δημοσιονομικής διαχείρισης και εποπτείας (ενσωμάτωση της Οδηγίας 2011/85/ΕΕ) – δημόσιο λογιστικό και άλλες διατάξεις»). The provisions on the Fiscal Council have thus far been amended by Law No 4337/2015 on measures implementing the agreement on fiscal targets and

member of the EU Network of Independent Fiscal Institutions.[196] The Fiscal Council became fully operational when its first Executive Board was appointed in November 2015. Its President and members of the Governing Council 'enjoy personal and functional independence'.[197] The Fiscal Council evaluates the macroeconomic forecasts on which the medium-term fiscal plan and the draft budget are based.[198] Moreover, it monitors compliance with the numerical fiscal rules incorporating the medium-term budgetary objective and the TFEU reference values on public deficit and debt.[199] Furthermore, it assesses whether the circumstances leading to the activation of the correction mechanism for cases of significant observed deviations from the medium-term budgetary objective or the adjustment path towards it have occurred.[200] Where the correction mechanism has been activated, the Fiscal Council assesses whether the budgetary correction is proceeding in accordance with the national corrective plan.[201]

structural reforms («Μέτρα για την εφαρμογή της συμφωνίας δημοσιονομικών στόχων και διαρθρωτικών μεταρρυθμίσεων») (Government Gazette A' 129/17.10.2015), Article 10(4) and (13); Law No 4334/2015 on urgent measures concerning the negotiations and the conclusion of an agreement with the European Stability Mechanism («Επείγουσες ρυθμίσεις για τη διαπραγμάτευση και σύναψη συμφωνίας με τον Ευρωπαϊκό Μηχανισμό Στήριξης (Ε.Μ.Σ.)») (Government Gazette A' 80/16.07.2015), Article 1(22)(b); Law No 4336/2015 on pension reforms – ratifying the draft agreement on economic support from the European Stability Mechanism – and measures for implementing the financial assistance facility agreement («Συνταξιοδοτικές διατάξεις – Κύρωση του Σχεδίου Σύμβασης Οικονομικής Ενίσχυσης από τον Ευρωπαϊκό Μηχανισμό Σταθερότητας και ρυθμίσεις για την υλοποίηση της Συμφωνίας Χρηματοδότησης») (Government Gazette A' 94/14.08.2015), Articles 2(2)(D.10) and 39(3).

195 ibid Article 2(1).

196 EU Independent Fiscal Institutions (n 171).

197 Law No 4270/2014, Article 2(3).

198 ibid Article 2(4)(a).

199 ibid Article 2(4)(b).

200 ibid Article 2(4)(c)(aa) and (bb).

201 ibid Article 2(4)(c)(cc).

Last, the Fiscal Council assesses whether the circumstances which may allow, under the SGP, a temporary deviation from the medium-term budgetary objective or the adjustment path towards it have occurred or ceased to exist.[202]

The third macroeconomic adjustment programme for Greece

The readers of this chapter are well familiar with the timeline of the latest Greek crisis. The fifth review of the second economic adjustment programme for Greece was never concluded, and the duration of the programme expired without the disbursement of the remaining funds. In summer 2015, Greece reached an agreement with its creditors on a third bailout programme.[203] A MoU 'detailing the economic reform measures and commitments associated with the financial assistance package' was concluded between the European Commission (acting on behalf of the ESM), Greece, and the Bank of Greece.[204] This was accompanied by a Financial Assistance Facility Agreement 'setting out the relevant financial information related to the loan'.[205]

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202 ibid Article 2(4)(c)(dd).

203 See European Commission, 'Financial Assistance to Greece' (8 September 2015) <http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm> accessed 10 September 2015.

204 Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece <http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf> accessed 10 September 2015 (the third MoU). The main elements of the programme are also laid down in Council Implementing Decision (EU) 2015/1411 of 19 August 2015 approving the macroeconomic adjustment programme of Greece [2015] OJ L219/12, which was adopted pursuant to Article 7(2) of Regulation 472/2013.

205 Financial Assistance Facility Agreement between European Stability Mechanism and the Hellenic Republic as the Beneficiary Member State and the Bank of Greece as Central Bank and Hellenic Financial Stability Fund as Recapitalisation Fund <http://www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf> accessed 10 September 2015.

The programme builds on four 'pillars': '[r]estoring fiscal sustainability'; '[s]afeguarding financial stability'; '[g]rowth, competitiveness and investment'; and '[a] modern State and public administration'.[206] 'The Government commits to *consult* and *agree* with the European Commission, the European Central Bank and the International Monetary Fund on all actions relevant for the achievement of the objectives of the Memorandum of Understanding before these are finalized and legally adopted' [emphasis added].[207] But these objectives are very broad, and the MoU covers almost all policy areas, apart from, say, sports, cultural affairs, and migration policy. Moreover, the MoU provides that '[t]he conditionality will be updated on a quarterly basis, taking into account the progress in reforms achieved over the previous quarter'.[208] 'In each review the specific policy measures and other instruments to achieve these broad objectives … will be fully specified in detail and timeline.'[209]

Overall, the reforms mandated by the third MoU are cast in the following form: Greece is either required to implement reform R by date D in the manner specified in the MoU; or is asked to draw a plan by date D_1 in order to implement reform R by date D_2, so as to achieve the objectives set out in the MoU. In terms of substance, the Greek authorities are either asked to fully implement the existing legislation or previously agreed reforms; or to transpose and/or fully implement existing EU legislation; or to adopt legislation and/or other administrative acts in order to comply with the terms of the

206 The third MoU (n 204) 5.

207 ibid 4.

208 ibid 4.

209 ibid 4.

new MoU; or to repeal legislation which was passed by the Greek parliament during the first half of 2015 without the prior consent of the Troika. Given the very tight deadlines set by the institutions in the MoU, there is provision for technical assistance for designing and implementing various reforms posited in the MoU.

The discussion above highlighted the level of detail of the provisions of the first two MoUs that were concluded with the Greek authorities. The third MoU, too, involves a very detailed policy prescription. Nevertheless, some of the features of the third economic adjustment programme stand out in this respect. Greece is put under an obligation to establish a new fund, in order 'to manage valuable Greek assets; and to protect, create and ultimately maximize their value which it will monetize through privatisations and other means'.[210] This fund will be 'managed by the Greek authorities *under the supervision of the relevant European Institutions*' [emphasis added].[211] Moreover, the MoU provides that '[t]he authorities will endorse the Asset Development plan approved by [the Hellenic Republic Asset Development Fund] on 30/07/2015', which 'is *attached to this Memorandum as annex and constitutes an integral part of this agreement*' [emphasis added].[212] A List of Government Pending Actions aiming to 'facilitate the privatization process and complete all needed Government actions to allow

210 ibid 28.

211 ibid 28.

212 ibid 28. It can be found here: Hellenic Republic Asset Development Fund, 'Asset Development Plan' (30 July 2015) <http://www.hradf.com/sites/default/files/attachments/20150907-asset-development-plan-en_0.pdf> accessed 10 September 2015.

tenders to be successfully executed' is also 'attached to this Memorandum as an Annex and constitutes an integral part of this agreement'.[213]

Another feature of this privatisation programme that distinguishes it from its predecessors is that 'the authorities shall appoint an independent Task Force to identify options and prepare recommendations on the operational goals, structure and governance of the Fund to be created'.[214] 'The mandate and composition of the Task Force would be drawn up by the authorities, *in agreement with the European Institutions and in consultation with the Eurogroup*' [emphasis added].[215] The target for government proceeds is again set at €50 billion, 'of which EUR 25bn will be used for the repayment of the recapitalization of banks and other assets and 50% of every remaining euro (i.e. 50% of EUR 25bn) will be used for decreasing the debt to GDP ratio and the remaining 50% will be used for investments'.[216]

A similar selection procedure as the one adumbrated above is also required by the MoU for the members of the Executive Board and the General Council of the Hellenic Financial Stability Fund, which is responsible for Greek banks. The new MoU requires that the Greek government design a new procedure for their selection and appointment, 'which will imply a greater role for the Institutions than in the past'.[217] More specifically, 'a Selection Panel will be set up, composed of six independent expert members, *of which*

213 The third MoU (n 204) 28.

214 ibid 28.

215 ibid 28.

216 ibid 29.

217 ibid 20.

three appointed by the EU institutions – including the chairman with a casting vote in the event of a tie –, and three appointed by the authorities (two by the Ministry of Finance and one by the Bank of Greece)' [emphasis added].[218] Moreover, '[t]he Ministry of Finance, the Bank of Greece, the European Commission, the ECB and the ESM will each have an observer to the Selection Panel.'[219]

Another novelty of the third programme for Greece is that it was accompanied by a social impact assessment.[220] This was requested by President Juncker, in order 'to feed the negotiation process from the Commission side, and to guide the follow-up and monitoring of [the MoU's] implementation'.[221] It will be recalled that the Commission President had pledged to undertake social impact assessments for future support and reform programmes in his political guidelines for the new Commission.[222]

However, the social impact assessment accompanying the third MoU counts as a missed opportunity. The 25-page long document focuses almost exclusively on the socio-economic context in which the institutions reached an agreement on the third programme for Greece, and on the rationale behind the reforms posited in the MoU. Insofar as the expected impact of these reforms on the Greek economy is at issue at all, the social

218 ibid 20.

219 ibid 20.

220 European Commission, 'Commission Staff Working Document: Assessment of the Social Impact of the New Stability Support Programme for Greece' SWD(2015) 162 final (19 August 2015) <http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/assessment_social_impact_en.pdf> accessed 11 September 2015.

221 ibid 3.

222 Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (Strasbourg, 15 July 2014) <http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf> accessed 1 May 2015, 8.

impact assessment focuses exclusively on their *positive* impact on the economy and the society at large. It is very hard to imagine that the full implementation of such a comprehensive economic adjustment programme will have no negative impact whatsoever on the citizens. There is no analysis of such adverse effects on the Greek people or firms operating in Greece, and hence the social impact assessment largely counts as an attempt to 'rebrand' the Troika and the reforms agreed between Greece and its creditors.

Conclusions

The foregoing analysis has shed light on many important changes brought about in the EU economic and fiscal governance framework since the outbreak of the Eurozone crisis. Our main focus in this chapter was on the bearing of these new legal instruments on national fiscal, economic and social policy. There will be no attempt to summarise the preceding argument. It is nonetheless worth highlighting certain features that are of particular importance. They are distinct, albeit related.

First, we argued that the EU Member States are now subject to more stringent fiscal rules as a result of 'six-pack' legislation. The Euro area Member States are subject to further restraints flowing from 'six-pack' legislation, 'two-pack' legislation, and the Fiscal Compact. Moreover, the bailed-out States are experiencing a further loss of their economic sovereignty through the conditionality attached to the financial assistance granted to them. The rescue packages have also had a bearing on the economic policy of lender States, in that the fiscal leeway left to them has been *de facto* curtailed.

Second, one should not lose sight of the important changes brought about by these instruments in EU economic surveillance. These are of the utmost importance for the economic and budgetary policy of the Member States. Some of these changes concern all the EU Member States, whereas other rules only apply to Euro area Member States.

As regards EU-wide reforms, the Union co-legislators have taken steps to ensure that the broad economic policy and employment guidelines (Articles 121(2) and 148(2) TFEU) exert influence on national policy-making. This is achieved through the European Semester for economic policy coordination. Moreover, the scope of EU monitoring has been widened, thereby now covering general economic policy. This was the result of the new legislation on the prevention and correction of macroeconomic imbalances (Regulation 1176/2011). Furthermore, the 'six-pack' legislation on national budgetary frameworks (Directive 2011/85) makes inroads into the Member States' substantive and procedural budgetary autonomy.

As regards Euro area Member States, the Union co-legislators have sought to step up the application of sanctions for breaches of the SGP. Notably, these serve to amplify obligations enshrined in Council recommendations, that is, in soft law instruments. Moreover, the Fiscal Compact makes inroads into national budgetary processes. This is achieved through the obligation to establish a 'correction mechanism' and the common principles governing these mechanisms. Furthermore, we argued that 'two-pack' legislation broadens economic surveillance beyond fiscal policy through the use of two instruments: enhanced surveillance (Regulation 472/2013); and economic partnership programmes (Regulation 473/2013). It has been further argued that the newly-established common budgetary timeline and the obligation to submit a draft budgetary plan to the

Commission and to the Eurogroup, which is enshrined in 'two pack' legislation (Regulation 473/2013), bring the cycle of domestic budgetary policy within the framework of EU monitoring.

Third, we argued that the Union institutions now possess the tools to closely monitor the economic, fiscal and financial situation in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. Consequently, other things being equal, the 'Troika' (or 'Quadriga') could be replaced by fully-fledged EU monitoring. It might still be necessary to incorporate the TSCG and the ESM into EU law.

Fourth, it has been argued that the new EU economic rules have redistributive effects in European societies. This is exemplified by the SGP principles governing the adjustment path towards the medium-term budgetary objective and the Council recommendations addressed to Member States in the context of the European Semester. Through the 'back door' of economic governance, the EU institutions and fellow Member States exert considerable influence on national economic and social policy and encroach on very sensitive areas of *prima facie* exclusive national competence. To be sure, these areas are important from the standpoint of macroeconomics. Be that as it may, there is a general sense that the EU powers in this area have increased over the last few years and that they now bear *some* resemblance to the powers that the EU would have had under a classic fiscal federalism model.

Fifth, we examined the rigorousness of EU and independent national economic oversight. We have shown that EU oversight of the German economy is relatively rigorous, and that the Union institutions do not 'go easy' on the German authorities. As

regards Greece, we have seen that there is very close monitoring of the economic, fiscal and financial situation in the country, as well as rigorous oversight of the progress Greece is making in relation to its economic adjustment programme. The surveillance missions carried out by the 'Troika' (now the 'Quadriga') are complemented by independent national fiscal oversight, which is also quite rigorous. The difference is that national fiscal 'watchdogs' cannot withhold payments to Greece and hence their influence over national policy-making is more limited than the one of the 'Troika'.

Last, the third programme for Greece serves to further corroborate the preceding argument. The Greek authorities are again put under very detailed obligations, which severely limit the available policy options in a large number of areas of national competence. To be sure, the Greek government could still influence the way these reforms are designed and implemented and/or renegotiate some of the commitments set out in the MoU.[223]

[223] See the general clause to this effect in p. 2 of the third MoU (n 204), as well as more specific clauses for particular policy areas (see, e.g., pp. 14-15 on pension reforms).

CHAPTER FOUR: DEMOCRACY, LEGITIMACY AND ACCOUNTABILITY IN EURO CRISIS MANAGEMENT

Introduction

The discussion thus far has focused on the crisis-induced developments in the Economic and Monetary Union (EMU) and on the impact of the revised EU economic governance framework on national economic policy. The focus now shifts to democracy, legitimacy, and accountability in Euro crisis management.

The discussion begins with the main critiques of the EU's response to the crisis. It will be shown that scholars in this area castigate the EMU governance framework for its shortcomings in terms of input, output and social legitimacy. The focus then shifts to the main arguments in favour of increased democratic controls and intense inter-institutional dialogue in the functioning of the EMU. It will be argued that the rationale for more democratic input into the EMU's policies is manifold. The impact of economic policy choices in the EU on people's rights and the welfare state, the effects of national policy-making on the interests of the Union and other EU Member States, and the need to safeguard the effectiveness of this multi-level system of economic governance, mandate that serious thought be given to the democratic credentials of the EMU.

Moreover, it will be shown that the crisis-induced developments in the EU have impacted on the horizontal and vertical distribution of power in the EU and its Member States. First, more powers were conferred on the Commission, the Council, and the Eurogroup in the measures enacted to combat the crisis. Though the European Parliament

was heavily involved in norm production and had a pretty good strike rate in getting its amendments included in the final legislation, its role in policy implementation has remained minimal. Second, the EU legislature put much of its reforming faith in a new recruit to strengthen democratic control in the EMU – the national parliaments of the Member States. These do not have a veto over proposed EU legislation, but have a role to play in enforcing national fiscal rectitude. Further, the crisis-induced legal and economic developments have circumscribed their budgetary sovereignty in many ways, but it should not escape our notice that many of the newly-enacted rules serve to empower parliaments vis-à-vis the Executive. Third, the *de facto* division between borrower and lender Member States might have a bearing on the intra-institutional balance of power in the EU, and the emerging patterns of geographical fragmentation threaten the unity of the EU-28.

It will be further argued that transparency and accountability could be enhanced in a number of ways. The Commission should carry out impact assessments prior to the adoption of key legislative instruments and could enhance citizen participation through online consultation exercises. Moreover, rather than acting outside the formal confines of the Lisbon Treaty, the EU institutions and creditor States could make use of the new 'two pack' legislation, thereby bringing economic surveillance within the normal EU process. Furthermore, the EU and national officials need to better explain to citizens the rationale for the continued existence of rules that have such a huge impact on their lives and rights. More transparency in the workings of the Eurogroup, whose role is now heightened, might prove instrumental in this respect.

Input legitimacy, output legitimacy, and the Euro crisis

There is a voluminous bibliography on democracy in the EU,[1] which has now been enriched by a burgeoning body of literature on the effects of the Euro crisis on the state of democracy in the EU and the Member States.[2] This chapter is not a literature review

[1] See, just in terms of articles and book chapters, Paul Craig, 'Integration, Democracy, and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011); Andreas Follesdal and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5; Anand Menon and Stephen Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union' (2007) LSE Law, Society and Economy Working Paper 13/2007 <www.lse.ac.uk/collections/law/wps/WPS13-2007MenonandWeatherill.pdf> accessed 16 January 2015; Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603; Kalypso Nicolaidis, 'The Idea of European Demoicracy' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012); Joseph Weiler and others, 'European Democracy and its Critique – Five Uneasy Pieces' (1995) EUI Working Paper RSC 95/11 <core.kmi.open.ac.uk/download/pdf/6538430.pdf> accessed 16 January 2015.

[2] See among many others Cinzia Alcidi and others, 'Enhancing the Legitimacy of EMU Governance' (2014) CEPS Special Report 98/2014 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2561211> accessed 3 March 2015; Roberto Baratta, 'Legal Issues of the "Fiscal Compact": Searching for a Mature Democratic Governance of the Euro' (2012 EUDO Dissemination Conference, Florence, November 2012) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2196998> accessed 2 March 2015; Paul Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' in Federico Fabbrini and others (eds), *What Form of Government for the European Union and the Eurozone* (Hart Publishing 2015) ch 2; Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 159-66; Miguel Poiares Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice' (2012) RSCAS Policy Paper 2012/11 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2180248> accessed 3 March 2015; Miguel Poiares Maduro and others, 'The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis' in Miguel Poiares Maduro and others, 'The Democratic Governance of the Euro' (2012) RCAS Policy Paper 2012/08 <cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS_PP_2012_08.pdf?sequence=1> accessed 3 March 2015; Giandomenico Majone, 'Rethinking European Integration after the Debt Crisis' (2012) UCL European Institute Working Paper 3/2012 <www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf> accessed 2 March 2015; Jean-Claude Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2011); Fritz Scharpf, 'Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis' (2012) MPIfG Discussion Paper 12/6 <www.mpifg.de/pu/mpifg_dp/dp12-6.pdf> accessed 2 March 2015; Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) ch 7; Joseph Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 Journal of European Integration 825; Constantin Yannakopoulos, 'Un Etat devant la faillite: entre droit et non-droit' (10 December 2013) <www.constitutionalism.gr/wp-

and there will therefore be no attempt to consider all aspects of this rich material. The below is only a high-level indication of the content covered within these writings.

If anything, there is a near consensus in the relevant literature that the Euro crisis has deepened the EU's legitimacy problems. To begin with, Joseph Weiler (2012) argues that there is a 'collapse of all three forms of legitimacy in the current European circumstance',[3] viz., process (or input) legitimacy, result (or output) legitimacy,[4] and what he terms as 'telos legitimacy' or 'political messianism'. As regards input legitimacy, Weiler argues that 'there is the persistent, chronic, troubling Democracy Deficit, which cannot be talked away'.[5] His account of input legitimacy in the EU is worth quoting in some length:

content/uploads/2013/12/2013.12_Fin-du-droit_intervention_Yannakopoulos.pdf> accessed 17 March 2016, 15.

3 Joseph Weiler (n 2) 828.

4 See for the distinction between input and output legitimacy Fritz Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 Journal of European Public Policy 18, 19.

5 Joseph Weiler (n 2) 828.

> In essence it is the inability of the Union to develop structures and processes which adequately replicate or, "translate" …, at the Union level even the imperfect habits of governmental control, parliamentary accountability and administrative responsibility that are practiced with different modalities in the various member states. Make no mistake: it is perfectly understood that the Union is not a state. But it is in the business of governance and has taken over extensive areas previously in the hands of the member states. … Democracy is not about states. Democracy is about the exercise of public power – and the Union exercises a huge amount of public power. We live by the credo that any exercise of public power has to be legitimated democratically and it is exactly here that process legitimation fails.[6]

Weiler further argues that 'the two primordial features of any functioning democracy are missing – the grand principles of accountability and representation'.[7] This is because the citizens cannot 'throw the scoundrels out', and 'dissatisfaction with "Europe" when it exists has no channel to affect, at the European level, the agents of European governance'.[8] Weiler argues that 'there is simply no moment in the civic calendar of Europe where the citizen can influence directly the outcome of any policy choice facing the Community and Union'.[9] 'The political colour of the European Parliament only very weakly gets translated into the legislative and administrative output of the Union'.[10]

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6 ibid 828-29.

7 ibid 829.

8 ibid 829.

9 ibid 829.

10 ibid 829.

Weiler further notes 'the extraordinary decline in voter participation in elections for the European Parliament' and 'the absence of the European Parliament as a major player in the current crisis'.[11] He even goes as far as calling the Council of the EU 'an elaborate rubber stamp to the Union's two Presidents – Merkel and Sarkozy (or now, Hollande)' and diagnoses a 'double failure of institutional legitimacy, of Parliament and Council'.[12]

As regards output legitimacy, Weiler notes that '[r]ightly or wrongly, the economic woes of Europe, which are manifest in the Euro crisis are attributed to the European construct', and that '[i]f success breeds legitimacy, failure, even if wrongly allocated, leads to the opposite'.[13] Furthermore, insofar as the EU has relied on legitimacy by promise of an attractive land ('telos legitimacy'), this too 'has now collapsed'.[14] This is partly because '[p]*art of the very phenomenology of political messianism is that it always collapses as a mechanism for mobilization and legitimation*'.[15] It is also because 'Europe is a victim of its own success',[16] and 'much has changed in societal mores' on which this vision was premised.[17]

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11 ibid 830.

12 ibid 830-31.

13 ibid 831.

14 ibid 832-37.

15 ibid 836.

16 ibid 836.

17 ibid 837.

Weiler concludes that the future European Madisons crafting the EU's response to the crisis 'will have to dip heavily into the political structure and decisional process of the member states'.[18] 'It will be national parliaments, national judiciaries, national media and, yes, national governments who will have to lend their legitimacy to a solution which inevitably will involve yet a higher degree of integration'.[19] As such, 'the importance, even primacy of the national communities as the deepest source of legitimacy of the integration project will be affirmed again'.[20]

Other commentators, too, have made a similar diagnosis. Giandomenico Majone (2012) argues that an important lesson from the crisis concerns 'the limits of the separability of politics and economics'.[21] In sharp contrast to what he had previously argued about the EU's microeconomic constitution,[22] Majone believes that '[s]uch a separation is much more difficult, not to say impossible, at the level of macroeconomic policymaking.'[23] 'This is because so much of what the modern welfare state does depends crucially on the way macroeconomic policies are designed and implemented.'[24]

In Majone's opinion, '[t]he uncertainties and delays in tackling the sovereign-debt crisis have further increased an already high level of dissatisfaction with the EU and its

18 ibid 837.

19 ibid 837.

20 ibid 837.

21 Giandomenico Majone (n 2) 12.

22 Giandomenico Majone (n 1) 7, 10-11, 14.

23 Giandomenico Majone (n 2) 12.

24 ibid 12.

institutions.'[25] He believes that most academics are reluctant to admit that the 'root cause' of the democracy problem in the EU is the 'mismatch between expanding supranational powers and the limited, even shrinking, popular support of the European project'.[26] Furthermore, he argues that 'the sovereign debt crisis – and the various attempts to resolve it – have drastically reduced an already limited normative capital'.[27] Majone uses some strong language here, arguing that 'Greece is being treated as a protectorate of the EU',[28] and that 'the concentration of decision-making powers in very few hands has reached a level never attained before'.[29] He concludes that:

> Effectively, the defenders of EMU in its present form assume that the debt crisis can be solved only by enlarging the democratic deficit of the EU to a point where, given the state of public opinion today, it becomes politically unsustainable: a democratic default. They refuse to admit the need of more flexible patterns of integration.[30]

The list of scholars criticising the democratic credentials of the EU's response to the crisis is long. Fritz Scharpf (2012) argues that 'the European responses to the euro crisis have disabled national democratic legitimacy, and at the same time, they have destroyed the possibility of legitimacy intermediation on which the European polity so far had depended'.[31] This is because, in Scharpf's opinion, 'national democratic processes [in

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25 ibid 13.

26 ibid 19.

27 ibid 19.

28 ibid 19.

29 ibid 20.

30 ibid 21.

31 Fritz Scharpf (n 2) 26.

borrower states] were disabled as ever more detailed and highly publicized instructions on welfare cutbacks and labor market deregulation had to be implemented by successive Greek governments and parliaments without even the opportunity for face-saving gestures – let alone the permission to call a referendum' and without the option of holding the perceived 'authors' of these policies to account for their choices.[32] 'But if the loss of autonomy is obvious for debtor states, it is no less true for the parliaments of creditor countries'.[33] These often have to approve 'take-it-or-leave-it offers', with no other viable and/or attractive alternative offered to them.[34] In Scharpf's words, 'it is clear that agreement will ultimately be "*alternativlos*"'.[35]

Scharpf further argues that 'debtor states have completely lost fiscal autonomy, and the exercise of wide ranges of their economic, social and labor-market competences has been subjected to direct European control'.[36] As regards creditor States, they have to finance rescue operations 'through direct contributions and financial guarantees from their own budgets and at the expense of their own taxpayers'.[37] Furthermore, Scharpf argues that the effect of 'six-pack' legislation and the Fiscal Compact is that 'European control over fiscal policy and over an indefinite range of other national competences is being generalized to apply to all member states, regardless of any applications for rescue

32 ibid 25.

33 ibid 25.

34 ibid 25.

35 ibid 25.

36 ibid 27.

37 ibid 27.

credits'.[38] 'What needs to be legitimated, therefore, are European controls over national policy choices and national resources, rather than choices about common European policies and the allocation of European resources.'[39]

Furthermore, Kaarlo Tuori and Klaus Tuori (2014) argue that 'the democratic deficit at the Member State level, related to the externalities of national policies, does not suffice to provide transnational decision-making with democratic justification'.[40] 'The problem remains how to ensure the necessary democratic input legitimation for Union policies and actions.'[41]

Kaarlo Tuori and Klaus Tuori note that 'the electoral success of populist parties riding on nationalistic and anti-European themes, testifies to increasing legitimation problems'.[42] Echoing the views of Scharpf, they argue that governments and parliaments in crisis-hit countries 'are widely conceived as mere executors of policies imposed from the outside'.[43] 'In assisting Member States, too, the European level is increasingly held responsible for policies affecting citizens, and the national parliament is not seen to possess much leeway in their implementation.'[44] 'In these circumstances, parliamentary

38 ibid 27.

39 ibid 27.

40 Kaarlo Tuori and Klaus Tuori (n 2) 209.

41 ibid 209.

42 ibid 210.

43 ibid 210-11.

44 ibid 211.

and electoral mechanisms are hardly able to procure input legitimation even for national decision-making, not to speak of channelling such legitimation to the European level.'[45]

Similarly to Majone, Kaarlo Tuori and Klaus Tuori argue that 'the strategy of de-politicisation has obvious limits'.[46] Their argument is that:

> The need for legitimation arises from the impacts that policies have on citizens' lives. Democratic input legitimation has responded to the redistributive effects of fiscal and economic policy. European citizens have experienced these effects very profoundly during the Eurozone crisis. The need for legitimation has not disappeared; on the contrary, it has intensified.[47]

When discussing the various ways to remedy the 'notorious' democracy deficit, Kaarlo Tuori and Klaus Tuori argue that the 'developments during the Eurozone crisis have not been very encouraging, in that '[t]he European Parliament and the national parliaments have been accorded but a peripheral position in both financial stability mechanisms and European economic governance.'[48] In their opinion, '[t]he rather modest efforts to engage the European Parliament and national parliaments in European economic governance, as well as to increase transparency, are hardly able to affect the general picture'.[49] However, 'a more far-reaching involvement of the European

45 ibid 211.

46 ibid 213.

47 ibid 213.

48 ibid 213.

49 ibid 215.

Parliament is not unproblematic, either', because democracy 'requires that those not concerned and not contributing be left without a voice'.[50]

Kaarlo Tuori and Klaus Tuori further place considerable emphasis on the constitutional and structural implications of the use of public international law instruments for the purposes of effectuating changes in the EU economic governance framework. They highlight the fact that the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) 'remain outside the scope of application of Treaty provisions on the principle of transparency and complementary secondary legislation, as well as the EU Charter of Fundamental Rights'.[51] As such, 'stability mechanisms work behind the shield of far-going confidentiality and immunity'.[52]

The almost vanishing fiscal leeway left to national parliaments is a recurrent theme in the relevant literature. Roberto Baratta (2012) argues that 'the space left to national parliaments to deviate from objectives provided for in the relevant excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if any'.[53] In his opinion, 'the normative instruments adopted to tackle the financial crisis … show structural shortcomings in terms of democratic legitimacy'.[54] This is partly because 'these constraints do not flow from a mature democratic political process', the implicit

50 ibid 215.

51 ibid 218.

52 ibid 218.

53 Roberto Baratta (n 2) 23-24.

54 ibid 24.

assumption being that there is a democratic deficit in the EU.[55] It is also because the European Parliament only has a 'limited role … in the economic governance of the EU'.[56]

Furthermore, Baratta argues that 'the *fiscal compact* seems to widen the democratic deficit of the EU economic governance'.[57] This is because 'the margin of manoeuvre for national authorities facing budgetary problems is quite reduced'.[58] What is more, the TSCG precepts have 'an impact both on the functioning and powers of domestic institutions and the daily life of (millions of) citizens and companies through the austerity measures likely to be related to the application of the correction mechanism'.[59] Baratta further argues that 'the Commission role is enhanced' and that 'the decision-making power of governments is reinforced'.[60] In his opinion, the limited role left to the European Parliament means that the system 'depends upon effective accountability to … national parliaments'. In this connection, he argues that '[t]he multilevel democratic nature of the EU system needs to be reinforced so that it will rely less on national legitimacy inputs and more on its own direct source of democratic accountability'.[61]

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55 ibid 24.

56 ibid 24.

57 ibid 25.

58 ibid 25.

59 ibid 25.

60 ibid 25-26.

61 ibid 26.

The case for instilling more democratic legitimacy into the EMU

The discussion thus far has focused on the perceived democratic failings of the EU's response to the crisis. The focus now shifts to the various considerations and challenges that one needs to take into account and address when crafting the EU's response to this yawning legitimacy gap. In a multi-level system of economic governance such as the EMU, the challenge is to find the appropriate level, pattern, and type of accountability that should be involved in the development of its governance structures. If anything, 'this crisis is as much one of *governance* as of economics and finance'.[62] In what follows, there will be no assumption that the same type and/or degree of accountability would be appropriate for each and every Union or Euro area institution acting in this area. This chapter will be primarily focusing on the role of the European and national parliaments in the EMU. The rationale for increased democratic controls and intense inter-institutional dialogue in the functioning of the EMU is manifold.

The impact of economic measures on people's rights and the welfare state

First, simply put, the need for more democratic input into economic policy-making is premised on the impact of such policies on people's lives. 'With tighter discipline and common "steering" being extended throughout the macroeconomy, the democratisation of European governance is no longer a luxury, but a necessity'.[63]

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62 Sionaidh Douglas-Scott, 'Justice and Pluralism in the EU' (2012) 65 Current Legal Problems 83, 94.

63 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Effective Enforcement of Budgetary Surveillance in the Euro Area' 2010/0278 (COD) (11 January 2011)

As the previous chapter has shown, the new EU economic rules have redistributive effects in European societies and encroach on very sensitive areas of national policy. Fritz Scharpf rightly argues that 'what needs to be legitimated … are European controls over national policy choices and national resources', viz. controls 'over fiscal policy and over an indefinite range of other national competences'.[64] The modern welfare state, as well as the standards of living and the rights of EU citizens, are intimately affected by EU-wide policies and decisions taken at EU level.[65]

Moreover, as it will be shown in the subsequent chapters, the various austerity measures adopted to combat the crisis might infringe social and labour rights, as these are enshrined in the EU Charter of Fundamental Rights, the European Social Charter and the ILO Conventions.[66] This is largely an effect of the conditionality attached to the financial assistance granted to crisis-hit countries.

In light of the above, though there is a valid European interest in ensuring the proper functioning of the single market and currency area, fiscal and economic policy cannot be fully 'depoliticised'.[67] Furthermore, one has to be mindful of the legal constraints flowing from national constitutions. The German Federal Constitutional Court

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<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.626+03+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, 35.

64 Fritz Scharpf (n 2) 27.

65 See among others Cristina Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' (2014) 20 ELJ 164, 165; Giandomenico Majone (n 2) 12; Kaarlo Tuori and Klaus Tuori (n 2) 213.

66 See also Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Legal Studies Research Paper 18/2013.

67 Giandomenico Majone (n 2) 12; Kaarlo Tuori and Klaus Tuori (n 2) 213.

(*Bundesverfassungsgericht*) has held that '[t]he fundamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy'.[68] In similar vein, the Four Presidents' Report argues that '[d]ecisions on national budgets are at the heart of Member States' parliamentary democracies',[69] thereby mirroring one of the fundamental precepts of ordoliberalism.[70]

The interests of the EU Member States

Second, the case for intense inter-institutional dialogue is premised on the interests of the EU Member States. This is because, in an internal market, 'the interdependence among the economies implies that imbalances spill over across countries, and the losses in efficiency in one Member State also lead to foregone welfare in its partners'.[71] 'There are several channels through which the macroeconomic situation and policy action in one Member State affect their partners: trade, financial and monetary linkages, structural reforms and confidence and uncertainty.'[72]

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68 BVerfG, 2BvR 987/10 of 7 September 2011, para 104.

69 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, 'Towards a Genuine Economic and Monetary Union' (5 December 2012) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf> accessed 21 April 2014 (Four Presidents' Report) 16.

70 See Kaarlo Tuori, 'The European Financial Crisis – Constitutional Aspects and Implications' (2012) EUI Law Working Paper 2012/28, 9.

71 Communication from the Commission to the European Parliament, the Council and the Eurogroup, 'Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances' COM(2014) 150 final (5 March 2014) <http://ec.europa.eu/economy_finance/economic_governance/documents/2014-03-05_in-depth_reviews_communication_en.pdf> accessed 1 May 2015, 6.

72 ibid 6.

Furthermore, a single market with a single currency and monetary policy 'reduce[s] the room for independent policy manoeuvre and amplif[ies] the cross-border effects of developments originating in one Member State'.[73] Consequently, 'a more effective coordination of policy between separate national authorities', most notably 'in areas of national economic management affecting aggregate demand, prices and costs of production', is deemed a prerequisite for the success of the EMU.[74]

In this connection, Miguel Poiares Maduro (2012) rightly argues that, prior to the crisis, 'no effective mechanisms were available to ensure that the fiscal policies of a Euro-Member State would take into account the interests of other Member States'.[75] 'But if national politics is not able to incorporate the existing European interdependence on certain issues then it cannot, itself, provide appropriate and legitimate democratic solutions to those issues.'[76]

This European interdependence has further manifested itself in bailout packages granted by Euro area Member States or financial mechanisms to crisis-hit countries. Apart from the effects of an economic crisis facing one Member State on aggregate welfare and the economies of 'richer' Member States, it should not escape our notice that the budgetary sovereignty of lender States, too, has been *de facto* curtailed, in that they

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73 Committee for the Study of Economic and Monetary Union, 'Report on Economic and Monetary Union in the European Community' (17 April 1989) <http://aei.pitt.edu/1007/1/monetary_delors.pdf> accessed 29 April 2015, 10 (Delors report).

74 ibid 10-11.

75 Miguel Poiares Maduro (n 2) 3.

76 Miguel Poiares Maduro and others (n 2) 3.

have less money to spend for other purposes.[77] Therefore, the Member States have to find adequate institutional mechanisms and structures to take into account 'the interests of actors whose voice is excluded or muffled (de jure or de facto) within purely national political processes',[78] these actors being the other EU Member States as well as the EU itself.

There is a further dimension to this debate. The EU or Euro area institutions, too, have to take cognisance of what would be acceptable to the Member States. The effects of proposed EU action on national and regional interests are considered when carrying out an impact assessment prior to the adoption of EU legislation.[79] Furthermore, Member State interests will be taken into account when the EU 'objective' is fashioned.[80] But deliberations in Council only take us this far: one or more Member States might be outvoted in Council due to the qualified majority voting arrangements obtaining in most areas of EU competence in the post-Lisbon world. What is more, some Member States might not even have a formal say on the proposed measures, be it because of the competence basis that is being used,[81] or because a group of Member States has decided to act outside the formal confines of the Lisbon Treaty.

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77 Kaarlo Tuori (n 70) 40-43.

78 This phrase is borrowed from Anand Menon and Stephen Weatherill (n 1) 3.

79 European Commission, 'Impact Assessment Guidelines' SEC(2009) 92 (15 January 2009) <http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf> accessed 27 April 2015, 41.

80 Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 JCMS 72, 82-83.

81 Article 136(2) TFEU.

Institutional dialogue between the 'EU Executive', the European Parliament, national Executives and national parliaments reduces the risk of externalities, viz., the risk that the EU/Euro area institutions or national authorities might reach decisions whose consequences would be deemed unacceptable by the EU institutions or other Member States. As such, it 'facilitat[es] the internalization of fiscal cross-country externalities'.[82]

Moreover, we have seen in Chapter 2 that some of the measures forming part of the 'six pack' and 'two pack' only apply to Euro area Member States. We have further seen that not all EU Member States are signatories to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG),[83] the Treaty establishing the ESM,[84] and the EFSF Framework Agreement.[85] The varying

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82 Alexandre de Streel, 'EU Fiscal Governance and the Effectiveness of its Reform' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 5, p. 102.

83 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden <http://www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/> accessed 18 January 2017.

84 Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (ESM Treaty) <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en_1.pdf> accessed 18 January 2017.

85 EFSF Framework Agreement (as amended with effect from the Effective Date of the Amendments) between Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland and European Financial Stability Facility

degree of economic integration within the EU naturally prompts inquiry as to how to safeguard the interests of *non-participating Member States*. These are, with the exception of the TSCG and the Agreement on the Single Resolution Fund,[86] the Member States which have not (yet) adopted the single currency.

It would be mistaken, in my opinion, to assume that non-Euro area (or otherwise non-participating) Member States are 'not concerned and not contributing' and hence should be 'left without a voice'.[87] This is so for a number of reasons. First, when a crisis erupts, there is a risk of contagion from crisis-hit countries to other EU Member States. Second, a financial and/or public debt crisis could jeopardise the proper functioning of the internal market (e.g., the proper functioning of the financial markets), which is an issue of concern to all EU Member States. Third, crisis-management decisions in one Member State could have adverse spill-over effects on non-Euro area Member States. For example, capital controls introduced in one Member State or a 'haircut' imposed on deposits in banks operating in (or from) one Member State could have serious repercussions for citizens and companies in other Member States. Fourth, one could note the use of Union institutions for the purpose of monitoring conditionality in beneficiary

<https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf> accessed 18 January 2017.

86 Agreement between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland on the transfer and mutualisation of contributions to the Single Resolution fund <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> accessed 30 March 2017.

87 Kaarlo Tuori and Klaus Tuori (n 2) 215.

Member States. Regardless of whether this institutional development is normatively desirable or not,[88] it could also be taken to mean that non-Euro area Member States should not be 'left without a voice' in this context. Insofar, however, as emergency and crisis measures addressed to safeguarding the financial stability of the Euro area do not entail budgetary responsibility for non-Euro area Member States, or, as the case may be, for those not participating in the Banking Union, these states are indeed 'not contributing' and should at the very least not obstruct such measures.

The cleavage between Euro area and non-Euro area Member States is, however, real.[89] As such, there are fears that regulation of the Euro area can have an impact on internal market issues more generally, and that this can be prejudicial to non-Eurozone Member States. More specifically, the Euro area Member States can themselves alone meet the qualified majority voting requirements for decision-making in the Council.[90] Accordingly, there is a danger of 'caucusing', whereby the Eurozone States would form a cohesive group that could drive EU legislation suiting their needs (and disregarding the interests of non-Euro area countries). What is more, the commonality of interest between the Euro area States could lead to discrimination in relation to internal market issues that affect non-Euro States. A further concern is that the financial crisis has impacted on the EU decision-making structure, increasing the power of the Euro area institutions and bodies (Eurogroup, ECB and Euro Summit) and leading to tension between them and the

88 See Paul Craig, '*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263.

89 See Alicia Hinarejos (n 2) 111-14, 118-19, 166.

90 Article 16(4) TEU.

formal EU institutions (ECOFIN Council and European Council).[91] An effective response to these concerns (insofar as there are empirically founded) should centre on the principle of non-discrimination on grounds of nationality; appropriate voting arrangements (such as the voting modalities in the European Banking Authority); structuring the relationship between Euro area and non-Euro area countries in certain policy areas in the image of the Banking Union ('close cooperation' with a two-way mechanism for termination); and process reforms affecting the workings of Euro area bodies.[92]

The general interest of the Union

There is a third policy rationale for intense institutional dialogue in the EMU. The European interest, too, is at stake, in that the attainment of the objectives of the internal market and EMU is highly contingent upon policy choices and decisions made at national level. This is largely an effect of fiscal decentralisation, or indeed of the 'asymmetric' nature of the EMU.[93]

The European interest is distinct from the interests of the EU Member States and is not an aggregate sum of their collective preferences. Moreover, the existence of a 'general interest of the Union' is recognised by the Treaties, and the Commission is put under an obligation to take appropriate initiatives to promote that interest.[94] The existence

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91 Paul Craig and Menelaos Markakis, 'The Euro Area, its Regulation and Impact on Non-Euro Member States' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 301-04.

92 ibid 304-11.

93 Alicia Hinarejos (n 2) ch 1.

94 Article 17(1) TEU.

of the 'interests of the Community' (or now of the Union) is also sometimes explicitly recognised by the Court.[95]

Apart from safeguarding the interests of other Euro area Member States, the EMU rules could also be seen as safeguarding the general interest of the Union and/or the Euro area. Excessive macroeconomic imbalances in one Member State might jeopardise financial stability in the whole Union. As such, these are now monitored by the Commission, the Council and the Eurogroup.[96] Moreover, the ESM was established to safeguard 'the stability of the euro area as a whole'.[97] In this connection, the Court held in *Pringle* that '[b]y its involvement in the ESM Treaty, the Commission promotes the general interest of the Union', because 'the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole'.[98]

In similar vein, the centralised fiscal controls, which were ratcheted up through the 'six pack' and 'two pack' of EU legislation and the TSCG, also contribute to the attainment of the Euro area's objectives. The members of the Committee for the Study of EMU (1989) were adamant that 'macroeconomic coordination, including binding rules in the budgetary field' and 'other arrangements both to limit the scope for divergences between member countries and to design an overall economic policy framework for the

95 See, e.g., Case 244/80 *Pasquale Foglia v Mariella Navarro* [1981] ECR 3045, para 19.

96 Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25.

97 Article 136(3) TFEU; ESM Treaty, Articles 3 and 12(1).

98 Case C-370/12 (Full Court) *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] OJ C26/15, para 164.

Community as a whole' were essential in an economic and monetary union.[99] In their opinion, 'an economic and monetary union could only operate on the basis of mutually consistent and sound behaviour by governments and other economic agents in all member countries'.[100] This is because 'uncoordinated and divergent national budgetary policies would undermine monetary stability and generate imbalances in the real and financial sectors of the Community'.[101] Given the small size of the EU budget, 'the task of setting a Community-wide fiscal policy stance [would] have to be performed through the coordination of national budgetary policies'.[102] 'Moreover, strong divergences in wage levels and developments, not justified by different trends in productivity, would produce economic tensions and pressures for monetary expansion.'[103]

For the reasons set out above, 'countries would have to accept that sharing a common market and a single currency area imposed policy constraints'.[104] 'The Community would need to be in a position to monitor its overall economic situation, to assess the consistency of developments in individual countries with regard to common objectives and to formulate guidelines for policy.'[105] Further, a 'coherent mix of fiscal

99 Delors report (n 73) 17.

100 ibid 19.

101 ibid 19.

102 ibid 19-20.

103 ibid 20.

104 ibid 20.

105 ibid 20.

and monetary policies' was seen to require binding rules on national budgetary policy.[106] All these objectives are now pursued through the application of 'six pack' and 'two pack' legislation in the context of the European Semester.

Arguably, the general interest of the Union could be seen as encompassing fundamental rights protection, the interests of the EU or non-participating Member States, and the effectiveness of the EMU governance framework. The divide is not pristine. At the same time, it should not escape our notice that the perceived interests of some EU Member States might sometimes collide with the general interest of the Union, or that national governments might resent the conferral of more powers on supranational institutions because it would reduce their fiscal leeway. The salient point for present purposes is that it might be useful for analytical purposes to disaggregate these closely allied, yet distinct or sometimes even conflicting, reasons for strengthening participatory input and inter-institutional dialogue in the EMU.

The effectiveness of the EMU governance framework

Fourth, there is a linkage between democratic controls and the effectiveness of this multi-level system of economic governance. The Presidents of the EU institutions readily admit that 'democratic control and accountability … at the level at which the decisions are taken … is key to ensuring the effectiveness of the integrated financial, budgetary and economic policy frameworks'.[107] 'This implies the involvement of the European Parliament as regards accountability for decisions taken at the European level, while

106 ibid 20-21.

107 Four Presidents' Report (n 69) 16.

maintaining the pivotal role of national parliaments, as appropriate'.[108] The precise blend between the two is not clear.

Moreover, as regards national economic policy, the need for robust accountability mechanisms is further premised on the need to build consensus in respect of the content of stringent austerity measures, thereby fostering national ownership of the reforms agreed with the creditor States and/or the EU institutions. National ownership is key to the success of the EMU.[109]

The institutional implications of the Eurozone crisis

But how do the institutional developments during and in the wake of the Euro crisis measure against this normative yardstick? This section will outline the impact of the crisis-induced developments on the horizontal and vertical balance of power in the EU and the Member States.

The horizontal dimension: the 'EU Executive' and the European Parliament

The discussion begins with an assessment of the powers accorded to the European Parliament in the economic union. For analytical purposes, we will distinguish between policy initiation, norm production, and norm implementation. These will now be examined in turn.

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108 ibid 16.

109 Alexandre de Streel (n 82) 97.

Policy initiation

As regards policy initiation, Kenneth Armstrong rightly argues that the Commission has encountered rivalry from the office of the President of the European Council,[110] which established a Task Force to consider proposals to strengthen EU economic governance.[111] One could further note that the mandate for the Four Presidents' Report[112] and the Four Presidents' Analytical Note[113] was given by the European Council, with the Euro Summit triggering the process in the latter case.

Given that the right of legislative initiative is conferred on the Commission in the Treaties,[114] the Parliament has no formal right to propose EU legislation. Furthermore, it is only the Council that can use Article 241 TFEU to 'frame specific proposals that it wishes the Commission to shape into concrete legislation'.[115] However, it should be noted that the European Parliament, too, has commissioned and financed reports on EMU governance.[116] Moreover, as early as on 7 October 2009 the European Parliament 'set up

110 Kenneth Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 E.L. Rev. 601, 607.

111 See Council of the European Union, 'Note from Task Force established by the March 2010 European Council to the European Council: Final Report by the Task Force' 15302/10 CO EUR-PREP 57 (21 October 2010) <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015302%202010%20INIT> accessed 2 March 2015.

112 Four Presidents' Report (n 69).

113 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem and Mario Draghi, 'Preparing for Next Steps on Better Economic Governance in the Euro Area: Analytical Note' (12 February 2015) <http://ec.europa.eu/priorities/docs/economic-governance-note_en.pdf> accessed 3 March 2015.

114 Article 17(2) TEU.

115 See Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (5th edn, OUP 2011) 45.

116 See, e.g., Cinzia Alcidi and others (n 2).

a special committee on the financial, economic and social crisis that carried out investigations and hearings until its dissolution on 30 July 2011, following the approval of its final report'.[117]

Norm production

> Competence basis, legislative procedure, and Treaties concluded outside the formal confines of the Lisbon Treaty

As regards norm production, the European Parliament has played a very significant role. It will be recalled that the amendments to the preventive arm of the Stability and Growth Pact (SGP) were made pursuant to Article 121(6) TFEU, which mandates the use of the ordinary legislative procedure.[118] The same competence basis was used to enact legislation on the prevention and correction of macroeconomic imbalances.[119] Moreover, the Euro area-specific components of the 'six-pack' and 'two-pack' of EU legislation were adopted on the basis of Article 136 TFEU in combination with Article 121(6) TFEU.[120]

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117 Cristina Fasone (n 65) 169.

118 Regulation (EU) 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 [2011] OJ L306/12.

119 Regulation (EU) 1176/2011 (n 96).

120 Regulation (EU) 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] OJ L306/1; Regulation (EU) 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] OJ L306/8; Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21

On the other hand, it should be noted that the amendments to the corrective arm of the SGP were made pursuant to the second subparagraph of Article 126(14) TFEU, which provides for a special legislative procedure.[121] Moreover, Council Directive 2011/85, which lays down uniform requirements for national budgetary frameworks, was adopted on the basis of the third subparagraph of Article 126(14) TFEU, which merely provides for a right of the European Parliament to be consulted on the proposed legislation.[122] Last, the EFSM was established through a Council Regulation which was adopted on the basis of Article 122(2) TFEU.[123]

Furthermore, we examined in Chapter 2 the varying legal form through which the measures taken to combat the crisis have taken effect. The principal default line is between measures that took legal effect as norms of EU law and those which took effect as non-EU legal measures.[124] The EFSF Framework Agreement, the ESM Treaty, the TSCG, and the agreement concluded between the Member States participating in the Single Resolution Mechanism constitute intergovernmental agreements, which were concluded outside the formal contours of the Lisbon Treaty.

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 [2013] OJ L140/11.

121 Council Regulation (EU) 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] OJ L306/33.

122 Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

123 Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

124 Paul Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 25.

It is true that the Member States initially sought to amend the EU Treaties in order to enshrine the TSCG precepts in EU primary law. This was, however, prevented by the UK veto.[125] 'The ESM took the form of an international treaty outside the confines of the Lisbon Treaty for rather different reasons, these being temporal, viz. that it was felt necessary to establish it before the amendment to Article 136 TFEU had come into force.'[126] Furthermore, it is surely correct that 'changes in EU economic governance cannot meaningfully be understood as mere switches from … intergovernmentalism to supranationalism' and that 'rules-based and co-ordination based governance techniques form "hybrid" normative grids and accountability frameworks'.[127] As such, this is not a zero-sum game.

However, it should be noted that the use of public international law instruments 'evades the institutions and processes which have evolved for norm-production within EU law'.[128] These are primarily Articles 114, 121(6), 126(14), 326-334 and 352 TFEU. Consequently, whenever the Member States have recourse to non-EU law instruments, the European Parliament cannot voice any concerns that it might have about the

125 Paul Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 E.L. Rev. 231, 232-33; Steve Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?' (2012) 8 EuConst 404, 406-07.

126 Paul Craig, 'The Financial Crisis, the EU Institutional Order and Constitutional Responsibility' (2014) Oxford Legal Studies Research Paper 1/2015 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517434> accessed 2 May 2015, 23.

127 Kenneth Armstrong (n 110) 603.

128 ibid 604.

envisaged precepts through the normal EU rulemaking process.[129] The same is true for non-participating Member States.[130]

If anything, 'the people fare less well when matters are regulated through *ad hoc* international agreements by comparison with the EU'.[131] This is so for a number of reasons:

> International agreements normally include no forum such as the EP. Such agreements are made, run, and terminated by executives. The significance of any parliamentary power over ratification is diminished by executive control over the legislature. Parliamentary supervision thereafter will usually be interstitial and marginal, this problem being exacerbated by the large number of such agreements. The ordinary citizen normally plays no role in this arena.[132]

The European Parliament was allowed to appoint four representatives in the negotiation process for the ESM Treaty. These reported on their activities to the parliamentary committees and the plenary.[133] There is evidence that the final version of the TSCG was largely the result of the amendments proposed by the Parliament, which had the main objective of bringing the content of the new Treaty in line with the 'six pack'.[134]

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129 See also Edoardo Chiti and Pedro Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CML Rev. 683, 689.

130 Kaarlo Tuori and Klaus Tuori (n 2) 158.

131 Paul Craig (n 1) 33.

132 ibid 33.

133 Cristina Fasone (n 65) 172.

134 ibid 173.

The European Parliament's input into the crisis-induced measures

Furthermore, one cannot just assume that the European Parliament rubber-stamped the measures which were enacted *within* the formal confines of the EU Treaties in accordance with the ordinary legislative procedure. A detailed analysis of the Commission proposals, the Committee draft reports, and the final texts adopted by the Union co-legislators reveals that the European Parliament had a pretty good strike rate when getting its amendments included in the final legislation. *Grosso modo*, the same is true for those few instruments which were adopted in accordance with a special legislative procedure, not least because they formed part of legislative 'packages'.

As regards the measures which were adopted pursuant to the ordinary legislative procedure, the temporal sequence was as follows. The Commission proposal was considered by the specialist parliamentary committee, which produced a draft report. This then was tabled for plenary and was *prima facie* endorsed by it. This constituted a 'partial vote at 1st reading/single reading' and 'the vote on the legislative resolution was postponed to a later date'. This then became the bargaining position used by the Parliament in the 'trilogue' discussions. The amendments adopted in plenary were 'the result of a compromise negotiated between Parliament and Council'. As an agreement was reached between Parliament and Council, the Parliament's position at first reading corresponds to the final legislative act.[135]

135 I am grateful to Professor Paul Craig for bringing the temporal sequence to my attention.

The Parliament's input into each of the measures enacted to combat the crisis is examined elsewhere.[136] Instead this chapter will focus on the broad themes that affect all these Regulations and Directives. We will distinguish between substantive/technical amendments and those amendments that concern accountability and transparency in the functioning of the EMU.

Substantive amendments

Some very technical and/or detailed amendments made by the rapporteurs to the proposed 'six pack' and 'two pack' of EU legislation got through. These concerned, for example, the frequency at which the medium-term budgetary objective should be revised,[137] or giving preference to existing Union or Euro area financial mechanisms before the crisis-hit Member State addresses potential lenders.[138] Another trend that is worth noticing is that the rapporteurs sought to extend the scope of application of those

136 Cristina Fasone (n 65) 171-73.

137 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies' 2010/0280 (COD) (17 December 2010) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.680+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, amendment 25. See Regulation (EC) 1466/97, third paragraph of Article 2-a, as amended by Regulation 1175/2011, Article 1(5).

138 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Strengthening of Economic and Budgetary Surveillance of Member States Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability in the Euro Area' 2011/0385 (COD) (14 March 2012) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-483.472+02+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, amendment 23. See Regulation 472/2013, second paragraph of Article 5.

Regulations that only apply to Euro area Member States to those non-Euro area Member States (if any) wishing to be bound by them.[139]

It is important to stress that the European Parliament is proving itself a real champion of fiscal discipline. The idea of requesting a revised draft budgetary plan in case of particularly serious non-compliance with the SGP precepts came from the relevant Committee draft report.[140] The same is true for sanctions for the manipulation of statistics.[141] Other proposed amendments that would have kept recalcitrant Member States on a tight leash, such as the *ex post* evaluation of budgetary forecasts[142] and tougher sanctions in the MIP,[143] did not go through.

It is fairly unsurprising that the Parliament suggested provisions with teeth. Being a pro-European institution, the Parliament sought to strengthen fiscal discipline in the EU and bolster the provisions on economic union. As noted above, fiscal irresponsibility by a

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139 See, e.g., Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area' 2010/0279 (COD) (16 December 2010) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.574+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, amendment 20.

140 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area 2011/0386 (COD) (14 February 2012) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-483.469+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, amendment 30. See Regulation 473/2013, Article 7(2).

141 Committee draft report (n 63), amendment 46. See Regulation 1173/2011, Article 8.

142 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Directive on Requirements for Budgetary Frameworks of the Member States' 2010/0277 (NLE) (16 December 2010) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.691+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, 24, amendment 24. cf Council Directive 2011/85, Article 4(6).

143 Committee draft report (n 139), amendment 24. cf Regulation 1174/2011, Article 3(5).

particular Member State may have a contagious effect on other Member States and threaten financial stability in the EU.

Furthermore, rewarding 'virtuous' Member States is a recurrent theme in the rapporteurs' proposals. For example, one of the rapporteurs had proposed that the EU use the revenues arising from unused payment appropriations in the Union budget for Member States that comply with the SGP or have taken corrective measures, in order to achieve the Union priorities for growth and jobs. This proposal did not go through.[144]

The overall picture emerging from legislative proposals, Committee draft reports, and the final legislation adopted by the EU legislature is that the European Parliament had a pretty good rate of success in getting its amendments through the legislative process, perhaps with the exception of Regulation 473/2013. As it will be shown below, the European Parliament was given more powers in this area than it had previously, though it is still not in the driving seat.

Accountability and transparency requirements

Unsurprisingly, the rapporteurs placed considerable emphasis on improving transparency and strengthening accountability to the European Parliament. As regards the SGP, the idea of including the framework for the European Semester in legislative texts (and not just in a code of conduct endorsed by the Council) originated in the European

144 Committee draft report (n 63), amendment 38.

Parliament.[145] Another proposal that got through concerns hearings of the President of the Eurogroup by the competent committee of the European Parliament.[146]

Moreover, as regards the 'two pack', the rapporteur had proposed that various reporting requirements in relation to developments in the financial sector be added to the proposed Regulation,[147] and the relevant proposals got through.[148] Furthermore, the Committee had asked for greater involvement of the European Parliament in post-programme surveillance,[149] and the proposal got through.[150]

Naturally, some of the proposed amendments to the 'six pack' and 'two pack' were not included in the final legislation. For example, one of the rapporteurs had proposed that the competent committee of the European Parliament be given the discretion to invite the Chairperson of the Board of Governors of the ESM or its Managing Director to appear before it to discuss financial assistance agreements and the consistency of related Memoranda of Understanding (MoUs) with the economic policy measures provided for in the TFEU. This proposal did not go through.[151] Moreover, various proposals to grant the Parliament discretion to invite recalcitrant Member States to explain their economic and budgetary policies and the corrective action they intend to

145 Committee draft report (n 137), amendments 21-22. See also the Explanatory Statement, 47.

146 Amendment 28. cf Regulation (EC) 1466/97, Article 2-ab(1), as amended by Regulation 1175/2011, Article 1(4).

147 Committee draft report (n 138), amendment 18.

148 Regulation 472/2013, Article 3(3).

149 Committee draft report (n 138), amendment 43.

150 See Regulation 472/2013, second subparagraph of Article 14(3).

151 Committee draft report (n 138), amendment 44.

take were not successful either.[152] In a similar vein, the rapporteurs' wish to transform the European Parliament into a forum for 'public debates on macro-economic and budgetary surveillance undertaken by the Council and the Commission' was only partially fulfilled by the inclusion of provisions on 'economic dialogue', as well as other detailed provisions.[153]

Policy implementation

Policy implementation refers to 'the structures and processes by which such norms are elaborated and compliance evaluated'.[154] In the context of EMU governance, one should bear in mind that 'EU fiscal rules are far from being self-executing norms', and hence 'the boundaries between norm production and norm compliance are far from distinct and operate more as a recursive process'.[155] As such, the horizontal division of power in relation to policy implementation is rather important.

It should be noted at the outset that these instruments rest on the idea of dual legitimation: the EU institutions are accountable for their actions in the EMU to the European Parliament, which directly represents the citizens at EU level, and to the Heads of State/Government or national ministers, who are democratically accountable to their

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152 See, e.g., Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Regulation Amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure' 2010/0276 (CNS) (18 January 2011) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.690+02+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015, amendments 35, 40, 42, 46, 48.

153 See, e.g., Committee draft report (n 139), amendment 29.

154 Kenneth Armstrong (n 110) 608.

155 ibid 608-09.

national parliaments and electorates.[156] In turn, the Presidents of the EU and Euro area institutions or bodies may be invited to appear before the European Parliament. The twin rationale behind these transparency and accountability requirements is to 'make sure the Treaty and regulations are being applied correctly' and to 'strengthen peer support and peer pressure' for recalcitrant Member States.[157]

Seen in this light, the European Parliament's limited role in norm implementation is regrettable. It might be the case that the European Parliament co-legislates with the Council when enacting most of these rules, but these norms, in their capacity as 'framework norms', then take on a life of their own, through their elaboration by the Commission, sometimes acting in liaison with the European Central Bank (ECB), in the post-legislative phase. The European Parliament should have a greater role in policy implementation, thereby exercising 'functions of political control and consultation'.[158]

To be sure, this is a feature of the EMU that already existed prior to the crisis. The European Parliament has never been a key player in the EMU. The salient point for present purposes is that the crisis-induced measures have not drastically altered this picture. The Union legislator has acted to increase the powers of the Parliament and has conferred various powers on the Commission, the Council and the Eurogroup. However, the European Parliament still has very few powers in this area.

A detailed examination of the various norms enacted in response to the Euro crisis reveals that, in the context of EU economic governance, the European Parliament is

156 See Article 10 TEU.

157 See the explanatory memorandum on the Committee draft report on Regulation 1174/2011 (n 139).

158 Article 14(1) TEU.

merely accorded a right to be consulted or informed on certain occasions, or to call Union officials to appear before it. It may also offer the opportunity to recalcitrant Member States to participate in an 'exchange of views'. These accountability requirements are commonly labelled as 'economic dialogue'.[159]

The relevant section in EU Regulations and Directives was entitled 'economic dialogue' advisedly: in the context of EMU governance, the final say does not lie with the European Parliament. Nor does the Parliament seem to wish to have an executive role in the surveillance process,[160] not least because it would not necessarily have the institutional capacity to do so. Its proper role lies in holding the EU officials politically accountable, in monitoring compliance with EU rules in this area, and in fostering national ownership of the EU's fiscal rules and recommendations. In the economic union, the Council, the Eurogroup and the Commission, sometimes acting in liaison with the ECB, are in the driving seat.

This is patently obvious from, for instance, 'two pack' legislation, which lays down the most detailed accountability and transparency requirements. As regards 'enhanced surveillance' over a Member State experiencing or threatened with serious difficulties with respect to its financial stability, the Commission is put under a legal obligation to *inform* the European Parliament about the measures adopted by the Member State concerned.[161] Every quarter the Commission shall *communicate* to the competent

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159 See, e.g., Regulation (EC) 1466/97, Article 2-ab, which was added by Regulation (EU) 1175/2011, Article 1(4). For an exegesis of 'economic dialogue' see Cristina Fasone (n 65) 175-77.

160 See the explanatory memorandum on the Committee draft report on Regulation 1174/2011 (n 139).

161 Regulation 472/2013, second subparagraph of Article 3(1).

committee of the European Parliament its assessment of the progress made by the Member State in the implementation of these measures.[162] When the EU asks the Member State concerned to adopt additional measures, the Council shall *inform* the ECON committee about the content of its recommendation, and this committee may offer the opportunity to the Member State concerned and to the Commission to participate in an *exchange of views*.[163] Moreover, during the course of the enhanced surveillance process, the ECON committee may invite representatives of the Commission, the ECB and the International Monetary Fund (IMF) to participate in an *economic dialogue*.[164]

However, it is patently clear that the Commission and the Council are in the driving seat. On the one hand, it is the Commission which may decide to subject a Member State to enhanced surveillance.[165] For its part, the Council may recommend to that Member State to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme.[166] On the other hand, where a Member State requests financial assistance, the Commission, the ECB, and, where appropriate, the IMF, are given a formal say on its macroeconomic adjustment programme.[167] The Commission is merely required to *orally inform* the Chair and Vice-Chairs of the ECON committee of the progress made in the preparation of the draft macroeconomic adjustment programme

162 ibid second subparagraph of Article 3(5).

163 ibid Article 3(8).

164 ibid Article 3(9).

165 ibid Article 2(1).

166 ibid Article 3(7).

167 ibid Article 7(1).

and in the implementation of that programme. This information shall be treated as *confidential*.[168]

Further, as regards the new and/or increased powers conferred on the Commission, the Council and the Eurogroup in relation to national draft budgetary plans and economic partnership programmes, the Commission is merely required to make its opinion public and be prepared to *present* it to the European Parliament.[169] Despite granting significant powers to the 'EU/Euro area Executive', this 'two pack' Regulation only provides for *economic dialogue*.[170]

To be fair, this upward flow of power from the national authorities to the EU institutions and bodies was at least partially matched by the conferral of increased powers on the European Parliament in European economic governance. These often exceed what Articles 121 and 126 TFEU would have demanded, had their wording been taken at face value. Be that as it may, there are still formidable gaps, and it should not escape our notice that the transparency and accountability requirements laid down by the 'six pack' and 'two pack' of EU legislation vary considerably from one area to another.

Last, as regards financial supervision, the powers conferred on the European Parliament in the newly-enacted Regulations are fairly similar to the ones enjoyed by it in the cycle of economic and fiscal surveillance. The European Parliament is primarily a supervisory body whose function is to question the EU authorities and receive their report. There is also provision for an 'exchange of views' between Union and national

168 ibid fifth subparagraph of Article 7(1) and third subparagraph of Article 7(4).

169 Regulation 473/2013, Article 7(3).

170 ibid Article 15.

authorities.[171] Given that this is an area of great sensitivity, there is added emphasis on 'full confidentiality' and 'professional secrecy'.[172]

The vertical dimension: the EU institutions and national parliaments

The discussion thus far has focused on the tasks conferred on the European Parliament in the various instruments enacted in response to the crisis. The focus now shifts to the role of national parliaments in the EMU.

National parliaments are a new recruit to the task of strengthening the democratic legitimacy of the EMU. One has to trawl through the provisions of the crisis-induced measures to get a picture of the powers conferred on them in the revised EMU governance framework. The accountability and transparency requirements laid down by the EU legislation primarily aim at building consensus over fiscal targets and reforms mandated by the EU institutions, and at 'naming and shaming' recalcitrant Member States.

First, it should be noted that, as regards the adoption of EU Regulations and Directives in this area, national parliaments do not have a formal voice over and above subsidiarity checks or policing the limits of Article 352 TFEU, whenever this competence

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171 See, e.g., Regulation (EU) 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] OJ L331/1, preamble recital 23; Regulation 1092/2010, Articles 17(3) and 19; Regulation (EU) 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] OJ L331/12, preamble recital 10; Regulation 1093/2010, Article 18; Council Regulation (EU) 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63, preamble recitals 55-59; and Regulation 1024/2013, Article 20.

172 See, e.g., Regulation 1092/2010, Article 19(5).

basis is used.[173] It is doubtful whether according national parliaments a veto or 'red card' over proposed EU legislation would be legitimate. National parliaments can hold the ministers and the Head of State/Government to account for their actions in the EU or European Council. Their role could be further enhanced 'by each government giving more information and more say to its Parliament, through systematic pre- and post-briefings of the sessions of the EU Council and of the European Council'.[174] The same could be done prior to Euro Summit or Eurogroup meetings. Furthermore, it should be observed that national parliaments have repeatedly signalled their agreement to the Treaty precepts when ratifying the EU Treaties and the successive Treaty amendments.

Second, writers in this area rightly point out that the new EU fiscal rules have curtailed national budgetary autonomy.[175] Furthermore, we have seen in Chapter 3 that EU economic surveillance now covers a broader area, because it has been extended to general economic policy.[176] These controls serve to safeguard the interests of the Union and other EU Member States, but they might sometimes have repercussions for labour rights and the welfare state. What is more, the net result of the various instruments

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173 See Articles 12 TEU and 352(2) TFEU; and Protocols (No 1) on the Role of National Parliaments in the European Union and (No 2) on the Application of the Principles of Subsidiarity and Proportionality. For this debate see among many others Paul Craig (n 80); Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev. 63; Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827.

174 Jean-Claude Piris (n 2) 35 fn 25.

175 See, e.g., Roberto Baratta (n 2) 23-25; Fritz Scharpf (n 2) 25, 27.

176 Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 CML Rev. 1621, 1631; Kaarlo Tuori and Klaus Tuori (n 2) 190.

adopted to combat the crisis is that the fiscal leeway left to national Executives and parliaments is diminishing.

This is all the more so for lender Member States which have signed a MoU with their creditors. This is evidenced by the conditionality attached to the financial assistance granted to them, which we examined in Chapter 3. It is surely correct that national parliaments in crisis-hit countries have the ultimate power to reject the bailout terms mandated by the EU institutions and the IMF. However, Executives and parliaments in crisis-hit countries would hardly, if ever, risk defaulting on their debts and/or leaving the Eurozone. As such, they almost invariably agree to swallow the bitter pill of austerity in return for financial assistance by the *Geldgeber* (i.e., the lender States), with the exception of the Cypriot parliament's *initial* rejection of the bailout terms and Greece's negotiations with its creditors in early 2015. Though in formal terms the borrower States brought these reforms upon themselves, in that they fall within their exclusive powers in the economic field, these measures were collectively agreed with their creditors, who arguably had greater bargaining power than crisis-hit countries on the brink of bankruptcy and chaos.

There is a real problem here, the main infirmity being that the normative precepts of non-domination and transnational mutual recognition[177] might be severely undermined by the *de facto* division between borrower and lender States. However, it is hard to see how national parliaments in crisis-hit countries could be granted more power than a formal *veto* over proposed national legislation. Their role in this area could only be

[177] Kalypso Nicolaidis (n 1) 264-69.

extended through synergies with the European and other national parliaments.[178] The Article 13 TSCG interparliamentary conference might prove instrumental in this respect.

Third, national parliaments have a role to play in enforcing national fiscal rectitude, thereby protecting future generations and promoting the interests of the Union and other EU Member States. Seen in this light, the downward flow of information from the EU institutions to national parliaments is necessary to enable them to discharge their role as discipline enforcers.

For example, as regards enhanced surveillance over Member States experiencing difficulties with respect to their financial stability, the 'two pack' legislation provides that the Commission shall *inform* the parliament of the Member State concerned of the measures adopted by that State in 'cooperation' with the EU institutions and agencies and the IMF.[179] Presumably, the rationale behind this provision is to build consensus over the content of such measures, thereby fostering national ownership of the reforms agreed with that Member State.

Moreover, where a Council recommendation to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme is made public, representatives of the Commission may be invited by the national parliament concerned to participate in an *exchange of views*.[180] Furthermore, during the course of the enhanced surveillance process, the parliament of the Member State concerned may invite

178 See also Cristina Fasone (n 65) 168.

179 Regulation 472/2013, second subparagraph of Article 3(1).

180 ibid Article 3(8)(b).

representatives of the Commission, the ECB and the IMF to participate in an *economic dialogue*.[181]

Further, the national parliament concerned is given the power to invite representatives of the Commission to participate in an *exchange of views* on the progress made in the implementation of the country's macroeconomic adjustment programme or during post-programme surveillance.[182] In this connection, the Commission shall *communicate* its assessment of the economic, fiscal and financial situation in the Member State under post-programme surveillance to the parliament of that Member State.[183] Arguably, the parliament can then use all this information to hold the national Executive to account for its actions in this area.

The other 'two pack' Regulation adds that the Commission should be prepared to *present* its opinion on the draft budgetary plan of the Member State concerned to the parliament of that State.[184] Furthermore, at the request of the parliament of the Member State concerned, the Commission shall *present* to it its recommendation regarding full implementation of the measures provided for in the Council recommendation or decision to give notice under Article 126 TFEU.[185] Such duties facilitate the internalisation of negative cross-border externalities, thereby protecting the interests of the Union and other

181 ibid Article 3(9).

182 ibid Articles 7(11) and 14(5).

183 ibid Article 14(3).

184 Regulation 473/2013, Article 7(3).

185 Regulation 473/2013, Article 11(2).

EU Member States. Depending on the domestic political situation, they might also facilitate the smooth passage of painful measures through the parliament concerned.

The horizontal dimension: the national Executive and national parliaments

The discussion thus far has focused on the institutional implications of the Euro crisis at EU level. The focus now shifts to the relationship and tensions (if any) between the Executive and the legislature in the Member States. We have seen that, for some writers in this area, the EU's legitimacy could only be boosted through indirect control via national parliaments.[186] Ultimately, 'European democracy depends on the health of national democracies'.[187]

The concerns about Executive dominance set out above could be taken to mean that national Executives have reinforced their position towards the legislature. This is surely correct whenever more powers are conferred on the European Council, the Council and the Eurogroup, not least because of the difficulties facing national parliaments in exercising control over the actions of the 'EU Executive'. However, the force of this argument is tempered by at least two important considerations.

First, Executive dominance is a feature of national budgetary policy which existed prior to the crisis. Scholars in many EU countries bemoan what they perceive as the 'deparliamentarisation' of budgetary policy.[188] Other authors even go as far as arguing

186 See, e.g., Joseph Weiler (n 2) 837.

187 Kalypso Nicolaidis (n 1) 273.

188 See the evidence provided by Giacomo Delledonne, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 201.

that 'parliamentary safeguards have ceased to function'.[189] This is largely a result of Executive control over the legislature and serves to exacerbate the commitment problem.[190]

Second, the revised EU economic rules can sometimes be seen as *empowering* national parliaments vis-à-vis the Executive. Following the crisis-induced reforms of the EMU governance framework, 'national parliaments are able to scrutinize national budgets to a greater extent than hitherto, given that this area has previously been largely regarded as falling within the province of national executives'.[191] National parliaments can use the balanced budget rule as an extra lever to exert influence on economic policy-making.[192] Furthermore, 'the parliaments may, thanks to the objective analysis of the newly established fiscal councils, be able to better exercise their budgetary scrutiny and oversight'.[193]

The intra-institutional dimension and patterns of geographical fragmentation: borrower States and lender States

Insofar as the bailout packages were primarily funded through national contributions, the Euro crisis has led to a *de facto* division between borrower and lender Member States. In

189 Marek Antoš, 'Fiscal Stability Rules in Central European Constitutions' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 10, 208.

190 See Giandomenico Majone (n 1) 16ff.

191 Paul Craig (n 126) 28.

192 I am grateful to Professor Paul Craig for bringing this point to my attention.

193 Alexandre de Streel (n 82) 102.

fact, a more nuanced approach might be warranted. Lender States are further divided into relatively 'rich' Member States (e.g., Germany and France) and those Member States which are not necessarily in a better economic position than those countries which they have to keep afloat (e.g. Slovenia and Lithuania). Moreover, as regards borrower States, they could be subdivided into countries which have received funds from other States and/or financial mechanisms and have now successfully exited their bailout programmes (Ireland, Portugal and Spain), and countries which are still in receipt of financial assistance (at the time of writing, only Greece).

In intra-institutional terms, it is still uncertain whether creditor States are exercising greater dominance over crisis-hit countries, not least because the temporal dimension is not clear.[194] Moreover, it could be argued that larger Member States have always wielded more power within these institutions.[195] Furthermore, as repeatedly noted above, the lender States, too, have taken a blow from the Euro crisis. Their budgetary sovereignty has been *de facto* curtailed, in that they have less money to spend for other purposes. This is partly because they had to grant bailout packages to other EU Member States. It is also because they had to rescue their ailing banks.

Given the patterns of geographical fragmentation adumbrated above, there is a growing consensus among EU law scholars, political scientists and politicians that there is a need for 'more flexible patterns of integration'.[196] Their argument almost invariably

194 Paul Craig (n 126) 29-30. cf Giandomenico Majone (n 2) 19-20; Joseph Weiler (n 2) 830-31.

195 Paul Craig (n 126) 30.

196 Giandomenico Majone (n 2) 21. See also Valéry Giscard d'Estaing, *Europa: La Dernière Chance de l'Europe* (XO 2014); Jean-Claude Piris (n 2).

rests on the premise that the emerging patterns of geographical fragmentation and/or the economic heterogeneity within the EMU warrant variable geometry or integration *à la carte* in the EU. For example, Giandomenico Majone argues as follows:

> Actually, monetary union has split the EU into several camps – perhaps permanently. … [W]e now have a Union divided into three groups: the members of the euro zone; the *de jure* (UK, Denmark) and *de facto* (Sweden) opt-outs; and the member states waiting (with less and less enthusiasm) to be admitted to the euro zone. A fourth group may emerge in the near future … the future drop-outs of the euro zone – countries with a large public debt which in the next five to ten years may have to give up the euro. … But even fiscally sound members of the Eurozone could in the future decide to give up the common currency. The reason is that a one-size-fits-all monetary policy may entail costs too high to make monetary union acceptable in terms of an economic calculus of benefits and costs.[197]

Drawing on the economic theory of clubs, Majone makes a convincing case for variable geometry or integration *à la carte* in the EU.[198] This model of integration connotes the idea that 'no one must participate in everything'.[199] Accordingly, 'there would be common European policies in areas where the member states have a common interest, but not otherwise'.[200]

There is much that is of interest in Majone's thoughtful analysis. His theory is, however, conspicuously light on details. How should one go about adjusting the existing legal and institutional arrangements in the EMU? For example, should some competences conferred upon the EU in the Treaties be returned to the Member States? Do we need a 'Euro area flexibility clause'? And, if the answer to the preceding question is in the

197 Giandomenico Majone (n 2) 21-22.

198 ibid 23-30.

199 ibid 22.

200 ibid 22.

affirmative, what would it add, if anything, to Articles 136 and 352 TFEU and the Treaty provisions on enhanced cooperation?

Moreover, there are real difficulties with Majone's hypothesis. First, as regards the economic 'pillar' of the EMU, what would Majone's proposal add, if anything, to the *country-specific* medium-term budgetary objectives, the *country-specific* recommendations, and the different SGP/TSCG rules applying to countries with sound public finances, as opposed to countries with a high debt-to-GDP ratio? Majone cites the monetary union and the Schengen Agreement as 'concrete examples of variable geometry' because of the various *de lege* and *de facto* opt-outs,[201] but fails to appreciate the extent to which there is already a considerable degree of variable geometry *within* the EMU.

Second, as regards monetary policy, Majone's argument would inevitably lead to the *demise* of the single currency. If one were to endorse the theory of optimal currency areas,[202] it could be said to be true that the Eurozone does not constitute an optimal currency area. It would be virtually impossible to adjust monetary policy to the perceived needs of each and every of the 19 Euro area Member States or indeed of different blocs of them. Some of these States would have to leave the Euro area and switch back to their national currencies. Alternatively, there could be a parallel currency in, say, Greece. Even the limited capacity of the ECB to use the monetary policy instruments at its disposal – e.g., bond-buying programmes or the Emergency Liquidity Assistance – in a

201 ibid 25.

202 See Robert Mundell, 'A Theory of Optimum Currency Areas' (1961) 51 American Economic Review 657.

differentiated manner can be said to be largely constrained by the constitutional requirements laid down by the Treaties, as interpreted by the CJEU in *Pringle*[203] or the German *Bundesverfassungsgericht* in the *Gauweiler* case.[204]

For his part, Jean-Claude Piris argues that if the existing possibilities of differentiated integration prove inadequate to solve the problems facing the EU, 'then the option of a "Two-speed Europe" should be considered, with a group of Member States playing the role of an "avant-garde".[205] This could be achieved in a 'softer' or a 'bolder' form, the principal default line between these two forms of differentiated integration being the existence of a legal instrument establishing a 'group' or 'avant-garde' of Member States in the latter case.[206]

Piris offers a number of arguments as to why a 'two-speed Europe' is the best way forward. First, 'the two branches of EMU must be rebalanced' and 'in order to do that, it would be necessary to harmonize somewhat the budgetary and economic policies of those states that have the euro as their currency'.[207] Second, 'the fact remains that an EU composed of twenty-seven [now twenty-eight] heterogeneous Member States has proven that it is not able to function efficiently within its present legal framework and that it is not able to answer the needs, interests and wishes of all its Member States at the

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203 Case C-370/12 (n 98).

204 BVerfG, 2 BvR 2728/13 of 14.1.2014 <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html> accessed 4 May 2015; Case C-62/14 (Grand Chamber) *Gauweiler and Others* (Court, 16 June 2015), paras 109ff; BVerfG, 2 BvR 2728/13 of 21 June 2016.

205 Jean-Claude Piris (n 2) 52.

206 ibid 104-05.

207 ibid 102.

same time'.[208] Third, '[a] two-speed Europe might also help to try and regain the support of European citizens by presenting them with a bold and coherent political project'.[209]

The more detailed aspects of Piris' argument are scrutinised elsewhere.[210] Suffice it to say for present purposes that, insofar as the EMU is not 'balanced', the constitutional responsibility for the status quo lies with the Member States.[211] Moreover, it is unclear how the failure of the EU-28 could serve as a basis for a more 'bold and coherent political project'. One could even go as far as saying that a 'two-speed EU' might stigmatise those Member States that cannot keep pace with the 'avant-garde', thereby serving to increase political tensions within the EU. It might be a clichéd view of Europe, but it is true that «*nous ne sommes pas locataires en Europe, mais copropriétaires*» (i.e., we are not renters in Europe, but co-owners). It would be most unfortunate if the Euro crisis led to the failure of the EU as a political project. Nevertheless, more could be done to enhance its democratic credentials.

Policy proposals to enhance transparency and accountability in the EMU

It would be mistaken to assume that there are no further steps that could be taken to enhance transparency and accountability in the EMU. In this connection, EU law scholars

208 ibid 103.

209 ibid 103.

210 Paul Craig, 'Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe' (2012) 37 E.L. Rev. 800.

211 Paul Craig (n 126) 5-15.

have made a number of detailed policy suggestions.[212] To be sure, this is not purely an EU law issue, and the powers conferred on national institutions are highly contingent upon national constitutional arrangements. This chapter will advance a number of modest, yet hopefully useful, policy proposals that would serve to improve, in the opinion of the author, transparency and accountability in the EMU. These proposals will primarily focus on the measures that have been enacted *within* the formal contours of the EU Treaties. It is important to stress that their implementation would not require a Treaty amendment, which might as well be politically unfeasible at this stage.

First, a detailed analysis of the impact assessments (IAs) carried out by the Commission from 2008 onwards reveals that there was no IA for the 'six pack' and 'two pack' of EU legislation.[213] Most IAs concern financial regulation and financial supervision, the most prominent example being the IA carried out prior to the establishment of the European Supervisory Agencies (ESAs) and the European Systemic Risk Board (ESRB).[214]

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212 See among many others Cristina Fasone (n 65) 178, 180; Miguel Poiares Maduro and others (n 2) 9; Jean-Claude Piris (n 2) 35 fn 25.

213 See European Commission, 'List of Impact Assessments' (13 January 2015) <http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2014_en.htm> accessed 4 May 2015.

214 European Commission, 'Commission Staff Working Document - Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Community Macro Prudential Oversight of the Financial System and Establishing a European Systemic Risk Board, Proposal for a Council Decision Entrusting the European Central Bank with Specific Tasks Concerning the Functioning of the European Systemic Risk Board, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Banking Authority, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Insurance and Occupational Pensions Authority, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Securities and Markets Authority: Impact Assessment' SEC(2009) 1234 (23 September 2009) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC1234&from=EN> accessed 4 May 2015.

It is perfectly understood that 'it normally takes more than 12 months to produce an IA, including the periods needed for public consultation'.[215] The EU institutions and Member States had to react promptly to combat a financial and public debt crisis that could have led to the demise of the single currency and/or the collapse of the financial system in Europe. Be that as it may, in the future the EU Commission should endeavour to carry out IAs prior to the adoption of key legislative instruments. The benefits of an IA are well known. Notably, an IA 'helps the EU institutions to design better policies and laws'; 'facilitates better-informed decision-making throughout the legislative process'; 'helps to ensure … respect for Fundamental Rights'; and 'helps to ensure that the principles of subsidiarity and proportionality are respected'.[216]

In this connection, it should be further noted that the Council, Commission and Parliament did not ask the EU Agency of Fundamental Rights (FRA) to assess the impact of the proposals on 'six pack' and 'two pack' on fundamental rights. Nor did they ask the FRA to examine the effects of other post-crisis developments.[217] In fact, the Euro crisis was not identified in the two Multiannual Frameworks spanning the crisis (2007-12; and 2013-17) as one of the thematic areas that the FRA should look into.[218] 'Additionally, the Frameworks have never identified socio-economic rights –of particular relevance in the context of the euro area crisis and its effects– as an area of focus for the Agency.'[219] As

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215 European Commission (n 79) 8.

216 ibid 6.

217 Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis' (2016) 22 ELJ 61, 68-70.

218 ibid 67.

219 ibid 67.

argued by Hinarejos (2016), 'the Agency should be allowed to observe, gather data and disseminate advice out of its own initiative in relation to the effects on fundamental rights of all post-crisis developments, including those that have formally "escaped" the EU legal framework but bear clear ties to it'.[220] 'And finally, the institutions with the competence to do so—Council, Commission and European Parliament—should, ideally, make better use of the Agency's capability and expertise by requesting its advice in this context…'.[221]

Second, it is axiomatic that '[c]onsultation helps to ensure that policies are effective and efficient, and it increases the legitimacy of EU action from the point of view of stakeholders and citizens.'[222] When carrying out IAs, the Commission could enhance citizen participation through online consultation exercises. This could be achieved through 'Your Voice in Europe', which is 'the European Commission's "single access point" to a wide variety of consultations, discussions and other tools which enable you to play an active role in the European policy-making process'.[223]

Furthermore, the President of the European Commission has pledged to undertake social impact assessments for future support and reform programmes.[224] In this connection, Transparency International EU (2017) argues that EU Charter rights should

220 ibid 73.

221 ibid 73.

222 European Commission (n 79) 19.

223 European Commission, 'Your Voice in Europe' (30 June 2014) <http://ec.europa.eu/yourvoice/index_en.htm> accessed 4 May 2015. See Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 301-02.

224 Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (Strasbourg, 15 July 2014) <http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf> accessed 1 May 2015, 8.

be factored into social impact assessments.[225] Moreover, the impact of the EU Commission's 'Better Regulation Agenda' (2015) might prove significant in this area of EU law, too, insofar as the use of IAs and consultation exercises might be expanded to cover more acts and stakeholders.[226]

One should not be misguided into believing that no consultation exercises were carried out in relation to measures enacted to combat the financial crisis. A detailed analysis of online consultation exercises carried out by the Commission through 'Your Voice in Europe' from 2008 onwards shows that most of these consultations concerned financial regulation, financial supervision, and banking law.[227] As such, there is ample scope for improvement.

Third, we argued in Chapter 3 that, following the adoption of 'two pack' legislation, the EU institutions now possess the tools that would enable them to closely monitor the economic, financial and fiscal developments in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. As such, rather than acting outside the formal confines of the Lisbon Treaty, the EU institutions could make use of 'two pack' legislation, thereby bringing economic surveillance within the normal EU process. This would improve transparency and accountability in many ways. Notably, the ESM institutions are currently acting outside the scope of EU law and

225 Transparency International EU, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) <transparency.eu/wpcontent/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> accessed 7 April 2017, 27.

226 European Commission, 'Better Regulation Agenda: Enhancing Transparency and Scrutiny for Better EU Law-Making' IP/15/4988 (Strasbourg, 19 May 2015) <http://europa.eu/rapid/press-release_IP-15-4988_en.htm> accessed 25 May 2015.

227 See European Commission, 'Closed Consultations' (12 March 2015) <http://ec.europa.eu/yourvoice/consultations/2015/index_en.htm> accessed 4 May 2015.

hence are not bound by the EU Charter of Fundamental Rights. This theme will be more fully explored in Chapter 6 in light of the CJEU's ruling in *Ledra Advertising*.[228] Further, we have seen that 'two pack' legislation lays down the most extensive transparency and accountability requirements of any instrument of European economic governance. As such, 'get[ting] the system within the normal EU process'[229] would enhance the role of the European Parliament in EU economic governance.

Ideally, the TSCG rules and/or the ESM should be incorporated into the EU Treaties and secondary legislation, not least because these 'remain outside the scope of application of Treaty provisions on the principle of transparency and complementary secondary legislation, as well as the EU Charter of Fundamental Rights'.[230] This was confirmed by the Court in *Pringle*[231] and *Ledra Advertising* only concerns, as we shall see in Chapter 6, the liability of the EU institutions for damages when acting in the ESM. However, a Treaty amendment seems rather unlikely at this stage.

Fourth, the EU and national officials need to better explain to citizens the rationale for the continued existence of the EU economic rules, 'in particular that EU constraint replaces the previous monetary constraint (risk of devaluation) existing before the common currency and aims to protect future generations by limiting the short-term

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228 Joined Cases C-8/15 P to C-10/15 P (Grand Chamber) *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C:2016:701.

229 European Parliament, 'MEPs Anticipate End of Troika' (16 January 2014) <http://www.europarl.europa.eu/news/en/news-room/content/20140110IPR32420/html/MEPs-anticipate-end-of-the-Troika> accessed 22 April 2014.

230 Kaarlo Tuori and Klaus Tuori (n 2) 218.

231 Case C-370/12 (n 98) paras 178-181.

bias of policymakers'.[232] This proposal has no 'cosmopolitan elitist' overtone. What is often conspicuously absent in treatises of the EU's democratic woes is an analysis of the *benefits* of EMU membership. In this connection, the 1989 Delors report argues that a single currency area 'remove[s] intra-Community exchange rate uncertainties and reduce[s] transaction costs, eliminate[s] exchange rate variability and reduce[s] the susceptibility of the Community to external shocks'.[233] Moreover, Roberto Baratta (2012) rightly argues that, for all its 'vices', the balanced budget rule promotes intergenerational justice/equality by 'prevent[ing] the elites governing a country from adopting unethical debt-creating policies which will be paid by the future generations',[234] thereby alleviating the commitment problem. Integrating the needs of future generations into governance structures is in line with recent developments in the laws of the Member States.[235]

Fifth, much of the decision-making in Eurogroup takes place behind closed doors. We might indeed have access to public statements made after the Eurogroup meetings, but we do not have the minutes from those meetings. This is regrettable. The heightening of the role of Euro area bodies in EU economic governance, which is intrinsically linked to the main features of the financial mechanisms that were set up to combat the crisis, makes it increasingly difficult to sustain an argument that the Eurogroup is merely an

232 Alexandre de Streel (n 82) 102.

233 Delors report (n 73) 17.

234 Roberto Baratta (n 2) 27.

235 See, e.g., The Well-Being of Future Generations (Wales) Act 2015 (anaw 2) and the evidence provided by Jaakko Kuosmanen, 'Taking the Needs of Future Generations into Account: The Case of Wales' (OxHRH Blog, 20 May 2015) <http://ohrh.law.ox.ac.uk/taking-the-needs-of-future-generations-into-account-the-case-of-wales/> accessed 6 June 2015.

'informal body'.[236] The Eurogroup has formal legitimacy through Article 137 TFEU and Protocol (No 14) on the Euro Group. Nor should it be seen as a semi-technocratic institution. Insofar as this argument has any currency at all, it could only be taken to apply to the Eurogroup Working Group (EWG).

More transparency in this context would better enable citizens and national institutions to understand the EU dimension of domestic debates on fiscal and economic policy and to internalise the negative cross-border externalities of policy choices made at national level. Consequently, it would also be in the interests of the EU itself to improve transparency in the workings of the Eurogroup.

Furthermore, it should not escape our notice that the decisions taken by the EWG and the Eurogroup might have an indirect impact on people's rights and the welfare state. For example, the EFSF Framework Agreement provides that the MoU and the main terms of the Financial Assistance Facility Agreement to be proposed to a crisis-hit Member State are approved by the EWG.[237] Before financial assistance is disbursed, the Commission presents, in liaison with the ECB, a report to the EWG analysing compliance by the Beneficiary Member State concerned with the terms and conditions set out in the MoU and the Council Decision (if any) relating to it. The Euro Area Member States then evaluate such compliance and unanimously decide whether to permit such disbursement.[238]

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236 See Council of the European Union, 'Eurogroup' (10 March 2015) <http://www.consilium.europa.eu/en/council-eu/eurogroup/> accessed 25 May 2015.

237 EFSF Framework Agreement, Article 2(1)(a).

238 ibid Article 3(1).

In light of the above, people have a valid interest in being informed of the decisions reached by the Euro area bodies, as well as in knowing the reasons behind them. This is only partially achieved through publishing the work programme of the Eurogroup and press statements. More should be done on this front.

The 2016 Transparency Initiative by the Eurogroup President is a welcome development. In the Eurogroup meeting of 11 February 2016, 'Ministers agreed as a first step to make public the annotated agendas for Eurogroup meetings and the summaries of their discussions.'[239] Moreover, the Eurogroup decided on 7 March 2016 that 'in future, Eurogroup meeting documents would be published shortly after the meetings … unless the institutions which drafted them object.'[240] 'Documents which have not been finalised or which contain market-sensitive information will not be made public.'[241] The European Ombudsman Emily O'Reilly has asked the Eurogroup President to make further improvements as regards access to documents relating to the work of the Eurogroup which are not published proactively, transparency in the workings of the Eurogroup Working Group (EWG), and the publication of draft programme country-related documents prior to Eurogroup meetings.[242] The latter documents are only published

239 Council of the European Union, 'Eurogroup, 11/02/2016' <http://www.consilium.europa.eu/en/meetings/eurogroup/2016/02/11/> accessed 7 April 2017.

240 Council of the European Union, 'Eurogroup, 07/03/2016' <http://www.consilium.europa.eu/en/meetings/eurogroup/2016/03/07/> accessed 7 April 2017.

241 ibid.

242 European Ombudsman, 'Recent Initiative to Improve Eurogroup Transparency' (14 March 2016) <www.ombudsman.europa.eu/resources/otherdocument.faces/en/65359/html.bookmark> accessed 7 March 2017; Council of the European Union, 'Reply from the Eurogroup President to the European Ombudsman's Letter on Eurogroup Transparency' (31 May 2016) <www.consilium.europa.eu/en/press/press-releases/2016/05/31-peg-letter-ombudsman/> accessed 7 April 2017; European Ombudsman, 'Follow-up Response from the European Ombudsman to the

ahead of the ESM Board of Governors meetings (that is, after Eurogroup meetings). Overall, the Eurogroup President resists the idea that the EU's transparency regime is applicable to the Eurogroup, insisting that Regulation 1049/2001 does not apply to an informal body. He further seeks very clearly to protect confidentiality in the workings of the EWG.

Sixth, decision-making in the ESM bodies, which are very much 'joined at the hip' with Euro area bodies,[243] can also be intransparent. A recent report by Transparency International EU (2017) focuses sharply on transparency and accountability in the ESM. It is rightly noted in the report that:

> … the ESM is outside of the EU treaties. This has real consequences and makes EU-level accountability impossible. EU law is not applicable, e.g. the Access to Documents Regulation, the EU's fundamental rights charter or integrity provisions flowing from the EU Staff Regulation. First and foremost, becoming an EU institution would enable the ESM to take advantage of the services of and synergies with a range of EU bodies and institutions, such as the European Parliament, Ombudsman, Court of Auditors, Anti-Fraud Office, European Data Protection Supervisor and more.[244]

Transparency International EU (2017) further argues that 'the difficulty in holding the ESM to account can be addressed partly by increasing the transparency of its

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Reply of President Dijsselbloem to her Letter Concerning Eurogroup Transparency' (30 August 2016) <www.ombudsman.europa.eu/resources/otherdocument.faces/en/70708/html.bookmark> accessed 7 March 2017; Council of the European Union, 'Reply from the Eurogroup President to the European Ombudsman's Letter on Eurogroup Transparency' (1 December 2016) <www.consilium.europa.eu/en/press/press-releases/2016/12/01-eurogroup-peg-letter-ombudsman/> accessed 7 April 2017.

243 Paul Craig and Menelaos Markakis (n 91) 289-92.

244 Transparency International EU, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) <transparency.eu/wpcontent/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> accessed 7 April 2017, 7.

operations'.[245] The key recommendations made in this respect are for the ESM to establish a procedure allowing the public to petition it for access to documents, also clarifying in its By-Laws what constitutes an 'overriding public interest' as a basis for precluding the disclosure of ESM documents.[246] Moreover, economic models and underlying assumptions used by the ESM, including those used to compute debt sustainability, should be made public to allow an informed debate.[247] Furthermore, it is argued that the ESM should publish redacted minutes of its Board of Directors and Board of Governors meetings.[248]

A final point concerns the EU's legitimacy more broadly, as well as the efficacy of the EMU framework. The 1989 Delors report notes that regional and structural policies 'help prevent the emergence or aggravation of regional and sectoral imbalances which could threaten the viability of an economic and monetary union'.[249] Accordingly, 'common policies aimed at structural change and regional development' are, in the opinion of the Delors committee, one of the four basic elements of an economic union.[250] These policies are 'necessary in order to promote an optimum allocation of resources and to spread welfare gains throughout the Community'.[251] 'If sufficient consideration were

245 ibid 8.

246 ibid 29-30.

247 ibid 30-31.

248 ibid 31.

249 Delors report (n 73) 12.

250 ibid 16.

251 ibid 18.

not given to regional imbalances, the economic union would be faced with grave economic and political risks.'[252]

Narrowing the development disparities among regions and Member States and promoting economic, social and territorial cohesion would greatly improve the output and social legitimacy of the EU. The Structural Funds and the Cohesion Fund are the financial instruments of EU regional policy which are used for these purposes. Allocating more money to crisis-hit countries through the use of these funds would be much less controversial than, say, additional bailout packages or a substantial EU budget increase.[253] To be sure, these might still prove necessary in the future. Further, one does not even necessarily need to increase the budget allocated to EU regional policy, which might well prove politically and/or economically difficult. For example, the EU has already temporarily increased by 10% the rate of co-financing for projects in countries which are in receipt of financial assistance. Therefore, projects in Greece, Portugal, Latvia and Romania can be co-financed by the EU by up to 95%.[254]

As regards Greece, the use of structural funds has been expanded to cover existing SMEs wishing to expand their activities, as well as 'bigger projects'. Moreover, an action plan with a list of priority projects was drafted, and the Taskforce for Greece '[was]

252 ibid 18.

253 cf Miguel Poiares Maduro (n 2).

254 European Commission, 'Actions Taken with Structural Funds to Promote Growth' (30 January 2012) <http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5735&lang=en> accessed 30 April 2015.

helping to strengthen the capacity of Greek authorities to accelerate implementation of structural funds investments on the ground'.[255]

The technical assistance provided by the Taskforce for Greece [had] yielded very positive results. 'Thanks to a combined effort, Greece [had then] reached 5th place out of all Member States in its absorption of EU Structural and Cohesion Funds, compared to 18th place at the end of 2011.'[256] 'The latest figures show[ed] the country [had then] made use of 81.3% of the funding available in 2007-2013', which [was] 'well above the EU average of 69.17%'.[257] As regards improvements in the business environment, risk-based customs controls, coupled with other reforms, [had] helped to decrease the time for clearance by up to 50% and costs by 20% to 50%.[258] Further, the Taskforce [had] assisted the Greek authorities in combatting tax fraud, tax evasion and money laundering,[259] thereby playing a small part in enhancing the social legitimacy of the bailout programme.

The Task Force was unfortunately dismantled by the Greek government in July 2015. In the opinion of the current author, technical assistance is crucial in cases of 'involuntary non-compliance' with the EU's rules and recommendations, where the Member States lack the capacity to comply with a given rule or the terms of the MoU

255 ibid.

256 European Commission, 'Seventh Activity Report of the Task Force for Greece: Reforms Delivering Results' MEMO/14/495 (23 July 2014) <http://europa.eu/rapid/press-release_MEMO-14-495_en.htm> accessed 30 April 2015, 1.

257 ibid 1.

258 ibid 3.

259 ibid 2-4.

signed with their creditors.[260] In this connection, it is argued by Amtenbrink and Repasi (2017) that the Euro area stabilisation function, which was proposed in the Five Presidents' Report (2015),[261] would 'addres[s] the current lack of sufficient instruments to tackle involuntary non-compliance through management at an early stage, before fiscal stability is at risk'.[262] The proposed fiscal stabilisation function would deal with asymmetric shocks and would add to the role of the EU's Structural and Cohesion Funds, which address, as we have seen, structural and regional imbalances. Ensuring fiscal discipline, addressing structural imbalances and inequalities and countering asymmetric shocks are all key to a mature EMU.[263]

Conclusions

The discussion in this chapter has focused on democracy, legitimacy and accountability in Euro crisis management and in the functioning of the EMU. There are features of EMU governance which should be readily applauded, whilst other features are potentially problematic. There will be no attempt to summarise the preceding argument in its entirety. It is nonetheless worth highlighting certain features that are of particular importance. These concern the various critiques mounted against the democratic credentials of the EU's response to the crisis.

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260 See further Fabian Amtenbrink and René Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) ch 9.

261 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (Five Presidents' Report) 14-15.

262 Fabian Amtenbrink and René Repasi (n 260).

263 Alicia Hinarejos (n 176) 1622-24.

First, as regards input legitimacy, most of the new EU economic rules were enacted in accordance with the ordinary legislative procedure, and, for the first time in its history, the European Parliament enjoyed a co-equal status with the Council in norm production in this area. Moreover, the Parliament had a pretty good strike rate when getting its amendments included in the final legislation.

It is clear that more powers could be granted to the European and national parliaments in this area, mostly in terms of supervising the implementation of these rules and the activities of the EU and national institutions. This would serve to safeguard people's rights, the interests of the Union and the Member States, and the effectiveness of the EMU governance framework.

As regards the involvement of civil society, there is more to be done. The task of seeking the views of the social partners and civil society organisations is sometimes only conferred on the domestic authorities,[264] but the EU institutions, too, have a role to play in this respect.[265] We argued above that the Commission should carry out IAs prior to the adoption of key legislative instruments and enhance citizen participation through online consultation exercises. The EU and national officials should take the social impact of their policy choices very seriously.[266]

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264 See, e.g., Regulation 472/2013, Article 8.

265 See also European Parliament, 'Report on Constitutional Problems of a Multitier Governance in the European Union' 2012/2078(INI) (15 November 2013) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0372+0+DOC+PDF+V0//EN> accessed 18 June 2015, 28 para 15.

266 See, e.g. Regulation 1176/2011, Article 8(1). See also Jean-Claude Juncker (n 224) 8.

Second, as regards fears of Executive dominance, these are allayed by the existence of rules which empower the legislature vis-à-vis the Executive. National parliaments can use the balanced budget rule as an extra lever to exert influence on economic policy-making. Furthermore, they can use the information provided by independent fiscal councils to scrutinise national budgetary and economic policy. The role of national parliaments could be further strengthened through synergies with parliaments in other Member States and the European Parliament – a theme also explored in Chapter 5 in relation to the Banking Union.

Third, in intra-institutional terms, there is no cast-iron evidence that large creditor States are exercising greater dominance over crisis-hit countries or smaller creditor States than was the case previously. None of what has been argued here should be taken to undermine the role of such salient principles as non-domination among peoples and mutual recognition of the many European identities, which should indeed be governing the functioning of the EU. In this connection, the *de facto* division between borrower and lender States could prove problematic, not least because it is a source of severe political tensions.

It is central to our thesis that the EU institutions and Member States should cherish the value of the EU-28 as a political project. There is very little (if any) evidence that the existing possibilities and arrangements for differentiated integration are inadequate. In fact, some of them (such as enhanced cooperation) have only rarely been used in this context.[267] Other Treaty provisions, too, such as Article 136 TFEU, have a

[267] See, e.g., the Commission proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax COM(2013) 71 final; Joachim Englisch, John Vella and

huge, and to a great extent yet unexplored, potential. It is important to consider and endeavour to have recourse to these competence bases before one castigates the 'rigidity' and 'inflexibilities' of the Treaty schema and seeks to radically reform the EU.[268]

All this places added responsibility on the EU and national officials to safeguard people's rights, the interests of the Union and Member States, and the effectiveness of the EMU framework. A richer notion of constitutional responsibility demands as much.[269] The well-being of us all is highly contingent upon the effective discharge of such a duty.

Anzhela Yevgenyeva (now Cédelle), 'The Financial Transaction Tax Proposal under the Enhanced Cooperation Procedure: Legal and Practical Considerations' (2013) 2 British Tax Review 223, 246-55.

268 See also European Parliament (n 265) 9-11.

269 Paul Craig (n 126) 10-15.

CHAPTER FIVE: DIVISION OF POWER, DEMOCRATIC INPUT AND ACCOUNTABILITY STRUCTURES IN THE EU'S BANKING UNION

Introduction

The discussion thus far has focused on democracy, legitimacy and accountability within the framework of EU economic governance. The focus now shifts to division of power and accountability structures in the Banking Union. This chapter will focus on political accountability in the European Banking Union (EBU). A detailed analysis of legal accountability in the EMU will be undertaken in the subsequent chapters.

The discussion begins with the division of competence between the national and EU authorities in the EBU. This is followed by examination of the role of the European and national parliaments, as well as the Council and Eurogroup, in holding the European Central Bank (ECB), the Single Resolution Board (SRB) and the national supervisory and resolution authorities to account for their actions in this area. The focus then shifts to the intra-institutional balance of power and the emerging patterns of geographical fragmentation. The penultimate section of the chapter focuses on access to information, which is crucial for all forms of accountability. The final section of this chapter offers a snapshot of some of the features of the SSM and the SRM which may hamper the EBU's effectiveness and place its output legitimacy in jeopardy.

Division of power in the Banking Union

By way of introduction, this section will focus on the powers conferred on the key institutional players in the EBU. The EU's governance structures in the areas of banking supervision and resolution will now be briefly examined in turn, the main focus being on policy implementation. This analysis will form the backdrop against which the chapter will further develop.

As regards the prudential supervision of banks, it is clear that the ECB is in the driving seat. We have seen that the SSM Regulation grants significant supervisory, investigatory and sanctioning tasks and powers to the ECB. These powers are taken away from the national supervisory authorities, which nevertheless retain other supervisory, investigatory and sanctioning powers.[1] The Supervisory Board of the ECB approves draft supervisory decisions, which shall be deemed to be adopted unless the ECB's Governing Council objects to them.[2] The European Parliament does not have to approve these decisions, nor is the European Parliament involved in an executive role in the supervision of banks. For example, the ECB is not required to seek parliamentary approval for withdrawing the authorisation of a credit institution or for opposing an acquisition of a 'qualifying holding' in a credit institution established in the Euro area.[3] The European Parliament cannot temporarily veto or override the decisions of the ECB either.

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1 Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (SSM Regulation), Article 6(6).

2 SSM Regulation, Article 26(8).

3 SSM Regulation, Articles 14-15.

The position with respect to the resolution of 'significant' credit institutions or cross-border groups is as follows. The SRB shall adopt a resolution scheme in relation to the entities and groups which fall within its sphere of competence when the conditions for resolution that are set out in the SRM Regulation are met.[4] More specifically, the ECB assesses whether an entity is failing or is likely to fail, after consulting the Board. The Board, too, may make such an assessment after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of that information, does not make such an assessment.[5] Moreover, the Board shall assess whether, having regard to timing and other relevant circumstances, there is any reasonable prospect that any alternative private sector measures or supervisory action would prevent the failure of the financially distressed institution within a reasonable timeframe. The ECB may inform the Board that it considers this condition to be met.[6]

Immediately after the adoption of the resolution scheme, the Board shall transmit it to the Commission. The latter institution shall either endorse it or object to it with regard to its discretionary aspects. Within 12 hours from the transmission of the resolution scheme by the Board, the Commission may propose to the Council to object to the resolution scheme on the ground that the resolution action is not necessary in the public interest; or to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme. There is a silent endorsement mechanism,

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4 Regulation (EU) 806/2014 of the European Parliament and of the Council 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 [2014] OJ L225/1 (SRM Regulation), first subparagraph of Article 18(1).

5 SRM Regulation, second subparagraph of Article 18(1).

6 SRM Regulation, fourth subparagraph of Article 18(1).

and the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its submission by the Board. Where the Council has approved the proposal of the Commission for modification of the resolution scheme or the Commission has objected to it, the Board shall within 8 hours modify the resolution scheme accordingly.[7] If the Council considers that resolution action is not necessary in the public interest, the entity concerned shall be wound up under normal insolvency proceedings.[8]

It is clear that the European Parliament is not involved in the adoption of a resolution scheme for a financially distressed bank. It does not have the power to decide what happens to the entity concerned; which resolution tools are applied to it; or who is excluded from the scope of the bail-in instrument.[9] Resolution powers are vested with the EU 'Executive', viz. the ECB, the SRB, the Commission, and the Council.

In this connection, it should be stressed that the ECB, the SRB, and the national supervisory and resolution authorities are independent. The members of the Supervisory Board and of the steering committee of the ECB, as well as the members of the executive session of the SRB, shall neither seek nor take instructions from the institutions or bodies of the Union, from any government of a Member State or from any other public or

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7 SRM Regulation, Article 18(7). For the voting arrangements for the decisions of the Council under Article 16 of the SRM Regulation see Council of the European Union, 'Single Resolution Mechanism: Texts Agreed at ECOFIN on 18 December 2013' 18137/13 (20 December 2013) <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2018137%202013%20INIT> accessed 20 February 2016, Declaration of the representatives of the 28 Member States meeting within the Council.

8 SRM Regulation, Article 18(8).

9 SRM Regulation, Article 18(6)(b) and last subparagraph of Article 18(7).

private body.[10] The institutions, bodies, offices and agencies of the Union and the governments of the Member States and any other public or private bodies shall respect that independence.[11] Taken together, the provisions adumbrated above make for two institutions (viz., the ECB and the SRB) which are not directly democratically legitimated, are independent, and exercise a great deal of power over the banking sector in the Euro area. This naturally prompts inquiry as to how these institutions and agencies are held accountable for their actions in the area of Banking Union.

The horizontal dimension: the 'EU Executive' and the powers conferred on the European Parliament, the Council and the Eurogroup

The accountability and transparency requirements set out in the SSM and the SRM Regulations are fairly similar. That being said, there are a few differences between the two instruments. These Regulations will now be examined in turn.

The SSM Regulation provides that '[t]he ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation'.[12] The SRM Regulation provides that the SRB 'shall be accountable to the European Parliament, the Council and the Commission'.[13] Both the ECB and the SRB shall submit a report on the performance of their tasks and shall present that report in public to the European Parliament.[14] The ECB shall further present that report to the Eurogroup in the presence

10 SSM Regulation, Article 19(1); SRM Regulation, Article 47(1)-(2).

11 SSM Regulation, Article 19(2); SRM Regulation, Article 47(3).

12 SSM Regulation, Article 20(1).

13 SRM Regulation, Article 45(1).

14 SSM Regulation, Article 20(2)-(3); SRM Regulation, Article 45(2)-(3).

of representatives from non-Euro area participating Member States (if any),[15] whereas the SRB shall present that report to the Council.[16]

Moreover, the Chair of the Supervisory Board of the ECB and the Chair of the SRB may be heard on the execution of their tasks by the Eurogroup (in the presence of representatives from non-Euro area participating Member States) and the Council respectively.[17] In this connection, the Memorandum of Understanding between the Council and the ECB 'on the cooperation on procedures related to the SSM' provides that the information exchanged during such hearings and exchanges of views shall be confidential.[18] Furthermore, at the request of the European Parliament, the Chair of the Supervisory Board and the Chair of the SRB shall participate in a (public) hearing on the performance of their respective tasks by the competent committee of the European Parliament.[19]

The SSM and the SRM Regulations further provide that the ECB and the SRB shall reply orally or in writing to questions put to them by the European Parliament and the Council, or, in the case of the ECB, the Eurogroup.[20] Upon request, the Chair of the Supervisory Board and the Chair of the SRB shall hold confidential oral discussions behind closed doors with the Chair and Vice-Chairs of the competent committee of the

15 SSM Regulation, Article 20(3).

16 SRM Regulation, Article 45(3).

17 SSM Regulation, Article 20(4); SRM Regulation, Article 45(5).

18 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 (SSM) <https://www.ecb.europa.eu/ecb/legal/pdf/mou_between_eucouncil_ecb.pdf> accessed 21 November 2015, section I.2.(3), p. 3.

19 SSM Regulation, Article 20(5); SRM Regulation, Article 45(4).

20 SSM Regulation, Article 20(6); SRM Regulation, Article 45(6).

European Parliament concerning their tasks when such discussions are required for the exercise of the European Parliament's powers under the TFEU.[21] The Interinstitutional Agreement between the European Parliament and the ECB, which only concerns the SSM, stipulates that no minutes or any other recording of the confidential meetings shall be taken. No statement shall be made for the press or any other media. Each participant to the confidential discussions shall sign every time a solemn declaration not to divulge the content of those discussions to any third person.[22] Furthermore, both the ECB and the SRB are put under an obligation to cooperate with the European Parliament during any investigations carried out by the latter institution pursuant to Article 226 TFEU.[23]

An institutional novelty of the SSM and the SRM is that the European Parliament's approval is required for the appointment of the Chair and the Vice-Chair of the Supervisory Board and for the appointment of the Chair, the Vice-Chair and the four full-time members of the SRB.[24] These officials are formally appointed by the Council by means of an implementing decision.[25]

More specifically, the Interinstitutional Agreement between the European Parliament and the ECB provides that the ECB shall provide the Parliament with the shortlist of candidates for the position of the Chair of the Supervisory Board. It shall

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21 SSM Regulation, Article 20(8); SRM Regulation, Article 45(7).

22 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] OJ L320/1, section I.2, p. 4.

23 SSM Regulation, Article 20(9); SRM Regulation, Article 45(8).

24 SSM Regulation, Article 26(3); SRM Regulation, Article 56(6).

25 SSM Regulation, Article 26(3); SRM Regulation, third subparagraph of Article 56(6).

further provide that shortlist of candidates to the Council.[26] The competent EP committee may submit questions to the ECB relating to the selection criteria and the shortlist of candidates. The ECB shall then submit its proposals for the Chair and the Vice-Chair to the Parliament together with written explanations of the underlying reasons. A public hearing of the proposed Chair and Vice-Chair of the Supervisory Board shall be held in the competent EP committee. The Parliament shall reach its final decision through a vote in the competent committee and in plenary. If the ECB's proposal is not approved by the Parliament, the ECB may decide either to draw on the pool of candidates that applied originally for the position or to re-initiate the selection process.[27]

The European Parliament's approval is further required for the removal of the Chair or Vice-Chair of the Supervisory Board from office.[28] The Parliament's approval is also required for the removal of the Chair, the Vice-Chair or a full-time member of the SRB from office.[29] The SSM and SRM Regulations provide that these officials shall only be removed from office if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct.[30] For those purposes, the European Parliament or the Council may inform the ECB (or, in the case of the SRB, the Commission) that they consider the conditions for the removal of those

26 Memorandum of Understanding (n 18), section II.(4), p. 4.

27 Interinstitutional Agreement (n 22), section II, pp. 4-5.

28 SSM Regulation, Article 26(4).

29 SRM Regulation, Article 56(9).

30 SSM Regulation, first subparagraph of Article 26(4); SRM Regulation, first subparagraph of Article 56(9).

officials from office to be fulfilled.[31] The ECB shall provide its considerations in writing.[32] Most recently, the European Parliament and the SRB reached an agreement on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the SRB.[33]

It should further be noted that, in sharp contrast to the role of the European Parliament in the Banking Union, the Council has some decision-making powers of its own within the framework of the SRM. This is important, because according to the Treaty schema the national ministers sitting in Council represent the Member States and are themselves democratically accountable to their national parliaments and citizens.[34] We have already seen that the Council may object to the resolution scheme adopted by the Board on the ground that the resolution action envisaged in it is not necessary in the public interest. We have further seen that it may approve or object to a material modification of the amount of the Single Resolution Fund (SRF) provided for in the resolution scheme.[35] Moreover, on application by a Member State, the Council may, acting unanimously, decide that the use of the Fund shall be considered to be compatible with the internal market.[36]

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31 SSM Regulation, third subparagraph of Article 26(4); SRM Regulation, second subparagraph of Article 56(9).

32 Interinstitutional Agreement (n 22), section II, p. 5; Memorandum of Understanding (n 18), section II.(6), p. 4.

33 Agreement between the European Parliament and the Single Resolution Board on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the Single Resolution Board within the framework of the Single Resolution Mechanism [2015] OJ L339/58.

34 TEU, Article 10(2).

35 SRM Regulation, Article 18(7)-(8).

36 SRM Regulation, Article 19(10).

The vertical dimension: the EU 'Executive' and the powers conferred on national parliaments

So far we have considered the powers conferred on the European Parliament, the Council and the Eurogroup in the SSM and the SRM Regulations. We now turn to consider the role of national parliaments in the Banking Union.

The SSM/SRM Regulations provide that the ECB and the SRB shall forward the report on the performance of their respective tasks to the national parliaments of the participating Member States.[37] Moreover, national parliaments may address to the ECB or the SRB their reasoned observations on that report.[38] They may further submit observations or questions to the ECB or the SRB in respect of their tasks.[39]

There is a discrepancy between the two Regulations in relation to the questions or observations that may be addressed to the ECB or the SRB by national parliaments. As regards the SSM, the ECB *may* reply to such questions or observations.[40] As regards the SRM, the SRB is *obliged* to reply in writing to such questions or observations.[41]

Furthermore, the national parliament of a participating Member State may invite the Chair (or a member) of the Supervisory Board or the Chair of the SRB to participate in an exchange of views in relation to supervision or resolution of entities in that Member

37 SSM Regulation, first subparagraph of Article 21(1); SRM Regulation, Articles 45(2) and 46(2).

38 SSM Regulation, second subparagraph of Article 21(1); SRM Regulation, Article 46(2).

39 SSM Regulation, Article 21(2); SRM Regulation, Article 46(1).

40 SSM Regulation, recital 56.

41 SRM Regulation, Article 46(1).

State together with a representative of the national supervisory or resolution authority.[42] Again, the SRM Regulation stipulates that the Chair of the SRB 'is obliged to follow such invitation', whereas there is no such provision in the SSM Regulation. However, the Chair of the Supervisory Board routinely accepts such invitations.

Evaluation of the powers conferred on the European and national parliaments in the SSM/SRM Regulations

Ruth Grant and Robert Keohane define accountability as the right of some actors 'to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met'.[43] This definition implies that some actors have oversight and enforcement capabilities vis-à-vis other actors.[44] In what follows we will be using this as a working definition to assess the powers granted to the European and national parliaments in the EBU governance framework.

It is clear that the elements of information and debate are there. We have seen that the ECB and the SRB are put under an obligation to submit reports and present them in public to the European Parliament and to the Eurogroup or Council. These reports are also forwarded to national parliaments, which may address to the ECB or the SRB their reasoned observations on them. There are hearings, exchanges of views, questions put to

42 SSM Regulation, Article 21(3); SRM Regulation, Article 46(3).

43 Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 American Political Science Review 29.

44 Nicholas Bell, Paul Love, Menelaos Markakis, Eric Oringer and Kai Stern, 'Ensuring the Accountability of the Eurozone Treasury' (2016) 2 Review of European and Transatlantic Affairs 7.

the ECB/SRB by the parliaments, and confidential oral discussions. All this is familiar: the accountability and transparency requirements laid down in the SSM/SRM Regulations are fairly similar to the ones set out in the 'six pack' and 'two pack' of EU legislation.

Moreover, we have seen that an institutional novelty of the SSM and the SRM is that the European Parliament's *approval* is required for the appointment of the Chair and the Vice-Chair of the Supervisory Board and for the appointment of the Chair, the Vice-Chair and the four full-time members of the SRB.[45] In this connection, it will be recalled that as regards the monetary policy functions of the ECB, the European Parliament is merely *consulted* on the appointment of the President, the Vice-President and the other members of the Executive Board of the ECB.[46] The European Parliament has stressed that it considers these novel arrangements to constitute 'an important precedent for an enhanced role of the EP in an EMU governance based on differentiation'.[47] It has further called 'for the inclusion of Parliament in the appointment procedure of the President, Vice-President and other members of the Executive Board of the ECB in Article 283 TFEU, by requiring that it consents to the recommendations of the Council'.[48] This proposal is reminiscent of the arrangements governing the Fed, whereby any appointment

45 SSM Regulation, Article 26(3); SRM Regulation, Article 56(6).

46 TFEU, second subparagraph of Article 283(2); Fabian Amtenbrink, 'On the Legitimacy and Democratic Accountability of the European Central Bank: Legal Arrangements and Practical Experiences' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) ch 9, 161-62.

47 Committee on Constitutional Affairs, 'Report on Constitutional Problems of a Multitier Governance in the European Union' 2012/2078(INI) (15 November 2013) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0372+0+DOC+XML+V0//EN> accessed 13 November 2015, para 40.

48 ibid para 75.

to the Board of Governors by the President of the United States has to be confirmed by the US Senate,[49] and its implementation would require a Treaty amendment.

A comparison with the revised EMU governance framework casts this institutional novelty in even more favourable light. More specifically, the European Parliament has no formal powers over the appointment of, say, the Managing Director of the European Stability Mechanism (ESM)[50] or the President of the Eurogroup,[51] whose role in EU economic governance is now heightened.[52] The ESM Treaty does not even mention the European Parliament. As regards national parliaments, the ESM Treaty merely provides that the Board of Governors shall make the annual report drawn up by the ESM Board of Auditors available to them.[53]

A comparison with the EMU governance framework further casts the powers conferred on national parliaments in the EBU in very favourable light. The ECB is also in charge of monetary policy-making, and national parliaments are not accorded any role in holding the ECB accountable for its actions in that area. Deirdre Curtin rights notes that:

> While in the context of monetary policy there is no legal framework for scrutiny by national parliaments, the supervisory functions of the ECB do entail certain formal reporting obligations along with the opportunity to

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49 Grégory Claeys, Mark Hallerberg and Olga Tschekassin, 'European Central Bank Accountability: How the Monetary Dialogue Could Evolve' (March 2014) Bruegel Policy Contribution Issue 2014/04, 5.

50 ESM Treaty, Article 7(1).

51 Protocol (No 14) on the Euro Group, Article 2.

52 Paul Craig and Menelaos Markakis, 'The Euro Area, its Regulation and Impact on Non-Euro Member States' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) ch 14.

53 ESM Treaty, Article 30(5). See further Transparency International EU, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) <transparency.eu/wpcontent/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> accessed 7 April 2017.

> invite the chair or a member of the Supervisory Board to appear before a national parliament.[54]

The element of 'sanction' is there too. An aspect that is often missing from the debate on the EBU is that the MEPs and national ministers could always agree to *change the legal framework* of the SSM and of the SRM. Given the legal basis that was used for the adoption of these instruments, this power formally lies with the Council, acting by means of Regulations in accordance with a special legislative procedure and after consulting the European Parliament and the ECB, in the case of the SSM;[55] and with the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, in the case of the SRM.[56] This is a very bold instrument of political accountability, which stands in sharp contrast to the 'quasi-constitutional status' of the legal and institutional arrangements pertaining to monetary policy. These are enshrined in EU primary law and hence are much more difficult, if not impossible, to change.[57]

However, the EU legislators aspiring to change the EBU legal framework would have to take the relevant Treaty constraints as well as other international standards into

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54 Deirdre Curtin, 'Democratic Accountability of EU Executive Power: A Reform Agenda for Parliaments' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) 185.

55 TFEU, Article 127(6).

56 TFEU, Article 114.

57 Fabian Amtenbrink and Kees Van Duin, 'The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue' (2009) 34 E.L. Rev. 561, 582-83; Fabian Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 729; Jakob De Haan and Laurence Gormley, 'The Democratic Deficit of the European Central Bank' (1996) 21 E.L. Rev. 95, 101.

account.[58] As regards the SSM, they would have to consider what it means for the ECB to be independent as a supervisor; what the legal basis for the ECB's independence in the context of the SSM is (primary or secondary EU law); and whether the meaning to be given to its independence in this context is any different from the one accorded to its independence as a monetary authority.[59]

It should further be noted that the European Parliament and Council have a very important role to play in the process culminating in the removal of the SSM/SRM officials from office.[60] Moreover, Ter Kuile, Wissink and Bovenschen helpfully explain that:

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58 Jean-Victor Louis, 'Democracy and the European Central Bank. Some Comments on Independence and Accountability' in Gregorio Garzón Clariana (ed), *Democracy in the New Economic Governance of the European Union* (Marcial Pons 2015) 137-38.

59 On the ECB's independence as a supervisor, see e.g. Ignazio Angeloni, 'Rethinking Banking Supervision and the SSM Perspective' (Fiesole, 23 April 2015) <www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150423.en.html> accessed 30 July 2016; Alberto De Gregorio Merino, 'Institutional Report' in Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016); Rosa María Lastra, 'Financial Institutions and Accountability Mechanisms' in Pablo Iglesias-Rodríguez (ed), *Building Responsive and Responsible Financial Regulators in the Aftermath of the Global Financial Crisis* (Intersentia 2015); Jean-Victor Louis (n 58); Takis Tridimas, 'General Report' in Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016).

60 SSM Regulation, Article 26(4); SRM Regulation, Article 56(9).

> …the absence of formal sanctions does not mean that there is no moment of "taking the blame or putting matters right". There can be other ways to ensure that the agent takes into account the principal's views, for example due to the indirect pressure that is felt when the agent has to explain what it has been doing or via informal coercion by the principal…[61]

The European Parliament's input into the crisis-induced measures

Furthermore, any assessment of the existing transparency and accountability arrangements in the EBU governance framework would have to take into account the initial shape of the legislative proposals and what the MEPs had asked for during the norm production phase. These documents provide a revealing insight into the priorities of the main EU policy-makers and cast new light on the final legislation.

Similarly to the 'six pack' and 'two pack' of EU legislation, the European Parliament did not just rubber-stamp the SSM and SRM Regulations. A detailed analysis of the Commission proposals, the Committee draft reports, and the final texts adopted by the Union legislature, as well as of the political background to the Intergovernmental Agreement on the Single Resolution Fund (IGA),[62] reveals that the European Parliament got crucial substantive amendments included in the final legislation. It further managed to strengthen the accountability structures that are built into the SSM and the SRM.

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61 Gijsbert Ter Kuile, Laura Wissink and Willem Bovenschen, 'Tailor-Made Accountability within the Single Supervisory Mechanism' (2015) 52 CMLRev 155, 174.

62 Intergovernmental Agreement between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Croatia, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic and the Republic of Finland on the transfer and mutualisation of contributions to the Single Resolution Fund <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT> accessed 25 November 2015.

As regards the SSM, the rapporteur had requested that the Parliament's approval be required for the appointment of the Chair of the Supervisory Board, and her proposal got through.[63] Moreover, the Committee on Economic and Monetary Affairs (ECON Committee) placed considerable emphasis on the organisational separation of the ECB staff involved in carrying out supervisory tasks from the staff involved in carrying out other tasks conferred on the ECB,[64] which is crucial in order to avoid any conflicts of interest between the ECB's supervisory and monetary policy functions. In this connection, it proposed that the ECB make public any necessary internal rules adopted for this purpose, and this proposal got through.[65] Furthermore, the ECON Committee successfully piloted other, more detailed, amendments through the legislative process.[66] Other detailed amendments did not go through.[67]

Notably, the arrangements for confidential discussions with the Chair and Vice-Chairs of the ECON Committee were proposed by the rapporteur in her draft report, and her proposal was included in the final legislation.[68] Furthermore, the proposal for rendering the Supervisory Board accountable to national parliaments by means of

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63 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' 2012/0242(CNS) (8 October 2012) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-497.794+01+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015, amendment 42; SSM Regulation, Article 26(3)-(4).

64 ibid amendment 40; SSM Regulation, second subparagraph of Article 25(2).

65 ibid amendment 41; SSM Regulation, Article 25(3).

66 See, e.g., ibid amendment 44 on the role of the steering committee; SSM Regulation, second subparagraph of Article 26(10).

67 See, e.g., ibid amendment 45 on the term of office of the Chair of the Supervisory Board; and SSM Regulation, second subparagraph of Article 26(3).

68 ibid amendment 47; SSM Regulation, Article 20(8).

exchanges of views originated in the Committee draft report and was successfully piloted by the Parliament through the legislative process.[69]

The Constitutional Affairs Committee, too, had given an opinion on the proposal for the SSM Regulation. The rapporteur, Mr Andrew Duff, had suggested that the ECB publish the results of stress tests on credit institutions.[70] The final text of the SSM Regulation provides for the 'possible publication' of such texts.[71] No such provision existed in the Commission's proposal.[72]

The rapporteur had further requested that the Supervisory Board be put under an obligation to make the minutes of its meetings public, but his proposal did not go through.[73] The rapporteur had further requested that the Supervisory Board submit its annual report to national parliaments, and the text of the final legislation provides that the Supervisory Board shall 'simultaneously forward that report directly to the national parliaments of the participating Member States'.[74] Furthermore, the rapporteur's

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69 ibid amendment 48; SSM Regulation, Article 21(3).

70 Committee on Constitutional Affairs, 'Opinion of the Committee of Constitutional Affairs for the Committee on Economic and Monetary Affairs on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' 2012/0242(CNS) (27 November 2012) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-498.084+03+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015, amendment 29.

71 SSM Regulation, Article 4(1)(f).

72 European Commission, 'Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' COM(2012) 511 final (12 September 2012) <http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0511/COM_COM(2012)0511_EN.pdf> accessed 14 November 2015, Article 4(1)(h).

73 Committee on Constitutional Affairs (n 70) amendment 43.

74 ibid amendment 45; SSM Regulation, first subparagraph of Article 21(1).

amendments transformed the Chair's discretion to participate in a hearing before the European Parliament into a legal obligation.[75]

As regards the SRM, the European Parliament again succeeded in altering the selection procedure for the Chair, the Vice-Chair and the four full-time members of the SRB. The original proposal provided that '[t]he Council shall appoint the Executive Director and the Deputy Executive Director [now Chair and Vice-Chair] after hearing the European Parliament'.[76] Thanks to the amendments proposed by the rapporteur,[77] the Commission has to seek the Parliament's approval of its proposal before the Chair, the Vice-Chair and the full-time members of the Board are formally appointed by the Council by means of an implementing decision.[78] This brings the SRM Regulation in line with the SSM Regulation. The same procedure is followed for the removal of the Chair, the Vice-Chair or a full-time member of the Board from office, again thanks to the amendments proposed by the European Parliament.[79]

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75 ibid amendment 47; SSM Regulation, Article 20(5).

76 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 Single Bank Resolution Fund and Amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' COM(2013) 520 final (10 July 2013) <http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0520/COM_COM(2013)0520_EN.pdf> accessed 14 November 2015, Article 52(5).

77 Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council 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 Single Bank Resolution Fund and Amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' 2013/0253(COD) (25 September 2013) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.706+01+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015, amendment 67.

78 SRM Regulation, Article 56(6).

79 European Commission (n 76), Article 52(8); Committee on Economic and Monetary Affairs (n 77) amendment 69; SRM Regulation, Article 56(9).

Moreover, the rapporteur had suggested that the Board be put under an obligation to forward its annual report to national parliaments. She had further suggested that national parliaments be given the power to address to the Board their reasoned observations on that report.[80] There were no such provisions in the Commission's proposal.[81] These proposals indeed went through, and the desired precepts are now enshrined in the SRM Regulation.[82] Furthermore, the European Parliament was successful in extending the period during which it can express its objections to a delegated act adopted by the Commission from two to three months.[83]

In terms of substance, it is noted that '[t]he European Parliament claimed victory in the sense that the final compromise "has repaired many of the serious flaws in the initial Council position".'[84] For example, the European Parliament 'insisted that the Fund be able to borrow on the capital market to augment its capacity' and 'pushed forward the target date for full funding to eight years instead of ten years after the SRM's coming into force'.[85] Moreover, the European Parliament played a pivotal role in giving liquidity support a lower weight of only 0,5,[86] thereby enabling the executive session of the SRB

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80 Committee on Economic and Monetary Affairs (n 77) amendment 52.

81 European Commission (n 76), Article 42.

82 SRM Regulation, Article 46(2).

83 European Commission (n 76) Article 82(5); Committee on Economic and Monetary Affairs (n 77) amendment 79; SRM Regulation, Article 93(6).

84 Jeffrey Gordon and Wolf-Georg Ringe, 'Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take' (2015) 115 Columbia Law Review 1297, 1345 fn 198.

85 ibid 1348; SRM Regulation, Articles 69 and 73-74.

86 SRM Regulation, recital 33 and Article 50(1)(c).

to grant liquidity support of up to €10 billion to an ailing bank.[87] Furthermore, we have already seen that the European Parliament managed to create 'a true hierarchy between the ECB and the SRB or a national resolution authority' in relation to the determination of whether an entity is failing or is likely to fail, whereas the Member States had wanted them to be on an equal footing in this respect.[88]

The horizontal dimension: the national Executive and national parliaments

The discussion thus far has focused on the role of the European and national parliaments, the Council and the Eurogroup in holding the EU institutions, bodies and agencies accountable for the performance of their duties in the area of Banking Union. The focus now shifts to the relationship and tensions (if any) between the national Executive and national parliaments.

We have seen that national supervisory and resolution authorities have an important role to play in the Banking Union. There is a division of labour between the EU institutions or agencies and the national authorities. The latter retain their supervisory powers with respect to 'less significant' entities, unless these are called under direct supervision.[89] They shall further assist the ECB with the preparation and implementation of any acts relating to the tasks conferred on it in the SSM Regulation, including

87 Danny Busch, 'Governance of the Single Resolution Mechanism' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) 323.

88 ibid 325; SRM Regulation, second subparagraph of Article 18(1).

89 SSM Regulation, Articles 6(6) and 6(5)(b).

assistance in verification activities.[90] As regards the national resolution authorities, they, too, retain their resolution powers in relation to 'less significant' entities, unless the SRF is used or the SRB decides to 'exercise directly all of the relevant powers' with regard to these entities or groups.[91] They shall further implement all decisions addressed to them by the Board.[92] Moreover, there are important supervisory and sanctioning powers which have remained with the national authorities, such as the power to introduce additional capital buffers or to impose some administrative penalties.[93]

In view of the above, national parliaments have a role to play in holding national supervisory and resolution authorities to account for their actions in this area, when these authorities are competent to act pursuant to the SSM and the SRM Regulations. The accountability arrangements might vary from one Member State to another, and so will the quality of parliamentary oversight exercised over these entities. A major problem is that 'the "police patrols" will generally occur in isolation'.[94] Christopher Gandrud and Mark Hallerberg explain that:

> This is fine, if one thinks that supervisors will be equally tough across all Member States. There may be concern, however, that national supervisors will choose forbearance for national firms: a given Member State's supervisor may give its banks more time, possibly creating negative externalities for other Member State banks and ultimately other Member States' public finances. There will be no opportunity for other Member State[s] or MEPs to evaluate or question the supervisor. This is a

90 SSM Regulation, Article 6(3).

91 SRM Regulation, Articles 7(3) and 7(4).

92 SRM Regulation, Article 29(1).

93 SSM Regulation, Articles 5 and 18(5). See, however, Article 5(2).

94 Christopher Gandrud and Mark Hallerberg, 'Does Banking Union Worsen the EU's Democratic Deficit? The Need for Greater Supervisory Data Transparency' (2015) 53 JCMS 769, 773.

> fundamental problem of the "police patrol" method of providing output legitimacy in the European banking union. Even in the best circumstances, "police patrols" are costly for parliamentarians… It takes time, effort and expertise to analyze complex financial data.[95]

This problem could be solved in a number of ways, the key challenges being to synchronise the operation of such accountability mechanisms and to create information flows between the parliaments of the participating Member States. First, the parliaments concerned could liaise with one another. Their representatives in Brussels could, for example, exchange information with one another about the activities of their respective Executives and central banks. Further, interparliamentary conferences might prove instrumental in creating information flows between the various parliaments involved in exercising democratic oversight over national (and European) financial 'watchdogs'.[96] This could be either the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC)[97] or the interparliamentary conference established by the Fiscal Compact. In formal terms, the mandate of the latter conference only covers 'budgetary policies and other issues covered by this Treaty'.[98] In reality, however, many other topics are discussed in the Article 13 TSCG conferences.[99]

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95 ibid 773-74.

96 Deirdre Curtin (n 54) 193-194; Davor Jančić, 'National Parliaments and EU Fiscal Integration (2016) 22 ELJ 225, 245-47; Valentin Kreilinger, 'Inter-Parliamentary Cooperation and Its Challenges: The Case of Economic and Financial Governance' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015).

97 Protocol (No 1) on the role of national parliaments in the European Union, Article 10.

98 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), Article 13.

99 See, e.g., the agenda of the meetings in Vilnius (16-17 October 2013), Rome (29-30 September 2014) and Brussels (4 February 2015): 'Interparliamentary Conference on Economic and Financial Governance of the European Union: Contribution'

Second, national parliaments could be granted the opportunity to directly engage in a dialogue with supervisors from other states. In the case of banks which are established in a participating Member State and offer financial services to customers or firms in other participating Member States, or have subsidiaries or branches located in other States, the national parliaments of those countries would very much like to be given the opportunity to invite a representative of the national competent authority which is responsible for the (parent) entity concerned. The members of the European Parliament, too, would want to hear representatives from the national competent authorities. However, it would be more plausible in the present circumstances to send queries directly to the ECB/SRB[100] or to conduct hearings in an inter-parliamentary body or conference, which would comprise both MPs and MEPs.[101] The legitimacy of such a body itself could be questioned, but it is clear that one cannot dispense with either the European or national parliaments at this stage of evolution of EMU.[102]

Third, it should be noted that if the cross-border activities of the entity concerned are deemed 'significant' under the SSM Regulation and the SSM Framework

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<http://renginiai.lrs.lt/renginiai/EventDocument/0f6147e3-6125-40b9-93d8-edc7c31e085f/EN%20Contribution%20-%20Vilnius%20IC-EFG.pdf> accessed 4 December 2015; 'Conference under Article 13 of the Fiscal Compact' <http://ue2014.parlamento.it/34?appuntamento=25> accessed 4 December 2015; 'European Parliamentary Week: The Conference under Article 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' <http://parleu2015.lv/files/fiskala-konference/article_13_conference_en_28_01_2015.pdf> accessed 4 December 2015.

100 I am grateful to Gianni Lo Schiavo for this comment.

101 See Valentin Kreilinger (n 96) 279. See e.g. the Joint Parliamentary Scrutiny Group which keeps an eye on the activities of the Europol: Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L135/53, Article 51.

102 Fabian Amtenbrink (n 57) 754-55.

Regulation,[103] the national parliaments concerned have the power to invite ECB representatives to participate in an exchange of views.[104] Moreover, the ECB could exercise its power to take the 'less significant' entities concerned into direct supervision, in order to 'ensure the consistent application of high supervisory standards'.[105] Furthermore, host authorities may challenge the opinion of the home authority through the European Banking Authority (EBA), which is accorded the power to settle disagreements between competent authorities.[106]

Apart from the need to ensure effective prudential oversight over banks, it should be stressed that national parliamentarians might find themselves in an uneasy position. In the post-Lehman Brothers world, financial supervision and bank resolution are matters of increasing electoral salience. Taxpayers might have to foot the bill for a financially distressed bank, be it through treasury handouts or the ESM/SRF. Shareholders, debtholders, depositors and other short-term credit suppliers might be 'bailed in' to provide capital for the ailing institution or a bridge entity. National politicians could come under tremendous pressure from their local constituencies to exert influence on supervisory or resolution outcomes, but this might as well not be possible because most of the relevant powers have been transferred to the EU institutions.

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103 SSM Regulation, Article 6(4)(iii); Regulation (EU) 468/2014 of the European Central Bank establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17) [2014] OJ L141/1, Articles 59-60.

104 SSM Regulation, Article 21(3).

105 SSM Regulation, Article 6(5)(b).

106 Regulation (EU) 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] OJ L331/12, as currently in force, Article 19.

This problem is aggravated by two features of the EU's governance structures in the EBU. First, there will be very little visibility of what the national officials are doing when participating in EU decision-making, be it in the ECB's Governing Council, in the ECB's Supervisory Board or in the SRB. As the ECB does not release minutes, there will be ample scope for parliamentarians and ordinary citizens to question the extent to which national officials are really acting in the country's perceived interests. However, it should be noted that as of January 2015, the ECB publishes 'monetary policy accounts', i.e. accounts of the monetary policy meetings of the ECB's Governing Council.[107] This is a welcome development. Second, the division of competence between the national and EU authorities is not crystal clear. Nevertheless, it should be noted that the ordinary citizen in the street would normally attach little importance to the SSM's or the SRM's complex governance structures and would simply demand that the competent authorities discharge their duties in an effective manner.

The intra-institutional dimension and patterns of geographical fragmentation

Large and small Member States

In intra-institutional terms, both large and small Member States will formally be on an almost equal footing. As regards the SSM, it will be recalled that the Supervisory Board is an internal body of the ECB which comprises its Chair and Vice Chair, four

107 Thomas Beukers, 'Constitutional Changes in Euro Government and the Relationship between the ECB and the Executive Power in the Union' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) 108. These are available on the ECB's website: https://www.ecb.europa.eu/press/accounts/2015/html/index.en.html.

representatives of the ECB, and one representative of the national competent authority in each participating Member State.[108] Decisions of the Supervisory Board shall be taken by a simple majority of its members. Each member shall have one vote and, in case of a draw, the Chair shall have a casting vote.[109] No Member State is granted a veto power, nor is there a weighted voting system. Large Member States could always try to form a coalition or use their 'soft power' in order to exert some influence on decision-making, but it should be stressed that the Supervisory Board is independent and shall neither seek nor take instructions from any government of a Member State or from any other public or private body.[110] However, decision-making in the Governing Council, which may always object to the Board's draft decisions,[111] is now governed by voting arrangements which give more power to central bankers from the five most significant Member States from an economic perspective.[112] To be sure, this is a non-objection procedure.

As regards decision-making in the SRM, the principal default line is between the tasks conferred on the SRB's plenary session and the tasks conferred on its executive session. It will be recalled that its plenary session comprises all members of its executive session (viz., the Chair and the four full-time members) plus one representative from each national resolution authority.[113] The general rule is that the Board, in its plenary session,

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108 SSM Regulation, Article 26(1).

109 SSM Regulation, Article 26(6).

110 SSM Regulation, Article 19.

111 SSM Regulation, Article 26(8).

112 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 10.2; Fabian Amtenbrink (n 57) 731.

113 SRM Regulation, Article 49.

shall take its decisions by a simple majority of its members. Each member shall have one vote and its Chair shall have a casting vote in the event of a tie.[114] By way of derogation from this rule, some decisions shall be taken by a simple majority of the Board's members, representing at least 30% of contributions.[115] In other cases, a majority of two thirds of its members is required, representing at least 50% of contributions.[116] Consequently, large Member States might wield more power in those cases. Still, no Member State has the power to veto the decisions of the SRB.

As regards the executive session of the SRB, it will be recalled that it comprises the Chair of the SRB, the four full-time members, and the members appointed by the Member States in which the entity and its subsidiaries are established.[117] If all members are not able to reach a joint agreement by consensus within a deadline set by the Chair, the Chair and the four full-time members shall take a decision by a simple majority.[118] Consequently, all the Member States concerned are again on an equal footing. It is indeed the case that at least one member of the plenary session may call a meeting of the plenary session to decide on a resolution scheme which provides for an SRF support of more than €5 billion,[119] but, as explained above, this would not equip any Member State representative with a veto power. More specifically, the resolution scheme would be

114 SRM Regulation, Article 52(1).

115 SRM Regulation, Article 52(2).

116 SRM Regulation, Article 52(3).

117 SRM Regulation, Article 53.

118 SRM Regulation, Article 55.

119 SRM Regulation, Article 50(2).

adopted by a simple majority of the Board members, representing at least 30% of contributions.[120]

Larger Member States are expected to wield more power within the SRB when decisions involve the mutualisation of national financing arrangements, the raising of *ex post* contributions, voluntary borrowing between financing arrangements or alternative financing means.[121] This is because, as explained above, the voting arrangements are different in such cases. It is also because the EU's stronger economies will have an extra lever in the form of granting access to public funds to finance the resolution of the institution concerned, which could be used in order to exert influence on SRB decision-making.[122]

Euro area and non-Euro area Member States

The problems with the position of non-Euro area Member States participating in the SSM are well known. It will be recalled that the SSM and the SRM Regulations only apply to Member States participating in the SSM and the SRM. Non-euro area Member States are under no legal obligation to participate in the SSM and the SRM. If they choose to participate in these mechanisms, a 'close cooperation' is established between the ECB and the national competent authority of the non-Euro area Member State concerned. It has rightly been noted that 'the "close cooperation" arrangement mechanism, which is established by an ECB decision with a two-way mechanism for termination, and the

120 SRM Regulation, Article 52(2).

121 SRM Regulation, Article 52(2)-(3).

122 SRM Regulation, Article 74.

procedure for a non-euro Member State to decide not to be bound by a decision of the ECB Governing Council, are reasonable compromises given the constraints of the available legal space'.[123]

The close cooperation mechanism is nevertheless peculiar. Under the current Treaty schema, the non-Euro area Member States are not represented in the ECB's Governing Council,[124] which is the main decision-making body of the ECB.[125] Moreover, the ECB does not have directly applicable powers over banks established in those States. More specifically, it may address instructions to the national competent (or designated) authority of a non-Euro area participating Member State, and the latter authority shall take all necessary measures in relation to the credit institutions concerned. There is a two-way mechanism for termination, and if the Member State concerned disagrees with a draft decision of the Supervisory Board it may request the ECB to terminate the close cooperation with immediate effect and will not be bound by the ensuing decision. The ECB, too, may suspend or terminate the close cooperation when a non-Euro area Member State notifies its reasoned disagreement with an objection of the Governing Council to a draft decision of the Supervisory Board and informs the ECB that it will not be bound by the amended decision of the Supervisory Board.[126]

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123 Eilís Ferran, 'European Banking Union: Imperfect, But It Can Work' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) 62.

124 Article 283(1) TFEU.

125 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 12.

126 SSM Regulation, Article 7; SRM Regulation, Article 4; Paul Craig and Menelaos Markakis (n 52).

In light of these institutional arrangements, as well as the various problems with the design of the SSM and the SRM which will be explained below, non-Euro area Member States might choose not to participate in the SSM and the SRM and hence the 'distance' between Euro area and non-Euro area Member States might grow larger. This is almost definitely the case as regards the United Kingdom and Sweden, which did not sign the IGA. In this area, too, Eurozone and non-Eurozone Member States seem to be going long distance. However, it should not escape our attention that other instruments of EU banking law, such as the Bank Recovery and Resolution Directive (BRRD) or the Directive on deposit guarantee schemes, apply to all 28 EU Member States.[127] Overall, the preceding discussion adds force to the argument that 'the EU is essentially made up of clusters of Member States in overlapping policy communities with variable boundaries in terms of membership',[128] the policy challenge being to safeguard the unity and integrity of the internal market. 'Inter-agency coordination' between the European System of Financial Supervision, the SSM and the SRM 'could go some way towards mitigating the prospect of such differentiation'.[129]

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127 Directive 2014/59/EU of the European Parliament and of the Council 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] OJ L173/190; Directive 2014/49/EU of the European Parliament and of the Council on deposit guarantee schemes (recast) [2014] OJ L173/149.

128 Vivien Schmidt, 'Changing the Policies, Politics, and Processes of the Eurozone in Crisis: Will This Time Be Different?' in David Natali and Bart Vanhercke (eds), *Social Policy in the European Union: State of Play 2015* (ETUI, OSE 2015) 33-64, 55.

129 Iris H-Y Chiu, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability' (2015) 8 EJLS 67, 101.

Access to information

The discussion thus far has primarily focused on the role of the European and national parliaments in the Banking Union and on the emerging patterns of geographical fragmentation. The focus now shifts to access to information, which is crucial for all forms of accountability (most notably, market, reputational and peer accountability).[130]

The rationale for transparency and access to information in the EBU

The legal rules governing access to documents drawn up or held by the ECB and the SRB are complex, and so too are the underlying issues. It is therefore important when assessing these rules to focus initially on foundational matters and to shift to more detailed issues thereafter.

We begin therefore with the rationale for transparency. Paul Craig summarises the values fostered by transparency as follows.[131]

130 Ruth Grant and Robert Keohane (n 43) 40.

131 Paul Craig, *EU Administrative Law* (2nd edn, 2012) 356.

> Transparency is rightly regarded as central to a democratic polity. Access to the relevant documentation is crucial for understanding the reasons behind governmental action. It facilitates construction of a reasoned argument by those opposed to a measure. Access to documentation is moreover of the essence of democracy. Government should be accountable for its action, and this is difficult if it has a "monopoly" over the available information. Individual citizens should be able to know the information held about them in order to check its correctness and the uses to which it is put. It is hoped furthermore that public disclosure of information will improve decision-making.
> There is an additional value served by transparency in the context of the EU. Transparency … functions as a valuable method of ensuring that Member States adhere to their EU obligations. …

Moreover, transparency can also be relevant for judicial review, because 'access to documents can provide information that will then form the basis for a legal challenge to an EU measure'.[132]

As regards bank supervision, it is well known that supervisory information can be of a very sensitive nature. 'There is a need to ensure the protection of the public interest as regards the Union's or a Member State's policy relating to the prudential supervision of credit institutions'.[133] It is surely the case that transparency should not come at the cost of putting financial stability in the Union or a Member State in jeopardy by triggering a run on a financially distressed bank. 'There is also a need to ensure the protection of the public interest as regards the purpose of supervisory inspections.'[134] Such inspections are crucial for the purposes of safeguarding financial stability in the Union and the Member States.

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132 ibid 357.

133 Decision (EU) 2015/529 of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) [2015] OJ L84/64, recital 4.

134 ibid recital 4.

There is no doubt that the ECB needs to be in a position to effectively discharge its duties in relation to the prudential supervision of credit institutions in the Euro area (and potentially beyond).[135] 'For the ECB to cooperate effectively, it is essential to provide and preserve a "space to think" for the free and constructive exchange of views and information between the [national and EU] authorities, institutions and other bodies.'[136] Nor would it be appropriate to require that the supervisory authorities disclose confidential information,[137] information protected under EU data protection law,[138] or commercially sensitive information.[139] Consequently, there should be some limits to transparency in this area on grounds of protecting the legitimate interests of other public or private bodies.

On the other hand, transparency is very important. The rationale for transparency in the area of prudential supervision of credit institutions is primarily (though not exclusively) instrumental. More specifically, economists explain that 'capital markets can't exercise discipline in the absence of relevant information'.[140] If investors indeed

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135 And so does the Commission. Amongst the copious literature, see particularly Carol Harlow, *Accountability in the European Union* (OUP 2002) 165; Susanne Schmidt and Arndt Wonka, 'European Commission' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) ch 24.

136 Decision (EU) 2015/529 (n 133) recital 8.

137 Decision 2004/258/EC of the European Central Bank on public access to European Central Bank documents (ECB/2004/3) [2004] OJ L80/42, as amended by Decision 2011/342/EU of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2011/6) [2011] OJ L158/37 and Decision (EU) 2015/529 of the European Central Bank amending Decision ECB/2004/3 on public access to European Central Bank documents (ECB/2015/1) [2015] OJ L84/64, Article 4(1)(c).

138 ibid Article 4(1)(b).

139 ibid first indent of Article 4(2).

140 Joseph Stiglitz, *The Price of Inequality* (Penguin 2012) 491 fn 30.

possess such information, they will charge a lower or higher premium on banks on the basis of their risk profile. In turn, higher capital costs may incentivise banks 'to decrease their risk profile',[141] thereby benefitting the public at large.

Transparency in this area is also important for a number of other reasons. First, it enables citizens and NGOs to assess whether the supervisory authority is discharging its duties in an effective manner.[142] Second, it may serve to safeguard the independence of the relevant agency, 'because accountability generates legitimacy among the population, and this legitimacy translates into greater support for independence'.[143] Third, it makes for a more efficient allocation of capital and a more integrated internal market in financial services, which is the very purpose of the EBU. This is because it helps build trust in the banking sector and therefore facilitates the cross-border provision of financial services, as well as cross-border mergers and acquisitions. This may in turn reduce the costs for the resolution of failing banks.[144]

Christopher Gandrud and Mark Hallerberg summarise the benefits of supervisory transparency as follows:

> Greater supervisory transparency … facilitates a more efficient distribution of capital, increases market discipline on banks and contributes to a decreased fractionalization of the European market for financial services. As such, it increases the legitimacy of regulators' outputs. It also enables the public to understand and evaluate how supervisors contributed to these output[s]. In so doing, it increases the legitimacy of actions that the regulator takes against banks and is a basic

141 Christopher Gandrud and Mark Hallerberg (n 94) 775.

142 ibid 774.

143 ibid 774.

144 ibid 774-75.

> requirement for making it possible to hold regulators accountable. The EU receives justified flak that there is distance between European citizens and the institutions that make decisions on their behalf. Transparency in terms of the data the supervisors themselves use to make decisions would allow the public, and more realistically the various interest groups one finds in civil society, to judge whether regulators chose actions consistent with protecting the public interest. Such "fire alarms" represent one small step towards addressing the democratic deficit that most citizens think exists in Europe.[145]

The optimal mix between transparency and 'secrecy' in the prudential supervision of banks is not clear. There is evidence from the economic literature on monetary policy-making in the US Federal Open Market Committee (FOMC) that transparency can cut both ways. 'On the positive side, there is a broad argument that transparency increases the accountability of policymakers, and induces them to work harder and behave better.'[146] 'On the negative side, many observers argue that too much transparency about deliberation will stifle committee discussion.'[147] Policymakers might wish to 'signal expertise' or 'may start pandering to their local constituencies in order to signal their preferences'.[148] The latter argument cuts both ways, as policymakers could 'avoid having to justify or defend yielding to national or local political pressures'.[149]

Stephen Hansen, Michael McMahon and Andrea Prat find evidence of both discipline and conformity.[150] The former is manifested through 'an increase in the

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145 ibid 782-83.

146 Stephen Hansen, Michael McMahon and Andrea Prat, 'Transparency and Deliberation within the FOMC: A Computational Linguistics Approach' (2014) Centre for Economic Performance Discussion Paper 1276/2014, 1.

147 ibid 2.

148 ibid 2 fn 4.

149 Willem Buiter, 'Alice in Euroland' (1999) 37 JCMS 181, 192.

150 Stephen Hansen, Michael McMahon and Andrea Prat (n 146) 4.

informativeness of inexperienced members' statements', in that they 'discuss a broader range of topics' during the economic situation discussion 'and, while doing so, use significantly more references to quantitative data and staff briefing material'.[151] Conformity in this context connotes that inexperienced members are 'less likely to make interjections, ask [fewer] questions and stick to a narrow range of topics' during the policy debate, because of 'reputational' and 'career concerns'.[152] 'They also speak more like [the Chairman of the US Federal Reserve].'[153] On balance, Stephen Hansen, Michael McMahon and Andrea Prat find that 'the counteracting force of increased discipline after transparency … appears even stronger' and hence 'central bank designers should take seriously the role of transparency in disciplining policymakers'.[154]

The detailed arrangements governing access to information in the EBU

ECB Decision 2004/258/EC is the key instrument governing public access to ECB documents. It provides that '[i]n order to safeguard the effectiveness of its decision-making process, including its internal consultations and preparations, the proceedings of the meetings of the ECB's decision-making bodies are confidential, unless the relevant body decides to make the outcome of its deliberations public.'[155]

151 ibid 4.

152 ibid 3-4.

153 ibid 4.

154 ibid 4. For a detailed discussion of these issues in relation to the ECB's monetary policy see also Fabian Amtenbrink (n 46) 147-63.

155 Decision 2004/258/EC (n 137) recital 3.

Before we let the one who has never sinned throw the first stone, it is important to note that confidentiality of the proceedings of the ECB's Governing Council is a Treaty imperative. More specifically, the Statute of the ESCB and of the ECB, which is annexed to the EU Treaties, provides that the proceedings of the meetings of the Governing Council shall be confidential and that the latter may decide to make the outcome of its deliberations public.[156] Moreover, the ECB's Rules of Procedure, which are enshrined in EU secondary law, add that:

> The proceedings of the decision-making bodies of the ECB, or any committee or group established by them, of the Supervisory Board, its Steering Committee and of any its substructures of a temporary nature shall be confidential unless the Governing Council authorises the President of the ECB to make the outcome of their deliberations public. The President shall consult the Chair of the Supervisory Board prior to making any such decision in relation to the proceedings of the Supervisory Board, its Steering Committee and of any its substructures of a temporary nature.[157]

However, not all is doom and gloom. The Interinstitutional Agreement between the European Parliament and the ECB provides that the latter institution 'shall provide Parliament's competent committee at least with a comprehensive and meaningful record of the proceedings of the Supervisory Board that enables an understanding of the

156 Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, Article 10.4.

157 Decision 2004/257/EC of the European Central Bank adopting the Rules of Procedure of the European Central Bank (ECB/2004/2) [2004] OJ L80/33, as amended by Decision 2009/328/EC of the European Central Bank amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2009/5) [2009] OJ L100/10, Decision 2014/179/EU of the European Central Bank amending Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2014/1) [2014] OJ L95/56, and Decision (EU) 2015/716 of the European Central Bank amending Decision ECB/2004/2 adopting the Rules of Procedure of the European Central Bank (ECB/2015/8) [2015] OJ L114/11, Article 23.1. See also Fabian Amtenbrink (n 46) 154-57.

discussions, including an annotated list of decisions'.[158] It further provides that if the ECB's Governing Council objects to a draft decision of the Supervisory Board, 'the President of the ECB shall inform the Chair of Parliament's competent committee of the reasons for such an objection, in line with the confidentiality requirements referred to in this Agreement'.[159]

As regards access to documents, it is indeed the case that Article 42 of the EU Charter has elevated the right of access to documents to the status of a fundamental right. However, it should not escape our attention that the TFEU provides that the ECB shall be subject to Article 15(3) TFEU only when exercising its 'administrative tasks'.[160] Deirdre Curtin and Joana Mendes rightly note that:

> The meaning and scope of "administrative tasks" is uncertain. This specification may well … have been intended to exclude access to documents produced when these institutions exercise their core non-administrative functions: … documents pertaining to the monetary policy of the Union (in the case of the ECB)… However, it is questionable if this broad understanding of this exception is in accordance with the principle of transparency as enshrined in the Treaty.[161]

The detailed rules governing access to information and documents are complicated to the extreme. As regards prudential supervision, Decision 2004/258/EC of the ECB, as is currently in force, governs access to documents drawn up or held by the ECB. If the relevant ECB documents are in the possession of the national competent

158 Interinstitutional Agreement (n 22) section I.4, pp. 5-6.

159 ibid section I.4, p. 6.

160 TFEU, fourth subparagraph of Article 15(3); EU Charter, Article 52(2).

161 Deirdre Curtin and Joana Mendes, 'Article 42 – Right of Access to Documents' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1108.

authorities, ECB Decision (EU) 2015/811 is applicable.[162] Access to files in an ECB supervisory procedure, which can function as an alternate route to the same goal but is nevertheless different from public access to files,[163] is governed by the SSM Framework Regulation.[164] Moreover, the conditions for disclosure of information by the Member States to national parliamentary enquiry committees, courts of auditors or other entities in charge of enquiries are laid down in CRDIV.[165]

As regards macro-prudential supervision, public access to European Systemic Risk Board (ESRB) documents is governed by another legal instrument which took the form of an ESRB decision and sets out the practical arrangements for the application of ECB Decision 2004/258/EC to ESRB documents.[166] Furthermore, as regards banking resolution, the SRM Regulation provides that access to documents held by the SRB is governed by yet another instrument, which is Regulation (EC) No 1049/2001.[167]

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162 Decision (EU) 2015/811 of the European Central Bank on public access to European Central Bank documents in the possession of the national competent authorities (ECB/2015/16) [2015] OJ L128/27.

163 Paul Craig (n 131) 326.

164 SSM Framework Regulation (n 103), Article 32.

165 Directive 2013/36/EU of the European Parliament and of the Council 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] OJ L176/338, Article 59(2).

166 Decision 2011/C 176/03 of the European Systemic Risk Board on public access to European Systemic Risk Board documents (ESRB/2011/5) [2011] OJ C176/3.

167 SRM Regulation, Article 90(1); Regulation (EC) 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

Similarly to the ESRB, the SRB, too, shall adopt the practical measures for applying Regulation (EC) No 1049/2001.[168]

It is most unfortunate that the rules on transparency and access to information are themselves obscure and complex. There is no single instrument governing access to ECB/SRB documents. One has to trawl through a large number of laws, which have already been amended multiple times, in order to trace the rules governing access to documents held by a given institution, body or agency. What is more, these instruments are only accessible in different websites, and there is not always an up-to-date consolidated version. Furthermore, it should not escape our attention that these complex rules should be read in the light of a whole raft of other provisions on data protection, business secrets, confidentiality and professional secrecy.

As regards the substance of these rules, ECB Decision 2004/258/EC, as is currently in force, carves out three big exceptions to public access to documents held by the ECB. More specifically, the ECB shall refuse access to a document where disclosure would undermine the protection of the public interest as regards 'the Union's or a Member State's policy relating to the prudential supervision of credit institutions and other financial institutions' or 'the purpose of supervisory inspections'.[169] It shall further deny access to documents when 'the soundness and security of financial market infrastructures, payment schemes or payment service providers' is at stake.[170]

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168 SRM Regulation, Article 90(2); Decision of the Executive Session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (SRB/ES/2017/01).

169 Decision 2004/258/EC (n 137) eight and ninth indents of Article 4(1)(a).

170 ibid tenth indent.

These are sensible rules. However, it is fairly obvious that these exceptions could, if interpreted broadly, shield ECB documents from almost all public scrutiny. It follows from their very nature as exceptions to a general rule that they should be construed narrowly. Unfortunately, the relevant case law of the CJEU does not bode well.

In the case of *Thesing and Bloomberg v ECB*,[171] a journalist sought access to two ECB documents concerning transactions in financial derivatives (off-market swaps) and their impact on Greek government books. Her request was refused on grounds that the disclosure of these documents would undermine the protection of the public interest as regards the economic policy of Greece and the Union.[172] The fear was that disclosure of such information would roil the markets and hence Greece (and possibly other Member States too) would lose access to them. The information contained in those documents was outdated at the time of the request for access and could, in the opinion of the ECB, mislead the public in general and the financial markets in particular. Moreover, the issues examined in those documents were part of a thorough examination by the European Commission in the framework of the excessive deficit procedure, and the results of that examination would be published in due time.[173]

The General Court held that 'the ECB must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to

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171 Case T-590/10 *Gabi Thesing and Bloomberg Finance LP v European Central Bank* EU:T:2013:55.

172 Decision 2004/258/EC of the European Central Bank on public access to European Central Bank documents (ECB/2004/3) [2004] OJ L80/42, as was then in force, second indent of Article 4(1)(a).

173 Case T-590/10 (n 171) para 49.

the fields covered by that exception could undermine the public interest'.[174] It further held that its review 'must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers'.[175] The General Court concluded that the contested decision was not vitiated by a manifest error of assessment.[176] That conclusion was not undermined, said the Court, by the applicants' arguments relating to Article 10 of the ECHR.[177] An appeal was lodged to the Court of Justice, but the latter swiftly dismissed it.[178]

Going back to ECB Decision 2004/258/EC, its up-to-date version further provides that:

174 ibid para 43.

175 ibid para 43.

176 ibid paras 47-65.

177 ibid paras 66-82.

178 Case C-28/13 P *Gabi Thesing and Bloomberg Finance LP v European Central Bank* EU:C:2014:230.

> Access to a document drafted or received by the ECB for internal use as part of deliberations and preliminary consultations within the ECB, or for exchanges of views between the ECB and [national central banks, national competent authorities or national designated authorities], shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure. Access to documents reflecting exchanges of views between the ECB and other relevant authorities and bodies shall be refused even after the decision has been taken, if disclosure of the document would seriously undermine the ECB's effectiveness in carrying out its tasks, unless there is an overriding public interest in disclosure.[179]

These restrictions to public access to ECB documents should be read in the light of the recitals of the preamble to the latest decision amending ECB Decision 2004/258/EC. These highlight the close links between economic and monetary policy, and explain that:

> It has proven to be of crucial importance for the ECB to be in a position to convey pertinent and candid messages to European and Member States' authorities so as to most effectively serve the public interest in the fulfilment of its mandate. This could entail that effective informal and confidential communication must also be possible and should not be undermined by the prospect of disclosure. … For the ECB to cooperate effectively, it is essential to provide and preserve a 'space to think' for the free and constructive exchange of views and information between the abovementioned authorities, institutions and other bodies. On this basis, the ECB should be entitled to protect documents exchanged as part of its cooperation with national central banks, national competent authorities, national designated authorities and other relevant authorities and bodies.[180]

These recitals could possibly be alluding to the *Thesing* case or (more plausibly) to the ECB's secret letters saga. It will be recalled that at the height of the Euro crisis, the ECB had sent a number of secret letters to the Irish, Spanish and Portuguese

179 Decision 2004/258/EC (n 137) Article 4(3).

180 Decision (EU) 2015/529 (n 133) recitals 7-8.

Governments.[181] The letter sent by the ECB to the Irish Government on 19 November 2010 provides a telling illustration of the content of such letters. The ECB explicitly threatened to cut Emergency Liquidity Assistance (ELA) provision to Irish banks unless the Irish Government submitted a request for financial support to its Euro area partners. The ECB requested that the Irish Government 'undertake decisive actions in the areas of fiscal consolidation, structural reforms and financial sector restructuring, in agreement with the European Commission, the International Monetary Fund and the ECB'. The ECB further required that the Irish Government bail out the Irish banks and guarantee the full repayment of ELA funds that were previously provided to them. Moreover, the ECB expressed concerns over 'the very large overall credit exposure of the Eurosystem towards the Irish banking system'. The Irish Government succumbed to the pressure and applied for financial support only two days later.[182] The letter to the Irish Government was reclassified for publication on 6 November 2014.[183] Ireland had already exited the EU-IMF financial assistance programme in December 2013.[184]

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181 Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 1, 20-21.

182 Andrew Walker, 'ECB Publishes Secret Irish Bailout Letters' (BBC, 6 November 2014) <http://www.bbc.co.uk/news/business-29942060> accessed 20 November 2015.

183 It can be accessed on the ECB's website: <http://www.ecb.europa.eu/press/shared/pdf/2010-11-19_Letter_ECB_President_to%20IE_FinMin.pdf?83824135ba733b6091e930d3a25314c9> accessed 20 November 2015.

184 European Commission, 'Post-Programme Surveillance for Ireland' (19 January 2016) <http://ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm> accessed 31 March 2016.

Claire Kilpatrick rightly argues that 'asserting that these secret letters are not "law" does not suffice to allay Rule of Law concerns'.[185] Her argument is worth quoting in some length:

> Should these letters be considered not to contain binding obligations, they evidence that national labour laws are being shaped in secret institutional structures with significant normative power outside the law. Yet the Rule of Law is not just a feature of the norms called law that exist, it is a commitment to govern through law and, as Neil Walker puts it, 'the avoidance of large zones of non-law (either in theory or in practice) where other forms of domination prevail'.[186]

Moreover, it should be noted that a recent General Court ruling,[187] which concerns access to documents held by the Commission that were drawn up in the context of preparing an impact assessment, could possibly have a bearing on the way the norms governing access to ECB documents are interpreted in the future. The ruling concerns the interpretation of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, which provides that:

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The General Court held that for the purposes of applying this provision, 'the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously

185 Claire Kilpatrick (n 181) 21.

186 ibid 21.

187 Joined Cases T-424/14 and T-425/14 *ClientEarth v European Commission* EU:T:2015:848.

undermine its decision-making process for developing a policy proposal'.[188] The need to preserve a 'thinking space' for the institution concerned pervades the judgment. The actions were eventually dismissed by the General Court. It remains to be seen whether this ruling will be confirmed or followed by the Court of Justice.[189]

Last, the position with respect to ESRB documents mirrors the limitations to public access to ECB documents. As such, the arguments put forward above hold true for the relevant ESRB decision. More specifically, the latter decision explicitly refers to ECB Decision 2004/258/EC and provides that the same exceptions to public access shall also apply to ESRB documents.[190] The ESRB shall refuse access to an ESRB document 'in particular where disclosure would undermine the protection of the public interest in the confidentiality or effectiveness of its proceedings, activities, discussions, warnings or recommendations'.[191] Furthermore, as regards access to SRB documents, Regulation 1049/2001 provides that the SRB shall refuse access to a document where disclosure would undermine the protection of the public interest as regards 'the financial, monetary or economic policy of the Community or a Member State'.[192] It shall further refuse access to a document 'where disclosure would undermine the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure'.[193]

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188 ibid para 97.

189 An appeal is currently pending before the Court of Justice: Case C-57/16 P.

190 Decision 2011/C 176/03 of the European Systemic Risk Board on public access to European Systemic Risk Board documents (ESRB/2011/5) [2011] OJ C176/3, Article 3.

191 ibid Article 3.

192 Regulation (EC) 1049/2001, fourth indent of Article 4(1)(a).

193 Regulation (EC) 1049/2001, third indent of Article 4(2).

Risks to the EBU's effectiveness

The discussion thus far has demonstrated that the Banking Union is an area of low visibility, with limited input from the European and national parliaments and very restrictive rules on public access to documents. Legal accountability, too, is limited in various ways.[194] This naturally prompts inquiry as to the output legitimacy of the ECB and of the SRB within the framework of the Banking Union. Is the way the latter is set up likely to enable the ECB and the SRB to effectively discharge their duties and to achieve their desired goals?

There is a burgeoning body of literature on the efficiency and the effectiveness of the EBU's legal arrangements and governance structures. This is no place to re-enter the debate. Suffice it to say for present purposes that it is argued that there are important risks to the effectiveness and credibility of both the SSM and the SRM. To be sure, a good deal of this was the result of gaining consensus on this complex subject. As pithily expressed by Eilís Ferran, '[i]f it were possible to start with a clean sheet not already criss-crossed

194 See among others Tomas Arons, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015); Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016); Marco Lamandini and others, 'Depicting the Limits to the SSM's Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights' Protection' (2015) Quaderni di Ricerca Giuridica della Consulenza Legale 79/2015 <www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2015-0079/index.html?com.dotmarketing.htmlpage.language=1> accessed 25 February 2016; Menelaos Markakis, 'Political and Legal Accountability in the European Banking Union: A First Assessment' in Marcel Szabó and others (eds), *Hungarian Yearbook of International and European Law 2016* (Eleven Publishing 2017) ch 32; Konstantina Panagiannaki, 'Die neue Bankenaufsicht in der Praxis' (IKYDA 4 conference, Thessaloniki, 7 November 2015); Gijsbert Ter Kuile, Laura Wissink and Willem Bovenschen (n 61).

by legal and political redlines, EBU would almost certainly look quite different from the structure that has actually emerged'.[195]

As regards the SSM, it is indeed the case that its potential scope was circumscribed by Article 127(6) TFEU and hence it could not be extended to cover all institutions that could cause systemic harm.[196] Moreover, the EBU 'is heavily reliant upon a rulebook that has been designed to serve a different purpose, namely EU28 harmonization, and which has left room for flexibility to accommodate national particularities'.[197] Substantive Union law to be applied by the ECB, the SRB or other Union bodies 'may need to be conceived in a more uniform manner than corresponding rules to be applied by national authorities of Member States that do not take part in the banking union'.[198] National particularities are present, but the SSM/SRM are intended to reduce to the extent possible such particularities.[199] Furthermore, there is much that could be said about the organisational and governance arrangements of the SSM, such as '[t]he complex distribution of prudential responsibilities between the ECB and [national competent authorities]',[200] 'the risk of conflicts of interest between monetary and

195 Eilís Ferran (n 123) 87; Gijsbert Ter Kuile, Laura Wissink and Willem Bovenschen (n 61) 179.

196 Eilís Ferran (n 123) 61-62.

197 ibid 59.

198 European Council, 'European Council Meeting (18 and 19 February 2016) – Conclusions' EUCO 1/16 (Brussels, 19 February 2016) <http://www.consilium.europa.eu/en/meetings/european-council/2016/02/EUCO-Conclusions_pdf/> accessed 20 February 2016, 13.

199 Regulation (EU) 2016/445 of the European Central Bank on the exercise of options and discretions available in Union law (ECB/2016/4) [2016] OJ L78/60; European Central Bank, 'ECB Guide on Options and Discretions Available in Union Law' (March 2016) <https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/ecb_guide_options_discretions.en.pdf> accessed 27 March 2016.

200 Eilís Ferran (n 123) 64-67.

supervisory policy functions' which are vested with one and the same institution,[201] and the position of non-Euro area Member States participating in the SSM.

As regards the SRM, the problems with the size of the Fund and the method through which this is determined are well known.[202] To put the €55 billion target size for the Fund in perspective, 'during the recent financial crisis, Germany alone had to inject €29 billion into its banks, and provide guarantees on the order of €174 billion'.[203] What is more, the third pillar of the EBU is not yet in place.[204] In this connection, the European Commission had pledged in its 2016 Work Programme to present a proposal for 'a European bank deposit scheme based on a reinsurance mechanism' by the end of 2015.[205] It eventually did so on 24 November 2015.[206] It remains to be seen whether the Commission will be able to successfully pilot this proposal through the legislative process. It further remains to be seen whether the final design of the European Deposit Insurance Scheme will be sufficiently robust to placate the concerns voiced thus far.

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201 ibid 62; Thomas Beukers (n 107) 103.

202 Danny Busch (n 87) 299 fn 150; Jeffrey Gordon and Wolf-Georg Ringe (n 84) 1347-48; Hans-Werner Sinn, *The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs* (OUP 2014) 305-06.

203 Christian Odendahl, 'We Don't Need No Federation: What a Devolved Eurozone Should Look Like' (Centre for European Reform, December 2015) <http://www.cer.org.uk/publications/archive/report/2015/we-dont-need-no-federation-what-devolved-eurozone-should-look> accessed 22 January 2016, 25.

204 Jeffrey Gordon and Wolf-Georg Ringe (n 84) 1348.

205 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2016: No Time for Business as Usual' COM(2015) 610 final (27 October 2015) <http://ec.europa.eu/atwork/pdf/cwp_2016_en.pdf> accessed 23 November 2015, 9.

206 European Commission, 'A Stronger Banking Union: New Measures to Reinforce Deposit Protection and Further Reduce Banking Risks' (24 November 2015) <http://europa.eu/rapid/press-release_IP-15-6152_en.htm> accessed 28 November 2015.

Moreover, the byzantine complexity of the SRM's governance framework might impede swift and effective decision-making.[207] In this connection, there are also concerns about the SRB's standing as a '"mere" agency' vis-à-vis the ECB, as well as 'the management of potential conflicts of interest within the Commission between resolution tasks and state aid/SRF tasks'.[208] Furthermore, similarly to the SSM framework, '[o]ther potentially troubling issues include … the adequacy of the arrangements for the non-participating Member States, and the robustness of the accountability arrangements.'[209]

Conclusion

There will be no attempt to summarise the preceding argument in its entirety. Instead we will highlight certain features which are of particular importance. The overarching picture which emerges from the preceding discussion is that the EU's Banking Union is an area of low citizen visibility, with limited input from the European and national parliaments and very restrictive rules governing public access to documents. Effective democratic oversight over the activities of the various non-majoritarian institutions acting in this area is often traded against other legitimate ends, such as financial stability, the protection of sensitive information and the proper conduct of supervisory inspections. To be sure, these are policy areas which are often removed from majoritarian oversight at national level, or the degree of majoritarian oversight is circumscribed quite severely. Be that as it may, the EBU seems to rely more on its promise of output legitimacy, from the standpoint of

207 Danny Busch (n 87) 332-35; Eilís Ferran (n 123) 76.

208 Eilís Ferran (n 123) 76.

209 ibid 76.

which it is a very promising development for banking supervision and resolution in the EU.

As regards the division of power in the EBU, we have seen that there is a very complex division of competence between the EU and national institutions. It is clear that the ECB and the SRB are in the driving seat in the SSM and the SRM. However, the Commission and the Council are also accorded a number of significant powers, and so too are the national competent (or designated) and resolution authorities, which have an important role to play in the EBU. The lines of accountability are sometimes blurred. For all its practical difficulties and imperfections, inter-parliamentary cooperation (that is, synergies between the European and national parliaments) might be the only viable alternative under the current Treaty schema in order to secure comprehensive parliamentary oversight of the activities of the various EBU actors.

It would be premature to pass judgment on the efficiency and/or effectiveness of the EBU arrangements. Other things being equal, the EBU represents a major breakthrough in bank supervision and resolution in the Euro area. However, it is indeed the case that due to legal and political constraints, the EBU's design is suboptimal, the main flaws being its complex governance structure, the very limited firepower given to the SRF, and the lack of an EDIS and a common fiscal backstop. To be sure, this is the best that could be achieved in terms of the structure and direction of the EBU, given the contending political forces that had to be placated in order to get the legislation through the EU legislative process.

One of the consequences of the EBU's imperfect design is that non-Euro area Member States are likely to avoid participating in the SSM and the SRM. This naturally

prompts inquiry as to the unity and integrity of the internal market in financial services, though it should not escape our attention that other EU banking laws, such as the BRRD or the Directive on deposit guarantee schemes, apply to all 28 Member States. 'Two-tier harmonisation' seems to be the only way forward for the time being.

If one were to compare the legal and institutional arrangements pertaining to the Banking Union to the main instruments of EU fiscal and economic governance, one would note that the accountability and transparency requirements laid down in the SSM and the SRM Regulations are fairly similar to the ones set out in the 'six pack' and 'two pack' of EU legislation. There is provision for reporting obligations, EP hearings, exchanges of views, and confidential oral discussions. The elements of information and debate are indeed there, though one might have to caution against an unduly narrow interpretation of the rules governing access to information.

Further, there are a number of important differences between the EBU and EU fiscal governance. We have seen that one of the novelties of the EBU framework is that the European Parliament's approval is required for the appointment of the Chair and the Vice-Chair of the Supervisory Board, and the Chair, the Vice-Chair and the four full-time members of the SRB. Parliamentary approval is further required for the removal of those officials from office. In sharp contrast to these novel arrangements, the European Parliament has no formal powers over the appointment of, say, the Managing Director of the ESM or the President of the Eurogroup. Moreover, as noted above, the European Parliament is merely consulted on the appointment of the President, the Vice-President and the other members of the ECB's Executive Board. Furthermore, it should not escape our attention that, following a proposal by the Commission, the Parliament and Council

could change the legal framework of the SSM and of the SRM to 'sanction' the ECB and the SRB for the performance of their duties. In principle, the Parliament and Council could do the same in the area of fiscal governance, but this argument only holds true when there are no relevant Treaty constraints or other restrictive rules enacted through intergovernmental treaties.

In terms of influence in norm production, the European Parliament got its way in many cases and successfully piloted many important changes to the SSM/SRM framework through the legislative process. It further emerges from the Committee draft reports that it managed to strengthen the accountability and transparency requirements laid down in the SSM and the SRM Regulations. Naturally, not all the amendments that were proposed by the rapporteurs got through. The overall picture is that the European Parliament played a meaningful role in the norm production phase with respect to the 'six pack', 'two pack' and EBU legislation.

CHAPTER SIX: JUDICIAL REVIEW IN THE ECONOMIC AND MONETARY UNION: THE EU COURTS

Introduction

3 July 2014. The six Greek MEPs of GUE/NGL submit a question to the European Commission about a report by a UN expert on 'human rights abuses in Greece as a result of the implementation of austerity measures'.[1] The six MEPs asked the Commission what it planned to do 'to put an end to the violation of rights in Greece, as part of its obligations under the Charter of Fundamental Rights'. Answering on behalf of the Commission, Mr Jyrki Katainen, then European Commissioner for Economic and Monetary Affairs and the Euro, noted that:

> The Commission is committed to ensuring that, when implementing EC law, Member States respect the rights enshrined in the EU Charter of Fundamental Rights. However, the programme documents are not EC law, but instruments agreed between Greece and its lenders: as such, the Charter cannot be used as a reference, and it is for Greece to ensure that its own obligations on fundamental rights are respected. …

The debate about fundamental rights, most notably social and labour rights,[2] is part and parcel of each and every discussion on the implications of bailout programmes for crisis-hit countries. That being said, the Commission steered clear of any human rights duties that it could be said to bear under the EU Charter of Fundamental Rights.

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1 Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2014-005633+0+DOC+XML+V0//EN.

2 This is not to say that the present author draws a sharp distinction between 'labour law' and 'social law': Claire Kilpatrick and Bruno De Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014) Sieps European Policy Analysis 2014:7, 3-5.

This is the EU institution which negotiates and signs the 'notorious' Memoranda of Understanding (MoUs), detailing the economic policy conditionality attached to the assistance granted to borrower countries. It further monitors the progress made by beneficiary states in the implementation of the programme. The European Central Bank (ECB) is also involved in negotiating the MoU and is further entrusted –together with the Commission– with monitoring compliance with the conditionality attached to the financial assistance facility.[3] Moreover, the Eurogroup and Euro Summit routinely discuss (or even broker an agreement on) such programmes, and –depending on the financial mechanism used– the Council approves the draft macroeconomic adjustment programme. Is it not somewhat disingenuous to argue that the bailout conditions are not EU law?

This chapter will seek to unpack access to EU courts in the area of Economic and Monetary Union (EMU), the emphasis being on the challenges facing austerity-hit litigants wishing to put their substantive case before the CJEU. The discussion will proceed as follows. First, it will be shown that aggrieved individuals might not always be able to locate a formally binding EU law measure which could form the basis of a direct or indirect challenge before the EU courts. Second, it will be seen that the judicial doors to an Article 263 TFEU challenge are, nevertheless, firmly shut as most, if not all, private persons will normally not be able to overcome the admissibility hurdles of direct and individual concern. Third, all Article 267 TFEU challenges have so far been declared inadmissible, which begs the question as to the legal quality of the bailout terms and its ripple effect on the scope of application of the EU Charter of Fundamental Rights.

[3] See ESM Treaty, Article 13.

Fourth, though aggrieved individuals could in principle bring an Article 340 TFEU action for damages before the EU courts, litigants are likely to face an uphill struggle in trying to convince the Court that the relevant requirements for liability of the EU institutions for damages for breach of EU law were met. The final section of this chapter will focus on the scope of application of the EU Charter of Fundamental Rights, which has formed the basis of many (unsuccessful, thus far) challenges to austerity measures that were enacted to combat the crisis.

Is there an EU act to challenge?

Going down the intergovernmental route: implications for judicial review

We have seen in Chapter 2 of this thesis that the Member States have set up a number of financial mechanisms, either within or outside the formal confines of the EU Treaties. The European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) were set up by means of intergovernmental agreements concluded between the Euro area Member States, whereas the European Financial Stabilisation Mechanism (EFSM) was established by means of a Council Regulation.[4] Balance of payments assistance, too, is based on a Council Regulation.[5] The intergovernmental family has further been enlarged by the Treaty on Stability, Coordination and Governance (commonly referred to as the Fiscal Compact) and the Intergovernmental Agreement on the Single Resolution Fund.

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4 Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1 (EFSM Regulation).

5 Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1.

As the EU courts have previously ruled that they do not have jurisdiction to review the legality of the MoU itself or of acts adopted by the ESM,[6] it is important to trace an EU law measure that could form the basis of a legal challenge before the EU courts. As regards the EFSM, its founding Regulation provides that Union financial assistance shall be granted by means of a *Council decision*, which sets out the general economic policy conditions attached to the Union financial assistance and approves the draft economic and financial adjustment programme prepared by the Member State concerned.[7] Upon securing the Council's approval, the Commission and the beneficiary Member State shall conclude a MoU detailing the general economic policy conditions laid down by the Council.[8] A similar procedure is followed in the case of balance-of-payments assistance.[9] There is no principled reason as to why one could not bring a direct or an indirect challenge against such Council decisions, provided that the other admissibility requirements are met.

As regards the two financial mechanisms that were set up outside the formal confines of the Lisbon Treaty, one can still trace secondary EU law measures that could in principle be challenged before the CJEU. First, there is the possibility of challenging the Council decisions adopted within the framework of the excessive deficit procedure,

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6 Case T-289/13 *Ledra Advertising Ltd v European Commission and European Central Bank* ECLI:EU:T:2014:981, paras 56-60; Case T-291/13 *Andreas Eleftheriou, Eleni Eleftheriou and Lilia Papachristofi v European Commission and European Central Bank* ECLI:EU:T:2014:978, paras 56-60; Case T-293/13 *Christos Theophilou and Eleni Theofilou v European Commission and European Central Bank* ECLI:EU:T:2014:979, paras 56-60; Joined Cases C-8/15 P to C-10/15 P (Grand Chamber) *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C:2016:701, paras 52-55.

7 EFSM Regulation, Article 3(2)-(4).

8 ibid Article 3(5).

9 Council Regulation (EC) 332/2002, as currently in force, Articles 3-3a.

provided that these are legally binding. Such Council decisions were indeed challenged by trade unions in the context of the first Greek bailout.[10] Second, we have seen in Chapters 2 and 3 of this thesis that 'two-pack' legislation grants the Council the power to approve the draft macroeconomic adjustment programme submitted by the Member State which is seeking financial assistance from its peers.[11] Member States are in fact under a legal obligation to submit such programmes to the EU institutions when seeking financial assistance. Such *Council implementing decisions* could in principle be challenged before the CJEU pursuant to Article 263 TFEU or could perhaps form the basis of an Article 267 TFEU challenge.

EU acts adopted by informal EU or Euro area bodies – the Cypriot cases

One major complication facing litigants in this area is that not all EU or Euro area bodies can formally adopt legally binding acts. To give one prominent example from the CJEU's case law, the General Court ruled in the *Mallis* case that the Eurogroup does not have the power to adopt legally binding decisions under the EU Treaties, it being merely an informal forum for discussion between finance ministers from Euro area Member States.[12] This ruling was confirmed by the Court of Justice on appeal.[13] More specifically,

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10 Case T-541/10 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos v Council of the European Union* ECLI:EU:T:2012:626; Case T-215/11 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY), Spyridon Papaspyros and Ilias Iliopoulos v Council of the European Union* ECLI:EU:T:2012:627 (concerning Council decisions adopted pursuant to Articles 126(9) and 136 TFEU within the framework of the excessive deficit procedure).

11 Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, Article 7.

12 Case T-327/13 *Konstantinos Mallis and Elli Konstantinou Mali v European Commission and European Central Bank* EU:T:2014:909.

the Court of Justice ruled that Eurogroup statements could not be attributed to the Commission and the ECB, notwithstanding the fact that these institutions participate in Eurogroup meetings.[14] 'Nor [was] there anything in the statement at issue reflecting a decision of the Commission and the ECB to create a legal obligation on the Member State concerned to implement the measures which it contain[ed].'[15] The contested Eurogroup statement was, said the Court, 'of a purely informative nature', and the adoption of the Cypriot law on the levy on bank deposits '[could not] be regarded as having been imposed by a supposed joint decision of the Commission and the ECB that was given concrete expression in the statement at issue.'[16] The Court further noted that the adverb 'informally' is used in the wording of Protocol No 14 on the Eurogroup and that the Eurogroup is not one of the Council configurations pursuant to Council Decision 2009/937/EU.[17] It concluded that 'the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU.'[18]

The effect of this Grand Chamber ruling is that Eurogroup statements setting out the 'core' bailout terms agreed between the Eurogroup and the ailing Member State could not be challenged before the CJEU under Article 263 TFEU, notwithstanding the fact that

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13 Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank* ECLI:EU:C:2016:702.

14 ibid para 57.

15 ibid para 58.

16 ibid paras 59-60.

17 ibid para 61; Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rule of Procedure [2009] OJ L325/35, as currently in force.

18 ibid para 61.

the Eurogroup is, in very many cases, the real 'author' of such measures.[19] This is perforce conjecture, but the same conclusion could be reached in future cases with respect to the workings of the Eurogroup Working Group and the Euro Summit, both of which had a prominent role to play during the Euro crisis.

Article 263 TFEU challenges

Privileged applicants

Even if the contested bailout terms were set out in a legally binding EU act, there would nonetheless be real difficulties in challenging the relevant Council decision before the CJEU.[20] These decisions are addressed to the beneficiary Member State. Since the latter signed the MoU, chances are it would not be interested in bringing a direct action before the CJEU. Given the short duration of such assistance programmes, the national government which signed the MoU would probably not be replaced through periodic elections before the expiry of the programme. And even if elections were held and people voted out those in power and substituted a party with different policies *before* the programme was completed, the new government would be under tremendous pressure to implement the bailout terms, as evidenced by the experience of the first SYRIZA-ANEL coalition government in Greece (January-September 2015). This is because such Council

19 For detailed analysis of the General Court ruling, see Paul Craig and Menelaos Markakis, 'The Euro Area, its Regulation and Impact on Non-Euro Member States' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) ch 14; Paul Craig, 'The Eurogroup, Political Power and Accountability' (Governing Finances in Europe: Shifting Regimes and Shifting Powers conference, Uppsala, 27-28 May 2016).

20 I use the words 'legally binding' advisedly, because a further obstacle facing litigants might be the kind of argument about the legal nature of MoUs, which is set out in the section on the Romanian and Portuguese MoU cases.

decisions mandate that any disbursement of further instalments shall be made on the basis of a satisfactory implementation of the economic programme.

It is equally hard to imagine that any other privileged applicant would seek to challenge such Council decisions before the CJEU. The EU Member States have agreed in Council to grant such financial assistance. To be sure, the Council acts by qualified majority in this area.[21] But even if a Member State is outvoted in Council, it is exceptionally hard to imagine, politically, that it would endeavour to block the granting of Union assistance to a crisis-hit EU Member State through an Article 263 TFEU challenge. This is all the more so because the difficulties facing a crisis-hit Member State may jeopardise the proper functioning of the internal market or the implementation of the common commercial policy.

The other three privileged applicants that might wish to bring a challenge before the CJEU are the European Parliament, the Council, and the Commission. The Council is the institution which agreed to grant financial assistance to the crisis-hit country concerned, therefore a Council challenge is out of the question. The Commission submits a proposal to the Council with respect to the macroeconomic adjustment programme and has an executive role in managing the programme, and it is therefore very hard to imagine that it might wish to bring a direct action before the CJEU. For its part, the European Parliament is clearly a pro-European institution and will normally not seek to raise obstacles to EU institutions and Member States wishing to keep a crisis-hit state afloat. Unless the Council decision was manifestly unreasonable or contrary to primary or secondary EU law, the European Parliament would probably not wish to bring a

[21] Council Regulation (EC) 332/2002, Article 8; Regulation (EU) 472/2013, Article 7(2).

challenge before the CJEU. This is perforce conjecture, but even in the latter case the Parliament would most likely use the accountability and transparency arrangements in the 'six-pack' and 'two-pack' of EU legislation as an extra lever to exert influence on the Council and the Commission so that they effectuate changes in the programme.

Non-privileged applicants: the requirement of direct concern – the Greek cases

The focus now shifts to non-privileged applicants. As these are not the immediate addressees of the Council decision, they would have to show that it is of direct and individual concern to them.[22] Clearly, no person could ever satisfy these criteria for standing. As regards direct concern, Paul Craig and Gráinne de Búrca helpfully explain that:

> The general principle is that a measure will be of direct concern where it directly affects the legal situation of the applicant and leaves no discretion to the addressees of the measure, who are entrusted with its implementation. This implementation must be automatic and result from EU rules without the application of other intermediate rules. It can be difficult to determine whether there is some autonomous exercise of will between the original decision and its implementation.[23]

The present author believes that it would be virtually impossible for non-privileged applicants to show that a provision requiring the national authorities concerned to reduce the public sector wage bill by, say, 5% directly affects their *legal* position and

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22 Article 263(4) TFEU.

23 Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases, and Materials* (6th edn, OUP 2015) 515. See on the meaning of direct concern, ibid 515-17; Stephen Weatherill, *EU Law* (12th edn, OUP 2016) 190-91; Joined Cases 41 to 44/70 *NV International Fruit Company and others v Commission of the European Communities* [1971] ECR I-411; Case 222/83 *Municipality of Differdange and Others v Commission of the European Communities* [1984] ECR I-2889.

leaves no discretion to the addressees of the measure who are entrusted with its implementation. There are very many ways in which such an obligation could be acted on. The national authorities concerned might opt for a horizontal reduction in the public sector wage bill. Alternatively, they might reduce the salaries of only some categories of civil servants, provided that this does not give rise to unlawful discrimination. Further, they might choose to reduce the salaries of highly-paid civil servants by, say, 10% and the salaries of other employees by, say, 3%. Much depends on the language in which the contested terms are cast, but, in the vast majority of cases, such a Council decision would not be of direct concern to the applicants.

The aforementioned difficulties with respect to the requirement of direct concern are evidenced in the fate of the two direct challenges that were brought by Greek trade unions and their leaders (in their capacity as civil servants) against Council decisions that were adopted within the framework of the excessive deficit procedure. As regards the first challenge, the applicants sought the annulment of the contested acts in their entirety and specifically targeted a number of measures, including a reduction in the Easter, summer and Christmas bonuses, an increase in the retirement age, a pension reduction, and a hiring-to-attrition ratio which led, in their opinion, to deterioration in the functioning of public services.[24]

The General Court intoned legal orthodoxy by saying that:

> In accordance with settled case-law, the condition that the decision forming the subject-matter of the proceedings must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 230 EC, requires, in principle, two cumulative criteria, namely that

[24] Case T-541/10 (n 10) para 67.

> the contested measure, first, must affect directly the legal situation of the individual and, second, leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules…[25]

The application of the test to the facts is equally important. For example, the provision concerning the reduction in holiday allowances 'with the aim of saving EUR 1 500 million for a full year (EUR 1 100 million in 2010)' was found to be 'vague', since it '[did] not specify the details of the reduction provided for, the way in which it [would] be implemented or the categories of civil servants which [would] be affected'.[26] Despite setting a 'clear objective' to be pursued by the Greek Government, it '[did] not prevent the Hellenic Republic, in particular, from excluding certain categories of civil servants from the principle of the reduction of bonuses, provided that the objective of making savings [was] achieved'.[27] It followed, said the General Court, that 'that provision [left] it to the discretion of the Greek authorities to specify all the details of the reduction of bonuses by way of national implementing measures', and 'it [was] those measures which, possibly, [would] directly affect the legal situation of the applicants'.[28] 'It [would] be the content of those measures which [would] determine whether, or to what extent, some of the applicants [would] suffer a reduction of bonuses.'[29] Those applicants would then be able, said the General Court, to bring an action against those national implementing

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25 ibid para 64.

26 ibid para 70.

27 ibid para 70.

28 ibid para 70.

29 ibid para 70.

measures before the national courts.[30] This conclusion could not be altered, said the General Court, 'where the possibility that addressees [would] not give effect to the measure concerned [was] purely theoretical and their intention to act in conformity with it [was] not in doubt … since compliance with those acts [was] the condition for the grant of financial aid to that State by means of the intergovernmental mechanism', because the relevant provision '[was] not such as to affect directly the legal situation of the applicants and … in the context of its implementation, the Greek authorities [had] a wide discretion'.[31]

The provisions concerning pension reform were not found to be of direct concern to the applicants either. The General Court summarised the content of the contested bailout term in the following terms:

> Article 2(2)(b) of the basic act requires the Hellenic Republic, by the end of September 2010, to adopt a law reforming the pension system with a view to ensuring its medium and long-term sustainability. That provision also defines the broad lines of the content of that law. That provision provides, inter alia, that the law must introduce a statutory retirement age of 65 years; a merger of the existing pension funds in three funds; a reduction of the upper limit on pensions; a gradual increase in the minimum contributory period for retirement on a full benefit and stricter conditions for eligibility for disability pensions. Finally, it is specified that, thanks to the implementation of this law, the projected increase in the pension expenditure to GDP ratio should be reduced to below the euro area average over the next decades and the increase of public sector spending on pensions over the period 2010-2060 should be limited to less than 2.5% of GDP.[32]

The General Court ruled that:

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30 ibid para 70.

31 ibid paras 71-73.

32 ibid para 74.

> …It is clear from the wording of that provision that it required the adoption of a national law in order to be implemented. It laid down the objective that that law was to achieve, namely the sustainability of the Greek pension system, and defined, in general terms, certain measures for which that law was to provide. Having regard in particular to its extent, since it did not concern only civil servants but all retiring workers in the private and public sectors, that provision was not intended to constitute a complete set of rules sufficient in itself for the Greek pension system, which did not need implementing measures and whose implementation was purely automatic, following from that provision alone. It follows that Article 2(2)(b) of the basic act left a very wide discretion to the Greek authorities to define the content of the law which was to implement it, provided that that law ensured the medium and long-term sustainability of the Greek pension system. It would accordingly have been that law which, possibly, would have directly affected the legal situation of the applicants. …[33]

It is very hard to imagine of any Council decision setting out 'a complete set of rules' for the purposes of reforming a given policy area, which would not need implementing measures and whose implementation would be 'purely automatic, following from that provision alone'. This would be practically impossible, as it would require a detailed knowledge of the existing national rules, the economic fundamentals, as well as knowledge of 'the situation on the ground' which could only be gained through on-site monitoring by teams of experts. Furthermore, the discussion in Chapter 3 has shown that it is somewhat disingenuous and formalistic to argue that the contested bailout terms leave 'a very wide discretion to the Greek authorities' to define the parameters of reform, as the Troika (now the 'Quadriga') clearly has more bargaining power than the government of a Member State which is seemingly constantly on the brink of bankruptcy. As taxpayers' money and the EU's and IMF's credibility are on the line, the institutions monitoring the implementation of the programme would not allow the government of a

[33] ibid para 76.

recipient Member State to implement reforms which do not make, in their opinion, economic sense, the role of the national authorities in some cases being reduced to submitting various proposals and carrying out the will of the institutions.

Going back to the General Court decision in the *ADEDY* case, another bailout term which provided for 'a replacement of only 20% of retiring employees in the public sector (central government, local governments, social security funds, public companies, state agencies and other public institutions)' was not of direct concern to the applicant trade union either, though the latter is a confederation with the federations of unions of public sector employees, employees of public legal persons and of local and regional authorities. This was because the impugned provision 'constitute[d] a general measure of organisation and management of the public administration, which [did] not directly affect their legal situation'.[34] 'In so far as that provision [brought] about a deterioration in the functioning of public services and worsen[ed] the applicants' conditions of employment, as they argue[d], it [was] a situation which [did] not influence their legal situation, but only their factual situation.'[35] Similar arguments were employed by the General Court to deny the existence of direct concern with respect to all other measures adumbrated in the contested Council decision.[36] The General Court remained equally unconvinced by arguments based on the principle of effective judicial protection or pertaining to 'the slowness of proceedings before the Greek administrative courts and the argument that dismissal of their action as inadmissible by the General Court would confer a

34 ibid para 78.

35 ibid para 78.

36 ibid paras 81-88.

presumption of legality on the contested acts',[37] all these being very pragmatic and legitimate concerns from the viewpoint of a Greek lawyer.

As regards the second direct challenge brought by *ADEDY* against the Council decision amending the one which formed the basis of its first challenge, it too failed to overcome the admissibility hurdle of direct concern. The applicants had primarily targeted a privatisation programme aspiring to reduce the volume of Greek debt. However, the General Court ruled that it was not of direct concern to them as the Greek authorities had a 'wide margin of appreciation' to choose the means necessary to improve the management of those assets owned by the state; to choose which assets would be sold; and to set the terms on which they would be sold.[38] In this connection, it remains to be seen whether the Asset Development Plan which is attached to the third MoU for Greece, setting out in detail the assets to be privatised and the terms on which such transactions will take place, would suffice to placate the concerns voiced by the General Court with respect to direct concern. Furthermore, the bailout term exhorting the Greek Government to means-test family benefits was said by the General Court to constitute a 'framework norm' which merely set out a fiscal objective to be pursued by the national authorities, leaving it to the latter authorities to flesh out the requisite detail in terms of the income criteria to be applied, the family benefits to be slashed, and so on.[39]

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37 ibid paras 89-97.

38 Case T-215/11 (n 10) paras 79-85.

39 ibid paras 86-91.

Non-privileged applicants: the requirement of individual concern

As regards individual concern, the leading authority is *Plaumann*.[40] The applicants would have to show that 'that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'.[41] The critique of this test is well known, but *Plaumann* nevertheless remains good law.[42] 'The ECJ's reasoning … renders it literally impossible for an applicant to succeed, except in a very limited category of retrospective cases'.[43] In light of the Court's case law on the meaning of 'individual concern', it is exceptionally hard to imagine that non-privileged applicants would be able to show that they were individually concerned by the contested Council decision. The Lisbon category of regulatory measure would not be of much help to litigants either, given the fairly broad meaning accorded to the concept of implementing act.[44]

Article 267 TFEU preliminary references

Procedural difficulties

Non-privileged applicants could perhaps trigger a reference for a preliminary ruling, thereby indirectly *domestically* challenging the impugned act. This would be a tall order.

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40 Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR English special edition 95.

41 ibid.

42 Paul Craig and Gráinne de Búrca (n 23) 519-32; Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, Opinion of AG Jacobs, para 102.

43 Paul Craig and Gráinne de Búrca (n 23) 520.

44 Case C-274/12 P (Grand Chamber) *Telefónica SA v European Commission* ECLI:EU:C:2013:852.

First, 'the applicant has no right to decide whether a reference is made, which measures are referred for review or what grounds of invalidity are raised and thus no right of access to the Court of Justice'.[45] For example, it will be seen in Chapter 7 that no reference was made by the Greek Council of State in a number of cases where the impugned measure could be said to restrict the exercise of one of the four freedoms. Second, there might be no challengeable implementing measures or –more plausibly– the applicant might have to break the law in order to be able to challenge ensuing sanctions.[46] Third, it is well known that 'indirect challenges … present a number of procedural disadvantages in comparison to direct challenges … as regards for example the participation of the institution(s) which adopted the measure, the delays and costs involved, the award of interim measures or the possibility of third party intervention'.[47] What is more, the applicant(s) would most likely have to fight through more than one national court.[48] Given the existence of these procedural constraints, the Article 267 TFEU route is at best only available to sufficiently large corporations, professional associations, NGOs, and trade unions, to the exclusion of the ordinary citizen in the street.

The legal quality of the bailout terms: the Romanian and Portuguese MoU cases

A further complication facing litigants in this area is that even when the contested bailout terms are set out in, say, a Council decision, it is not at all clear whether the Member

45 Case C-50/00 (n 42)**,** Opinion of AG Jacobs, para 102.

46 ibid para 102.

47 ibid para 102.

48 Article 267(2)-(3) TFEU.

State concerned is under an *EU law obligation* to act accordingly. This is one of the possible explanations for the Court's rulings in *the Romanian and Portuguese MoU cases*, which provide a telling illustration of the difficulties facing litigants who wish to challenge austerity measures that form part of bailout packages.[49]

Romania was in receipt of multilateral financial assistance by the EU, the IMF and the World Bank and is currently under post-programme surveillance.[50] Union assistance was granted through the facility providing medium-term financial assistance for non-Euro area Member States experiencing difficulties with respect to their balance of payments.[51] There were three different assistance programmes (2009-11; 2011-13; and 2013-15), the latter two packages being granted on a precautionary basis. Union financial assistance was made available upon the adoption of Council decisions pursuant to Council Regulation (EC) 332/2002.[52]

The conditionality attached to the financial assistance granted to Romania was adumbrated in these Council decisions.[53] The relevant provisions were cast in mandatory

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49 Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 131-36.

50 European Commission, 'Balance-of-Payments Assistance to Romania' (3 December 2015) <http://ec.europa.eu/economy_finance/assistance_eu_ms/romania/index_en.htm> accessed 15 February 2016.

51 Council Regulation (EC) 332/2002 (n 5).

52 Council Decision 2009/459/EC of 6 May 2009 providing Community medium-term financial assistance for Romania [2009] OJ L150/8; Council Decision 2011/288/EU of 12 May 2011 providing precautionary EU medium-term financial assistance for Romania [2011] OJ L132/15; Council Decision 2013/531/EU of 22 October 2013 providing precautionary Union medium-term financial assistance to Romania [2013] OJ L286/1; Council Decision 2013/532/EU of 22 October 2013 granting mutual assistance for Romania [2013] OJ L286/4.

53 Council Decision 2009/459/EC, Article 3(5); Council Decision 2011/288/EU, Article 3(3); Council Decision 2013/531/EU, Article 3(3).

terms: the specific economic policy conditions laid down in the MoU should include *inter alia* the terms set out in these Council decisions.

The *Romanian cases* concerned a 25% reduction in public sector pay.[54] The relevant Council decision and the first Romanian MoU exhorted the Romanian authorities to reduce the public sector wage bill.[55] The applicants in the main proceedings invoked various provisions of the EU Charter of Fundamental Rights and the European Convention of Human Rights, most notably their rights to property, equality and non-discrimination.[56] The Court declined jurisdiction in all four cases. It held that, according to Article 51(1) of the EU Charter, the EU Member States are bound by it 'only when they are implementing Union law'.[57] However, the orders of reference did not contain, said the Court, any specific evidence to support the view that the impugned national law was intended to implement Union law.[58] Consequently, the Court ruled that it clearly lacked jurisdiction to hear these cases.[59]

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54 Case C-434/11 *Corpul Național al Polițiștilor v Ministerul Administrației și Internelor (MAI), Inspectoratul General al Poliției Române (IGPR), Inspectoratul de Poliție al Județului Alba (IPJ)* [2012] OJ C73/13; Case C-462/11 *Victor Cozman v Teatrul Municipal Târgoviște* [2012] OJ C73/13; Case C-134/12 *Ministerul Administrației şi Internelor (MAI), Inspectoratul General al Poliţiei Române (IGPR) and Inspectoratul de Poliție al Județului Tulcea (IPJ) v Corpul Național al Polițiștilor - Biroul Executiv Central* [2012] OJ C303/9; Case C-369/12 *Corpul Național al Polițiștilor — Biroul Executiv Central, reprezentant al reclamanților Chițea Constantin și alții v Ministerul Administrației și Internelor, Inspectoratul General al Poliției Române, Inspectoratul de Poliție al Județului Brașov* [2013] OJ C108/12.

55 Council Decision 2009/459/EC (n 52), Article 3(5)(c); Memorandum of Understanding of 23 June 2009 between the European Community and Romania <http://ec.europa.eu/economy_finance/publications/publication15409_en.pdf> accessed 28 May 2015, para 5a.

56 EU Charter of Fundamental Rights, Articles 17(1), 20 and 21(1).

57 See, e.g., Case C-369/12 (n 54) para 14.

58 ibid para 15.

59 ibid para 16.

The applicants in the *Portuguese cases* were equally disappointed. Portugal has now exited a three-year (2011-14) economic adjustment programme, which was co-financed by the EFSM, the EFSF and the IMF, and is now under post-programme surveillance.[60] The *Portuguese cases* concerned austerity measures adopted to combat the crisis that had taken the country by storm.[61] More specifically, the impugned national laws provided for a public sector pay cut, and the suspension of payment or reduction of holiday and Christmas allowances. The applicant trade unions sought to argue that the principles of equality before the law and non-discrimination had been violated, because the impugned measures only applied to public sector employees. They further invoked their right to fair and just working conditions.[62]

With respect to the referring labour courts, the Court did not equivocate on the issue of admissibility. In iterative, almost self-referential manner, it ruled in all three cases that 'the order for reference did not contain any specific evidence to support the view that [the impugned law] was intended to implement EU law'.[63] Accordingly, it held that it clearly had no jurisdiction to hear these cases.[64]

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60 European Commission, 'Post-Programme Surveillance of Portugal' (4 February 2016) <http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm> accessed 15 February 2016.

61 Case C-128/12 *Sindicato dos Bancários do Norte, Sindicato dos Bancários do Centro, Sindicato dos Bancários do Sul e Ilhas, Luís Miguel Rodrigues Teixeira de Melo v BPN — Banco Português de Negócios SA* [2013] OJ C129/3; Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial - Companhia de Seguros SA* [2014] OJ C315/26; Case C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa - Companhia de Seguros SA* [2014] OJ C16/11.

62 EU Charter of Fundamental Rights, Articles 20, 21(1) and 31(1).

63 See, e.g., Case C-264/12 (n 61) para 19.

64 ibid para 22.

The CJEU's reference to one of the Romanian MoU rulings in *Siragusa* does not greatly advance our understanding of these cases.[65] It will be recalled that *Siragusa* concerned an order requiring Mr Siragusa to dismantle building work carried out in breach of a national law protecting cultural heritage and the landscape. The applicant in the main proceedings sought to argue that the impugned law was in breach of Article 17 of the EU Charter and of the principle of proportionality, but the CJEU ruled that Italy was not 'implementing Union law' within the meaning of Article 51(1) of the Charter. The only logical inference that could be drawn from the Court's reference to one of the Romanian MoU cases is that it sought to draw a parallel between the case at hand, where the impugned national legislation did not fall within the scope of EU law, and the Romanian MoU case, where the contested legislation was not shown to be intended to implement EU law.

To be sure, the applicants might have not established the link with the EU bailout terms with sufficient clarity, and the temporal dimension of the national implementing measures might have served to keep the judicial doors firmly shut.[66] As such, the Court could always distinguish a future case from the Romanian and Portuguese cases without 'overturning' its previous decisions. Inscrutable as the Court's reasoning might be, an alternative explanation might also be possible. Notwithstanding the particularities of each

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65 Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126, para 33.

66 To be sure, this is not to deny that the Court could have reformulated the poorly-framed questions, nor is it to deny that the principal reason for that poor framing might have been (as shown in Chapter 2) the near-total complexity of the bailout sources: Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 OJLS 1, 23-26.

case,[67] the Court might not think that the beneficiary Member States were at that stage of development of EU law under an *EU law obligation* to adopt the contested bailout measures. According to the argument, the relevant Council decisions do not impose an obligation on the recipient Member States to implement these measures as a matter of EU law, and no infringement proceedings could be brought under Articles 258-259 TFEU against the recipient States if such commitments were breached. Economic policy falls within the sphere of national competence, and the recipient States are exercising their own competences when adopting such measures. However, if they do not wish to implement the conditions set out in the programme, they shall not be granted financial assistance. To summarise this alternative line of reasoning: recipient States are exercising their own competences and are free to choose whether to implement the rescue terms, but the 'carrot' is that if they do so, they shall be given the money from their creditors.

The present author's understanding as to why this might be so is predicated on the Treaty division of competence between the EU and the Member States in the area of EMU. More specifically, it is one of the foundational precepts of the EMU that fiscal policy remains with the Member States, the role of the EU being restricted to economic policy coordination. The Bundesverfassungsgericht captured this point eloquently in *Gauweiler*, a case concerning the legality of outright monetary transactions (OMTs),[68] by saying that:

> According to Title VIII of the Treaty on the Functioning of the European Union and notwithstanding the special powers expressly assigned to the

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67 See Alicia Hinarejos (n 49) 134.

68 Paul Craig and Menelaos Markakis, '*Gauweiler* and the Legality of Outright Monetary Transactions' (2016) 41 ELRev 4.

> Union (e.g. Art. 121, 122, 126 TFEU), the responsibility for economic policy lies clearly with the Member States. In this field of economic policy, the European Union is – apart from individual exceptions that are in particular regulated in Part Three of the Treaty on the Functioning of the European Union – essentially limited to a coordination of Member States' economic policies (Art. 119 sec. 1 TFEU).[69]

The vexed issue of whether the MoUs transfer powers from the national to the EU (or other international) authorities came to a head with the Greek Council of State's decision in *the first MoU case*. It should be noted from the outset that this case concerned not only the legal nature of the MoU but also the division of power between the EU and Greek authorities following the ratification of the first MoU. This is because the Greek Council of State was asked to rule whether Law No 3845/2010 which had ratified the first MoU was in conformity with the Greek Constitution. The applicants sought to argue that the impugned law was unconstitutional, because Article 28(2) of the Greek Constitution provided that laws ratifying international treaties or agreements which transfer powers to bodies of international organisations needed to be approved by a majority of two thirds of the members of parliament. As the opposition had refused to vote in favour of the painful cuts, the impugned law had fallen short of such supermajority.

The Greek Council of State ruled in plenary session (comprising 54 judges) that:

> …the MoU which is annexed to the said law, in spite of it being the result of cooperation between the Greek authorities, the European Commission, the ECB and the IMF, … constitutes … the programme of the Greek Government, which sets out the policy objectives and the means of achieving those objectives for the next three years, as well as the timeline for enacting such measures, in order to tackle … the severe fiscal crisis

69 BVerfG, Case No. 2 BvR 2728/13 (Jan. 14, 2014) para 39.

> and avoid the risk of state insolvency… The act of annexing this programme to Law No 3845/2010 is merely meant to explicitly illustrate the content of and the timeline for the implementation of the programme... It being the Government's plan, the MoU does not confer powers on bodies of international organisations, nor does it enact other rules, nor does it have direct effect, but its implementation rests on the adoption of other acts by those bodies of the Greek State which are competent under the Constitution to implement the policies that are announced in the plan…[70]

This asymmetry between economic policy (which is only subject to coordination at the level of the EU) and monetary policy (which is an exclusive EU competence) is well known and is often said to be the very reason for EMU's vulnerability.[71] This was clearly recognised in, say, the Euro Plus Pact, which 'focuse[d] primarily on areas that fall under national competence and [were] key for increasing competitiveness and avoiding harmful imbalances'.[72] Given the importance of the preceding point, the present author might be excused for quoting Koen Lenaerts in some length, who, writing extrajudicially, argued with respect to Council recommendations adopted in the framework of the macroeconomic imbalance procedure that:

> From a *substantive* perspective, it is worth recalling that the EU institutions are bound by the principle of conferral. This means, in the realm of EMU, that while the European Union is empowered to lay down budgetary discipline and balance rules with which Member States must comply, it lacks the power to impose choices as to taxation and spending

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70 Greek Council of State (Plenary Session) Decision No 668/2012, para 28, affd by the same court in *the second MoU case*: Greek Council of State (Plenary Session) Decision No 2307/2014, para 19. The translation is provided by the current author and is not an official translation of the said decision by the court.

71 For a delightful analysis of the asymmetric nature of the EMU, see Alicia Hinarejos (n 49) ch 1. For an analysis of the EU competence in the area of economic policy see pp. 72-79 in ibid.

72 European Council, 'European Council 24/25 March 2011 Conclusions' EUCO 10/1/11 REV 1 (Brussels, 20 April 2011) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf> accessed 1 June 2016, 13, 14.

> on them. It is for the European Union to set budgetary and fiscal objectives, and it is for the Member States to choose the means for attaining them. For example, when the Council establishes the existence of an excessive macroeconomic imbalance, it addresses a recommendation to the Member State concerned on the basis of which the latter must submit a corrective action plan. Notwithstanding the fact that the corrective action plan must be approved by the Council, it is for the Member State concerned to adopt the "specific policy actions" that are required. Thus, the role of the Council is limited to determining whether the actions envisaged are sufficient to correct excessive macroeconomic imbalances.[73]

As the EU has no primary competence to regulate public sector pay in the Member States, the EU institutions would have not been able to adopt, say, a Regulation governing public sector pay in the Member States. However, the EU is not seeking to adopt general rules on public sector pay, nor were there any such EU rules of general application in force when the Romanian and Portuguese cases were decided. The EU institutions instead condition the provision of financial assistance on the fulfilment of a number of conditions that require the recipient Member State to reduce public sector pay. Does the EU have the competence to approve the conditions attached to the financial assistance and if so, what type of conditions could the Council attach to the granting of financial assistance?

It is clear from the EU Treaties and secondary law that the EU institutions indeed have the secondary competence to set out the terms attached to the financial assistance granted to crisis-hit Member States. For example, Article 122(2) TFEU, which served as the legal basis for the EFSM, provides that the Council 'may grant, under certain conditions, Union financial assistance to the Member State concerned'. Moreover, Article 136(3) TFEU, now the rock-solid Treaty foundation for the ESM, provides that '[t]he

[73] Koen Lenaerts, 'EMU and the EU's Constitutional Framework' (2014) 39 ELRev 753, 766-67.

granting of any required financial assistance under the mechanism will be made subject to strict conditionality'. Furthermore, we have seen that 'two-pack' legislation grants the power to the Council to approve the draft macroeconomic adjustment programme prepared by the Member State requesting financial assistance.[74] The conditionality attached to the financial assistance granted to Member States resembles the *ex ante* conditionalities which are applicable in the context of the European Structural and Investment Funds.[75] As evidenced by, say, the general *ex ante* conditionalities, these too sometimes concern areas which the EU might lack the primary competence to regulate.[76] The failure to complete actions to fulfil the latter conditionalities constitutes a ground for suspending interim payments by the Commission to the priorities of the programme concerned that are affected.

Going back to the EU's secondary competence to set the terms on which assistance will be given, the relevant Council decisions might not give rise, in the opinion of the Court, to an *EU law obligation* incumbent on the addressees of the measure (viz., the beneficiary Member States) to implement the bailout terms in national law. The obverse argument could be said to presuppose a mismatch between what is formally written down in Articles 121, 126 and 136 TFEU, which merely authorise economic policy coordination, and the relevant Council decisions which set the bailout terms. In

74 Regulation (EU) 472/2013, Article 7.

75 Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 [2013] OJ L347/320, Article 19.

76 ibid Part II of Annex XI.

line with the rationale underpinning the Greek Council of State's *first and second MoU rulings*, the impugned provisions of those Council decisions might have perhaps only stipulated the way in which the national authorities were to exercise their own competences if they wished to be granted financial assistance by their peers. If this had been true, they would have not sufficed, so the argument goes, to bring the matter within the scope of EU law. However, it is important to emphasise that we cannot be sure whether this line of reasoning best explains the Court's case law, as the wording of its judgements could also be taken at face value, meaning that litigants might have simply not established the link between the contested measures and EU law with sufficient clarity.

EU bailouts and the impact of 'two-pack' legislation

The emphasis thus far on treaties concluded outside the formal confines of the EU Treaties or on Council decisions adopted within the framework of the excessive deficit procedure risks overlooking the fact that the EU institutions now possess the tools that would enable them, as argued in Chapter 3 of this thesis, to closely monitor the economic, financial and fiscal developments in an ailing Euro area Member State and to request that it effectuate changes in its economic and fiscal policy. As such, rather than acting outside the formal confines of the Lisbon Treaty, the EU institutions could make use of 'two-pack' legislation, notably Regulation 472/2013, thereby bringing economic surveillance within the normal EU process.[77]

[77] Regulation (EU) 472/2013 (n 11).

The Council has already adopted a number of decisions under Regulation 472/2013 in respect of Cyprus, Ireland, and Portugal.[78] It has now also done so in the case of Greece for the purposes of approving the third macroeconomic adjustment programme which was agreed upon in summer 2015.[79] Could these decisions perhaps be successfully challenged –either directly or indirectly– before the CJEU for failure to respect the Charter rights and principles?

Again, opinions will reasonably differ as to whether recipient Member States are implementing EU law when they fulfil the conditions laid down in, among other instruments, a Council decision adopted under 'two pack'. The nature of the power contained in Article 7(2) of Regulation 472/2013 to 'approve the macroeconomic adjustment programme prepared by the Member State requesting financial assistance' needs to be spelled out more clearly. Regulation 472/2013 was adopted on the basis of Article 136 TFEU in combination with Article 121(6) TFEU. Given the complexity of this terrain, the present author might be excused for quoting these Treaty articles, as the competence issue cannot be resolved without a textual exegesis of the wording of the relevant Treaty articles. Article 136(1) TFEU provides that:

78 For further references, see Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 EuConst 393, 403 fn 38.

79 Council Implementing Decision (EU) 2015/1411 approving the macroeconomic adjustment programme of Greece [2015] L219/12.

> In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:
> (a) to strengthen the coordination and surveillance of their budgetary discipline;
> (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

Further, Article 121(6) TFEU, which was relied on by the Union legislature for the adoption of Regulation 472/2013, provides that '[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4'. In turn, paragraphs 3 and 4 of Article 121 TFEU provide that:

> 3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.
> For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.
> 4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public. …

It is readily apparent from the wording of these provisions, as well as from Article 5 TFEU, that the role of the Union in the area of economic policy is restricted to the adoption of coordinating measures, with the exception of those Treaty provisions which provide for the imposition of formal sanctions within the framework of the excessive deficit procedure.[80] This is something that both the Court of Justice and the General Court have conceded.[81] It has also prompted academic debate as to whether or how the EU competences could be expanded to match its normative ambitions.[82]

In light of the above, the Council's approval of the macroeconomic adjustment programme pursuant to Article 7 of Regulation 472/2013 should perhaps not be taken to mean that these measures are formally imposed, as a matter of EU law, by the Council on the Member State concerned. To use the *Pringle* terminology, this might be part and parcel of the process of 'managing financial assistance'.[83] If Article 7 of Regulation 472/2013 was taken to mean that the beneficiary States are under an EU law obligation to adopt the economic measures that are set out in general terms in such Council decisions, then it would be invalid, so the argument goes, for lack of Union competence. It might be the case that Regulation 472/2013 should be properly construed as setting out the process

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80 See also Fabian Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 740-41, 746.

81 Case C-370/12 (Full Court) *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] OJ C26/15, paras 51, 64; Case T-450/12 *Alexios Anagnostakis v European Commission* ECLI:EU:T:2015:739, para 58.

82 See, e.g., Sacha Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 OJLS 55.

83 Used by the Court when referring to the tasks conferred on the Commission and the ECB in treaties concluded outside the formal confines of the Lisbon Treaty: Case C-370/12 (n 81) para 158.

to be followed whenever a Member State requests financial assistance, its core obligation being to submit a draft macroeconomic adjustment programme to the EU institutions. But this argument is not conclusive, because it cannot be taken to mean, as will be shown below, that the Council could ask the Member State concerned to implement *any* conditions. Nor does it mean, as will also be shown below, that the Commission could agree to the inclusion of *any* conditions in the relevant MoU.

Article 340 TFEU actions for damages

Non-contractual liability: the Cypriot cases

The focus now shifts to Article 340 TFEU actions for damages. As regards non-contractual liability, there has been a shift in the CJEU's case law. More specifically, the General Court had ruled in a number of Cypriot cases concerning the 'haircut' imposed on bank deposits for the purposes of bank recapitalisation that EU courts had jurisdiction 'only in disputes relating to compensation for damage caused by the institutions of the European Union or by its servants in the performance of their duties'.[84] 'Consequently, a claim for compensation that is directed against the European Union and is based on the mere illegality of an act or course of conduct that has not been adopted by an institution of the European Union or by its servants must be rejected as inadmissible'.[85] The General Court intoned *Pringle* orthodoxy by noting that 'the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own' and that 'the activities pursued by those two institutions within the ESM Treaty

84 See, e.g., Case T-289/13 (n 6) para 42.

85 ibid para 43.

solely commit the ESM'.[86] As such, the adoption of the MoU could not be attributed, said the General Court, to the Commission or the ECB,[87] and therefore the Court had no jurisdiction to consider the claim for compensation, in so far as it was based on the illegality of certain provisions of the MoU.[88]

The legal position has now shifted. The Court of Justice ruled on appeal from the General Court in *Ledra Advertising* that 'unlawful conduct linked, as the case may be, to the adoption of a memorandum of understanding on behalf of the ESM' could be 'raised against the Commission and the ECB in an action for compensation under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU.'[89] The Court of Justice ruled that the Commission 'retain[ed], within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.'[90] Consequently, the General Court had erred in law by holding that it did not have jurisdiction to consider an action for compensation based on the alleged illegality of a number of paragraphs included in the Cypriot MoU.[91]

Moreover, the applicants would further need to convince the Court about the unlawfulness of the conduct of which the EU institutions are accused; the occurrence of

86 ibid para 45. See Case C-370/12 (n 81) para 161.

87 Case T-289/13 (n 6) para 46.

88 ibid para 47.

89 Joined Cases C-8/15 P to C-10/15 P (n 6) para 55.

90 ibid para 59.

91 ibid para 60.

actual damage; and the existence of a causal link between the conduct of the institution concerned and the damage complained of.[92] As regards the first condition, the Court of Justice recalled in *Ledra Advertising* that 'a sufficiently serious breach of a rule of law intended to confer rights on individuals must be established'.[93] In the Cypriot cases, that rule was Article 17(1) of the Charter, viz. the appellants' right to property.[94] This ruling will be examined in more detail in the EU Charter section. Suffice it to say for present purposes that the Court ruled that the contested measures did not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property and therefore the first condition for establishing non-contractual liability of the EU was not met.[95]

I believe the requirement of a sufficiently serious breach of a rule of EU law to be an exceptionally high threshold in fundamental rights cases. To be sure, the relevant requirement (though emphasised twice in the Court's reasoning, in paras 65 and 68) is somewhat brushed aside in the remainder of the judgment. As such, it is not clear whether something is required over and above a violation of a fundamental right enshrined in the Charter or whether *all* violations of the EU Charter could be said to constitute a sufficiently serious breach of EU law.

The third condition for non-contractual liability, viz. the existence of a causal link between the conduct of the institution and the damage complained of, did not feature in

92 Case T-289/13 (n 6) para 49; Joined Cases C-8/15 P to C-10/15 P (n 6) para 64.

93 Joined Cases C-8/15 P to C-10/15 P (n 6) para 65.

94 ibid para 66.

95 ibid paras 68-76.

the Court of Justice's reasoning, but was discussed in detail by the General Court. It is difficult to know whether the relevant paragraphs in the General Court's ruling remain good law, pending affirmation (or 'reversal') from a future ruling by the Court of Justice. Be that as it may, the General Court said that the third condition for non-contractual liability 'presuppose[d] the existence of a sufficiently direct causal nexus between the conduct of the EU institutions and the damage' or, in cases of inaction, 'it [was] particularly necessary to be certain that that damage was actually caused by the inaction complained of and could not have been caused by conduct separate from that alleged against the defendant institution'.[96]

It will be recalled that the conduct allegedly giving rise to the damage pleaded in the Cypriot cases was a failure by the Commission to act when signing the MoU, in so far as the applicant submitted that the Commission ought to have ensured that the Cypriot MoU was in conformity with EU law. However, the MoU was signed *after* the reduction in the value of the applicant's deposit at the Bank of Cyprus. That reduction actually occurred on the entry into force of Cypriot Decree No 103, pursuant to which part of that deposit was converted into shares or convertible instruments. Therefore, the applicant could not be regarded, said the General Court, as having established with the necessary certainty that the damage it claimed to have suffered was actually caused by the inaction alleged against the Commission.[97] Again, we do not know whether this is good law, but this ruling effectively means that all 'prior actions' carried out before a MoU is signed by

96 Case T-289/13 (n 6) paras 52-53.

97 ibid para 54.

the beneficiary country concerned could not be attributed to the Commission, even though such measures are of course adopted in cooperation with the EU institutions.

Joint liability of the EU and the Member States

The (relatively remote) possibility of joint liability of the EU and the Member States for breach of EU law cannot be readily excluded, even if the narrower construction of 'two-pack' legislation were to be supported. Not all policy areas covered by the terms set out in Council decisions fall outside the scope of EU law. For example, the Council decision addressed to Greece covers *inter alia* the regulation of energy markets.[98] Joint liability of the EU and the Member States can arise 'where the Union has taken inadequate steps to prevent a breach of Union law by national authorities'.[99] It was argued, for example, that some measures that were proposed by the Greek authorities in the past, such as the increase in the consumption tax imposed on natural gas or the increase in VAT for private schools, contravened EU secondary law, which contained explicit rules to this effect. Had these measures been endorsed by the EU by means of a Council decision, they could have given rise to liability of the EU for damages for breach of EU law under the conditions set out in the relevant case law.[100] However, it should again be stressed

98 Council Implementing Decision (EU) 2015/1411 (n 79), Article 2(6).

99 Paul Craig and Gráinne de Búrca (n 23) 601; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (OUP 2015) 501-07; Cases 5, 7 and 13-24/66 *Firma E. Kampffmeyer and others v Commission of the EEC* [1976] ECR 245.

100 See, e.g., Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* ECLI:EU:C:1971:116; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* ECLI:EU:C:1996:79; Case C-352/98 P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* ECLI:EU:C:2000:361; Case T-212/03 *MyTravel Group plc v Commission of the European Communities* ECLI:EU:T:2008:315.

that this is a fairly remote scenario, not least because the relevant macroeconomic adjustment programme is prepared in close cooperation with the EU institutions. Nonetheless, given how difficult it would be for non-privileged applicants to meet the Article 263 TFEU requirements for standing so as to bring an annulment action against the relevant Council decision, this might be a possibility worth pursuing. I believe joint liability of the EU and the Member States to be better suited for a programme drafted by the national authorities in cooperation with the EU institutions.

The scope of application of the EU Charter of Fundamental Rights

Setting the scene

The discussion thus far has focused on the various EU law remedies that aggrieved individuals could avail themselves of for the purposes of challenging the measures that were enacted in response to the crisis facing their respective countries. The focus now shifts to the scope of application of the EU Charter of Fundamental Rights, which has formed the basis of many (unsuccessful, thus far) challenges to austerity measures that were enacted in response to the crisis.

The ambiguity concerning the scope of application of the EU Charter of Fundamental Rights centres on the interpretation of Article 51(1) thereof, which provides that:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

This is no place to revisit the rich literature and case law on what it means to 'implement Union law' under Article 51(1) of the Charter.[101] Instead we will focus on crisis-specific uncertainties about the scope of application of the Charter: are the Member States 'implementing Union law' when adopting the bailout conditions; and are the Union institutions covered by the Charter when acting within the ESM framework? The prevailing view on these vexed issues is as follows.

Claire Kilpatrick carefully disaggregates the various financial assistance programmes, the essence of her argument being that, insofar as the rescue packages could be said to have an EU component or some connection to an EU act, the bailout conditions contained in them could be challenged under EU primary or secondary law.[102] Moreover, she argues that the involvement of the EU institutions in rescue programmes is rather

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101 Amongst the copious literature on the meaning of 'implementing Union law' in Article 51(1) of the Charter see particularly Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 488-99; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375, 376-87. The relevant body of case law is equally large: Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1989:321; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254; Case C-309/96 *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* ECLI:EU:C:1997:631; Case C-292/97 *Kjell Karlsson and Others* ECLI:EU:C:2000:202; Case C-617/10 (Grand Chamber) *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, paras 32-37; Case C-206/13(n 65) paras 23-33.

102 Claire Kilpatrick (n 78) 398-406.

important for the purposes of delineating the scope of application of the EU Charter,[103] as these entities are clearly bound by it.[104] Her argument is worth quoting in some length:

> Those who focus on excluding Charter application because it requires member states to be 'implementing Union law' fail to stress that Article 51 EUCFR makes clear that the Charter applies to all institutions, offices, bodies and agencies of the Union without limiting its application to when these EU institutions are 'implementing Union law'. Quite apart from fitting with the natural reading of Article 51 EUCFR, such a reading makes sense for at least two other reasons. To limit EU institutions' responsibility under the Charter to when they are 'implementing Union law' would be dramatically to limit the Charter's application to what have always been presented as its primary addressees. Moreover, a broad reading of the Charter's applicability with regard to actions of Union institutions rather than member state action makes sense as in the former case, unlike the latter, concerns of protecting national autonomy from EU overreach do not arise.[105]

EU institutions acting outside the formal confines of the Lisbon Treaty

Is the EU Charter also applicable to the actions of the EU institutions if these are used in treaties concluded outside the formal confines of the EU Treaties, as was the case with the EFSF, the TSCG, and the ESM? In this case, Catherine Barnard argues that 'the EU institutions which are "borrowed" under both the ESM and TSCG, especially the Commission and the ECB, must surely need to act in compliance with the Charter since the Charter is addressed to the EU institutions'.[106] For Claire Kilpatrick, 'all bailouts,

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103 ibid 404-06.

104 EU Charter, Article 51(1).

105 Claire Kilpatrick (n 78) 405-06.

106 Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Legal Studies Research Paper 18/2013, 13. Instead, Catherine Barnard left open the issue of the applicability of the Charter to Member State action in: Catherine Barnard, 'The Charter in Time of Crisis: A Case Study of Dismissal' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (OUP 2013) 267-69.

including those of Greece and Cyprus, entail the involvement of EU institutions and this is highly relevant for the application of the EU Charter'.[107] For his part, Steve Peers argues that '[t]he explanations to the Charter … appear to assume that the requirement of a link with EU law is only relevant to Member States' and that:

> As a matter of principle, it would be problematic if the EU institutions could escape the constraints of the Charter merely because they happen to be acting pursuant to treaties between member states, rather than EU law. Such a distinction would create an incentive to avoid the application of the Charter to the EU institutions simply by means of changing the forum in which they carried out their activity. It might seem odd that EU institutions would be bound by the Charter in the context of treaties between member states, while member states themselves would not be, but there is a fundamental difference between the two: the EU institutions owe their existence to EU law, but member states do not.[108]

The Court in *Pringle* did not address the issue of whether the EU institutions are bound by the Charter, but AG Kokott answered the preceding question in the affirmative.[109]

The matter has now been resolved by the Grand Chamber ruling in *Ledra Advertising*. The Court of Justice ruled that:

> Furthermore, whilst the Member States do not implement EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 178 to 181), on the other hand the Charter is addressed to the EU institutions, including, as the Advocate General has noted in point 85 of his Opinion, when they act outside the EU legal framework. Moreover, in the context of the adoption of a memorandum of understanding such as that of 26 April 2013, the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and

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107 Claire Kilpatrick (n 78) 406.

108 Steve Peers, 'Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework' (2013) 9 EuConst 37, 51-53.

109 Case C-370/12 (n 81), Opinion of AG Kokott, para 176.

> Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter.[110]

Digressing for a moment to the case, the Court went on to examine whether the Commission contributed to a sufficiently serious breach of the appellants' right to property, within the meaning of Article 17(1) of the Charter, in the context of the adoption of the Cypriot MoU.[111] In this connection, it held that 'the right to property guaranteed by that provision of the Charter is not absolute and that its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union.'[112] The adoption of the Cypriot MoU served, said the Court, 'an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system of the euro area as a whole.'[113] The Court concluded that:

110 Joined Cases C-8/15 P to C-10/15 P (n 6) para 67.

111 ibid para 68.

112 ibid para 69.

113 ibid para 71.

> In view of the objective of ensuring the stability of the banking system in the euro area, and having regard to the imminent risk of financial losses to which depositors with the two banks concerned would have been exposed if the latter had failed, such measures do not constitute a disproportionate and intolerable interference impairing the very substance of the appellants' right to property. Consequently, they cannot be regarded as unjustified restrictions on that right.[114]

Consequently, there was no violation, said the Court, of the appellants' right to property and therefore the conditions for non-contractual liability of the EU were not met in the Cypriot cases.[115]

I agree with the normative argument put forward by –among others– Kilpatrick, Hinarejos, Barnard and Peers that it would be wrong to exclude the application of the EU Charter in such cases. In this sense, the Court's ruling in *Ledra Advertising* is a welcome development.[116]

The Court provided little elaboration as to why the EU Charter applies to the activities of the EU institutions outside the formal confines of the EU Treaties. The only inference that could be drawn from the Court's reference to the AG Opinion is that the Court is in agreement with the argument set forth by AG Wahl, as it cited the following paragraph from his Opinion:

> For the reason explained above, I have no doubt that the Commission is to respect the EU rules, especially the Charter, when it acts outside the EU legal framework. After all, Article 51(1) of the Charter does not contain any limit as to the applicability of the Charter with respect to the EU

114 ibid para 74.

115 ibid paras 75-76.

116 Alicia Hinarejos, 'Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising' (EU Law Analysis Blog, 25 September 2016) <http://eulawanalysis.blogspot.nl/2016/09/bailouts-borrowed-institutions-and.html> accessed 26 September 2016.

> institutions, as it does for Member States. Furthermore, that provision also calls on the EU institutions to promote the application of Charter.[117]

The reason explained earlier in his Opinion, as I understand it, is that 'even when acting outside the EU framework, EU institutions must scrupulously observe EU law.'[118] 'The Commission is thus not permitted, even when acting on behalf of the ESM, deliberately to breach the EU rules.'[119] 'Moreover, the Commission may not contribute, through its conduct, to an infringement of the EU rules committed by other entities or bodies.'[120] It is important to note that though the Court's ruling solely concerns the applicability of the Charter, the AG seems to be making a much broader point about the applicability of EU law (presumably including other primary or secondary EU law) to the activities of the EU institutions outside the EU legal framework. This could be important for access to documents, data protection, and so on.

Opinions will reasonably differ as to whether the textual argument in relation to Article 51(1) of the Charter is convincing. One line of argument could be that the most natural interpretation of Article 51(1), read in the light of Article 51(2) and the explanations to the Charter, is that the EU institutions are only bound by the Charter when they are acting within the scope of EU law. To use the explanations' terminology, the powers exercised by the EU institutions in the framework of the EFSF and ESM were not 'determined by the Treaty'. Even though Article 51(1) is on its face unqualified in relation to the EU institutions, the Charter as a whole is a document which is bounded by

117 Joined Cases C-8/15 P to C-10/15 P, Opinion of AG Wahl, para 85.

118 ibid para 69.

119 ibid para 69.

120 ibid para 69.

the substantive scope of those Treaties. According to the argument, it would be very curious and counter-intuitive to put in a rights-based document where the substantive scope of application was unbounded and unconnected or indeed disconnected from the substantive scope of the constituent Treaties of which it forms part.

A different line of argument, which is indeed closer to the Court's reasoning in *Ledra Advertising*, is that the strangeness resides in allowing the institutions to take such an active role in these fora outside the EU Treaties, and that once you allow them to do this, Charter rights should attach to the actions of the institutions.[121] After all, the EU Charter did not confer new tasks on the EU institutions; this was done by means of intergovernmental agreements concluded by the Member States outside the formal confines of the EU Treaties. The EU Charter simply attaches to the actions of these institutions within the framework of those mechanisms.

Yet another line of reasoning, or indeed a way around the problem identified above, might be to conceptualise such intergovernmental agreements as EU law instruments intended to confer new tasks on the EU institutions.[122] To be sure, the *Pringle* limitations on the conferral of such tasks would of course be applicable to such treaties.[123] The point is, if these treaties further extend the Executive arm of the EU, the scope of application of the EU Charter should in principle be extended to cover the activities of the EU institutions pursuant to these treaties.

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121 I am grateful to Professor Paul Craig for this point. See further Paul Craig, '*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263.

122 Armin von Bogdandy, 'European Law Today: A Contemporary Concept and Its Functions' (XXVII FIDE Congress, Budapest, 19 May 2016).

123 Case C-370/12 (n 81) para 158.

Notwithstanding the precise reason as to why the EU Charter is applicable to the activities of the EU institutions in this context, it is not clear whether the actions of the EU institutions within these mechanisms are dispositive or creative of legal effect. When acting in the framework of the EFSF or the ESM, the Union institutions (viz., the Commission and the ECB) are 'managing financial assistance' granted through these financial mechanisms to crisis-hit countries. We have seen that the Court ruled in *Pringle* that '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', and that their activities 'solely commit the ESM'.[124] This could be said to be equally true in the case of the EFSF. This would then mean that, even if the Charter applies, there might not be a legally binding EU law act to challenge (either directly or indirectly) or that the latter act might not be of direct and individual concern to the aggrieved individuals (as per AG Wathelet in *Mallis*). *Ledra Advertising* only concerns, it will be recalled, actions for damages.

In light of the above, it is perhaps worth noting that the Member States have committed themselves to incorporate the substance of the TSCG into the legal framework of the European Union.[125] Further, the Presidents of the EU institutions argued in the Five Presidents' Report that the TSCG, the Euro Plus Pact and the Intergovernmental Agreement on the Single Resolution Fund 'need[ed] to be integrated into the legal framework of the European Union' and that the governance of the ESM 'should … be

124 ibid para 161.

125 Article 16 TSCG.

fully integrated within the EU Treaties'.[126] I agree with Kaarlo and Klaus Tuori that, unless these intergovernmental agreements are incorporated into the EU Treaties and secondary legislation, they will –at least partly– 'remain outside the scope of application of Treaty provisions on the principle of transparency and complementary secondary legislation, as well as the EU Charter of Fundamental Rights',[127] thereby opening up loopholes in fundamental rights protection in Europe. Opinions will reasonably differ as to whether this proposal –if it ever were to be implemented– would improve fundamental rights protection in Europe. Much would of course depend on the content of the relevant provisions, and on whether the reviewing powers of the CJEU would be restricted in that area or not. What is not in doubt is that the price to pay for such Treaty amendment would be yet another transfer of powers from the national to the EU authorities.

The applicability of the EU Charter to Member State action

The discussion thus far has focused on the applicability of the EU Charter of Fundamental Rights to the activities of the EU institutions when these are used in treaties concluded outside the formal confines of the EU Treaties. The focus now shifts to Member State action.

What we do know from the Court's ruling in *Pringle* is that the Member States are not bound by the Charter when they are acting within the context of the ESM,

126 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (Five Presidents' Report) 18.

127 Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 218.

because the Union has no competence to set up such a mechanism and therefore the Member States are not 'implementing Union law' within the meaning of Article 51(1).[128] Further, the Court in *Ledra Advertising* juxtaposed the legal position of the EU institutions, which were held to be bound by the Charter even when they acted outside the EU legal framework, with the legal position of the Member States, which 'do not implement EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context.'[129] 'Two-pack' legislation did not feature in the Court's analysis, and this paragraph in the Court's ruling could perhaps be said to concern only those cases where programme documents do not include Council decisions adopted under 'two pack'. In any event, the Court in *Ledra Advertising* was solely concerned with the responsibilities incumbent on the EU institutions and not with the ones falling on the Member States, and this might be the very reason why it did not elaborate on this point.

If the Member States are implementing Union law, then there is a lock onto the Charter. In this connection, it should be noted that the Court ruled in *Åkerberg Fransson* that the scope of application of the EU Charter is linked to the scope of application of EU law:

> Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter. Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such

128 Case C-370/12 (n 81) paras 178-81.

129 Joined Cases C-8/15 P to C-10/15 P (n 6) para 67.

> jurisdiction (see, to this effect, the order in Case C-466/11 *Currà and Others* [2012] ECR, paragraph 26). These considerations correspond to those underlying Article 6(1) TEU, according to which the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of European Union law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see *Dereci and Others*, paragraph 71).[130]

Litigants in this area could perhaps use the Council decisions adopted in relation to these bailouts for the purposes of challenging the terms agreed between the beneficiary Member State concerned and its creditors. AG Wathelet opined in *Mallis* that:

> At all events, the Council decisions thus addressed to a Member State support the view that national measures adopted pursuant to commitments entered into by a Member State vis-à-vis the ESM constitute an implementation of EU law even though the MoU does not constitute an act of EU law, provided, however, that those measures are reproduced in the Council decision adopted after the MoU has been signed.[131]

The availability of an EU law challenge in such cases depends on the fulfilment of a number of conditions that may or may not be met in the particular circumstances of a given case. First, there needs to be a formally binding EU law measure (normally, a Council decision) replicating the bailout term(s) the EU law legality of which the aggrieved individuals wish to contest.[132] Terms not (fully) included in the relevant

130 Case C-617/10 (n 101) paras 21-23.

131 Joined Cases C-105/15 P to C-109/15 P (n 13), Opinion of AG Wathelet, para 89.

132 Koen Lenaerts (n 73) 759 argues that 'the adoption of Regulation 472/2013 is a positive development, as it guarantees, albeit indirectly, that the MoU, which is not an EU measure, is compatible with the Charter, notably with the fundamental right of collective bargaining and action' and that 'the question that needs to be asked is actually whether, by adopting those measures, the Member State receiving financial assistance is fulfilling an obligation imposed by EU law, notably by the Council Decision approving that programme and/or by Regulation 472/2013'.

Council decision may or may not be able to be read into the Council decision.[133] Second, the impugned condition needs to be cast in mandatory terms and not as a 'strong suggestion' to the Member State which is the addressee of the decision. Third, the impugned provision needs to be of direct and individual concern to the private persons wishing to directly challenge it before the EU courts. Alternatively, it would suffice for private persons to show direct concern if the impugned provision did not entail implementing measures.[134] Relying on the *ADEDY* cases, AG Wathelet opined in *Mallis* that the bailout conditions replicated in such Council decisions were not of direct concern to the applicants.[135] In which case, the aggrieved individuals could only use the Article 267 TFEU route, though much would depend on the willingness of national courts to refer cases to the CJEU for a preliminary ruling.

But what if the bailout conditions are not EU law? Even the narrower construction of the Treaties and 'two-pack' legislation would not necessarily clog all available judicial avenues. First, it will be recalled that the Court ruled in the *Family Reunification* case that 'a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights'.[136] As such, even if beneficiary Member States are formally not under an EU law obligation to implement the bailout terms adumbrated in Council decisions (which at this stage of development of EU law we cannot be sure

133 Claire Kilpatrick (n 78) 409-12.

134 Article 263(4) TFEU.

135 Case C-105/15 P (n 13), Opinion of AG Wathelet, para 90. This point did not feature in the Court of Justice's ruling on appeal.

136 Case C-540/03 *European Parliament v Council of the European Union* ECLI:EU:C:2006:429, para 23.

about), the Council could not just require that the Member State concerned implement *any* conditions, acting in contravention of its Charter obligations. Second, it should not escape our attention that the beneficiary Member State has to comply with EU fundamental rights when implementing a binding EU law measure or derogating from a fundamental economic freedom. This is the most natural scope of application of the EU Charter. For example, the capital controls instituted in Cypriot (2013) and Greek banks (2015) clearly constitute a restriction on free movement of capital on grounds of public policy and public security.[137] In which case, the relevant national measures clearly fall within the scope of EU law and have to be compatible with fundamental rights and the EU Charter. Their EU law pedigree is not somehow altered because they are included in a MoU (whatever its legal nature) or a Council decision adopted under the excessive deficit procedure or the 'two-pack', and therefore the EU Charter applies to them. Third, it will be seen in Chapter 7 of this thesis that various national economic or fiscal policy measures adopted in response to the crisis were in fact reviewed by national courts, international courts, and other international bodies.[138] This is not to play into a 'complete system of remedies' narrative which is all too often used without much reflection of the particularities of the area of EMU, but it is to highlight that such measures were not –in most cases– somehow sucked into a 'black hole'. Be that as it may, *Bosphorus*-type

137 Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013) 610-11.

138 Though review by non-EU human rights' courts and bodies does not fulfil the same range of functions as review by EU Courts: Claire Kilpatrick (n 78) 415. Moreover, the alleged deficiencies of the complaint mechanism under the European Social Charter are duly noted: Michael Schwarz, 'A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation' (2014) 51 CMLRev 389, 399-400 fn 36. Notably, such decisions are not binding: Claire Kilpatrick and Bruno De Witte (n 2) 8.

anxieties are of course not fully misplaced, and aggrieved individuals might slip through the cracks.

Another point that needs to be made with respect to 'two-pack' legislation has to do with the somewhat bizarre dictum in Article 7 of Regulation 472/2013 that '[t]he draft macroeconomic adjustment programme shall fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union'.[139] This is yet another source of ambiguity. Though I agree with the argument advanced by Koen Lenaerts,[140] this dictum in Article 7 is somewhat otiose in the sense that, in an ideal world, it would have been an obvious point to make. It is also bizarre in the sense that one would expect that either the Charter applies and *all* its provisions bind the EU institutions in this context or it does not. This arcane provision should perhaps be properly construed to mean that 'the application of this Regulation and of those recommendations does not affect the right to negotiate, conclude and enforce collective agreements or to take collective action in accordance with national law',[141] in which case the reference to Article 152 TFEU and Article 28 of the Charter is a shorthand for respect for collective labour rights. However, if this provision merely 'sums up' what is explicitly provided for in other parts of the Regulation, it is of very limited value to litigants in this area and should be seen as a somewhat procedural (rather than substantive) guarantee. This is because it seems to concern only the way in which the macroeconomic adjustment programme is drawn. More importantly, it does not provide cast-iron evidence as to

139 Regulation (EU) 472/2013 (n 11), fifth subparagraph of Article 7(1).

140 See fn 132 above.

141 Regulation (EU) 472/2013 (n 11) Article 1(4).

whether the Charter is applicable to Council decisions adopted under the 'two-pack'. Nor should it of course escape our attention that, in terms of substance, the relevant bailout terms might sometimes aim to restrict collective bargaining or curtail labour rights in order to create a more 'flexible' labour market.

Conclusion

There is a distinction drawn in UK administrative law between *Wednesbury* reasonableness review and proportionality – a distinction that may or may not be based on principled grounds, insofar as the essence of both tests could be said to be balancing.[142] This distinction has in any event puzzled, or even haunted, students at UK universities who were educated in the civil law world, including the present author. Writing extrajudicially in 2014, Lord Carnwath of the UK Supreme Court bemoaned the fact that the 'burial rites' of the *Wednesbury* test remained unperformed.[143] He emphatically stated that:

> I started this paper at the beginning of my professional career in 1970. Over 40 years on, I am now approaching the end. My statutory date of retirement is fixed in 2020, if I last that long. I cannot of course prejudge the cases that may come before us in the Supreme Court or speak for my colleagues. But I will be interested to see whether by the end of that period we have not finally consigned *Wednesbury* to history.[144]

142 Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131.

143 Lord Carnwath CVO, 'From Rationality to Proportionality in the Modern Law' (2014) 44 Hong Kong L.J. 447, 458.

144 ibid 458.

The scope of application of the EU Charter of Fundamental Rights will, most likely, be fiercely debated for many years to come. More guidance from the CJEU would be most welcome indeed, especially in relation to the impact (if any) of the adoption of 'two-pack' legislation on the applicability of the EU Charter to Member State action.[145] In future cases, the CJEU might or might not opt to extend the scope of application of the EU Charter to Member State action in the context of bailout packages, my best guess being that it will do so. What is not in doubt is, as Professor Sionaidh Douglas-Scott argues, that:

> The scope of EU law has become the main determining factor as to whether any human rights violation may be pleaded, but this jurisdictional limit is complex in the extreme, transforming legal argument and the legal literature into a debate about the arcane limits of the European Union's competences rather than focusing on human rights.[146]

There is very little that could be added to the following argument, which is again put forward by Professor Douglas-Scott and is in many ways the common thread running through this entire doctoral thesis:

> What is important overall are *outcomes* – whether the use of human rights actually improves people's lives. And here, what does indeed seem to be the case is that the heavy, cumbersome operation of the law too often obscures and overwhelms the urgency and immediacy of rights claims, shifting time, effort and (above all) money onto contingent, technical issues, giving support to William's claim that law too often suffers and

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145 A big Cypriot case is currently pending before the General Court, with 51 applicants bringing an action for damages against the Council, Commission, Eurogroup (represented by Council) and ECB for the loss that they suffered as a result of the bail-in scheme: Action brought on 20 December 2013 – *K. Chrysostomides & Co. e.a. v Council e.a.* (Case T-680/13) 2014/C 194/33. For an analysis of the pending Cypriot cases, see Anastasia Karatzia, 'An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States' in Marcel Szabó and others (eds), *Hungarian Yearbook of International and European Law 2016* (Eleven Publishing 2017) ch 34.

146 Sionaidh Douglas-Scott, *Law After Modernity* (Hart Publishing 2013) 319.

> tolerates the intolerable, leaving one ambivalent as to the desirability of a juridification of human rights.[147]

The preceding analysis has illustrated that the various fiscal and economic policy measures adopted in response to the crisis were largely not put to the test by the EU courts. Almost ten years since the onset of the crisis, there has not been a single EU court ruling declaring an action (*any* action) against bailout measures well founded. Quite the contrary: most actions were declared inadmissible (often with little or somewhat obscure justification), and the actions for damages originating from the Cypriot crisis were dismissed on their merits in a course of a few paragraphs. To be sure, like the UK Supreme Court, the EU courts have little control over which cases come before them, nor can they 'save' actions for annulment or damages which were –according to some– badly drafted. Further, it will be seen in the next chapter that some of the measures adopted to combat the crisis were indeed scrutinised by the respective national courts, and that their legality was often challenged before various international courts and bodies, including (but not limited to) the European Court of Human Rights and the European Committee of Social Rights. The level of satisfaction with national court rulings will no doubt vary, and it is very hard, if not impossible, to argue that there have been no human rights violations in the Member States' dealings with the crisis.[148] Notwithstanding the force of the

147 ibid 322.

148 For a view on this issue see also ibid 270-71.

preceding point, it remains the case that, as regards control by the EU courts, there was not much by way of judicial protection and it was not very effective.[149]

[149] Paul Craig (n 19) 29. Stronger language is often used in the literature. Claire Kilpatrick speaks of 'a *malfunctioning of EU judicial and administrative review of bailouts* creating procedural Rule of Law problems': Claire Kilpatrick (n 66) 8, 23-28.

CHAPTER SEVEN: JUDICIAL REVIEW IN THE ECONOMIC AND MONETARY UNION: THE NATIONAL COURTS

Setting the scene

The discussion in Chapter 6 primarily focused on review of economic and fiscal policy measures by the EU courts. We have seen that litigants wishing to put their substantive case before the CJEU are facing very many problems, which are in most cases intractable. However, the emphasis thus far on review of economic and fiscal policy measures by the CJEU risks overlooking the fact that the Member States are also bound by national constitutional guarantees and international human rights standards. Accordingly, the focus now shifts to review by national courts and supranational or international courts and bodies.

If anything, the direct or indirect challenges brought before the CJEU through the Article 263 or 267 TFEU route are only the tip of the litigation iceberg. There are literally thousands of court cases across Europe that are in one way or another linked to the economic crisis. The impact of the crisis on fundamental rights (civil, political and socio-economic) cannot be overstated. Claire Kilpatrick and Bruno De Witte rightly note that 'an increasingly central dimension of that crisis and its management is important, sometimes dramatic, changes to social rights and entitlements'.[1] This is because 'the loan

[1] Claire Kilpatrick and Bruno De Witte, 'A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone' (2014) Sieps European Policy Analysis 2014:7, 1.

conditions in individual bailouts were [as we saw in Chapter 3] replete with social requirements and impacts'.[2]

Judicial review of economic policy measures in the EMU falls largely within the purview of national courts. This is, as we saw in Chapter 6, a direct consequence of the existing Treaty schema, which has fully 'federalised' monetary policy but largely left economic policy to the Member States. It is further a consequence of the way the rules on standing before the EU courts have been interpreted by the CJEU. The crisis-related measures adopted by national Executives and Parliaments are in principle subject to full review by the respective national courts, except where national constitutional arrangements or other rules provide otherwise.[3] If anything, the concern is that the EMU's governance framework has 'paradoxically', so the argument goes, given rise to 'a trend of increasing judicial involvement in the EMU domain … throughout Europe'.[4] The level of satisfaction with review by national courts will clearly be contingent upon national procedural requirements, the applicable standards of review, the intensity of such review, and so on.

There is considerable literature on the jurisprudence of national courts on crisis-related measures.[5] This chapter could not realistically cover all the case law and material

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2 ibid 2.

3 See, e.g., Marek Antoš, 'Fiscal Stability Rules in Central European Constitutions' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 214-15 fn 36, who helpfully explains the explicit constitutional limitations to the Hungarian Constitutional Court's power to review fiscal laws.

4 Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2015) ch 2, 64.

5 Damian Chalmers, 'Crisis Reconfiguration of the European Constitutional State' in Damian Chalmers and others (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (CUP 2016) ch 11; Xenophon Contiades, 'Introduction: The Global Financial Crisis and the

that is, directly or indirectly, related to the sovereign debt and financial crisis in Europe. It will primarily focus on the case law of the Bundesverfassungsgericht on EU measures enacted to combat the Euro crisis; and social challenges to bailout measures enacted to combat the Greek crisis and the relevant case law of the Greek Council of State. The chapter will further draw on examples from other jurisdictions where appropriate.

The material presented in this chapter will be divided into two parts. First, this chapter will examine some of the most important judgments delivered by courts in lender States during the Euro crisis, the emphasis being on the jurisprudence of the Bundesverfassungsgericht. These cases primarily focus on the effects of financial assistance mechanisms and revised EU fiscal governance rules on the principle of democracy, parliamentary prerogatives, and national budgetary powers. Second, this chapter will look at review by national courts in borrower States, the principal focus being on social challenges brought by austerity-hit litigants in Greece. Space precludes detailed treatment of the kind found in domestic literature. However, the comparative analysis, drawing on this literature, can shed light on the different types of challenge facing courts in borrower and lender States during the Euro crisis, as well as the different

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Constitution' in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013); Xenophon Contiades and Alkmene Fotiadou, 'Constitutional Reactions in Comparative Perspective: How Constitutions React to the Financial Crisis' in ibid ch 1; Mark Dawson, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) 53 JCMS 1; Yiannis Drosos, 'Yesterday – The Way to Forget about Tomorrow: The Greek Crisis as a European Case' (Democracy and the Financial Crisis in Europe conference, Amsterdam, June-July 2015); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2015) ch 2; George Gerapetritis, 'Europe's New Deal: A New Version of an Expiring Deal' (2014) 38 Eur J L Econ 91; George Gerapetritis, 'The New Economic Constitutionalism in Europe' (Oxford, 20 January 2016); Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 144-51; Claire Kilpatrick and Bruno De Witte (n 1) (examining Greece, Ireland, Portugal, Spain, and Italy); Claire Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' (2015) EUI Working Paper LAW 2015/34; Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014).

starting points and the subtle differences in the reasoning provided by courts in their judgments. As regards borrower States in particular, the twin challenge in this chapter is to examine to what extent litigants had any success in challenging in national courts the bailout conditions; and the extent to which arguments about social rights had purchase at national level.

Review by national courts in lender States: the Bundesverfassungsgericht

This section will focus on the case law of the Bundesverfassungsgericht on crisis-related measures aimed at keeping ailing Member States afloat or fixing the Eurozone architecture. We will examine the ruling on the Greek loan facility and the European Financial Stability Facility (EFSF) Framework Agreement; the ruling on the European Stability Mechanism (ESM) Treaty and the Fiscal Compact (TSCG); and the ruling on bond purchases by the ECB. The focus will then shift in the next section to important cases from France, Estonia, and Finland.

The ruling on the Greek loan facility and the EFSF Framework Agreement

The discussion begins with the Bundesverfassunggericht's ruling on the first Greek bailout and the EFSF. The applicants brought constitutional complaints against the Act on the Assumption of Guarantees to Preserve the Solvency of the Hellenic Republic Necessary for Financial Stability within the Monetary Union ('Act on Financial Stability within the Monetary Union')[6] and the Act on the Assumption of Guarantees in

[6] Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik, Währungsunion-

Connection with a European Stabilisation Mechanism ('Euro Stabilisation Mechanism Act').[7] These Acts essentially authorised the Federal Ministry of Finance to grant financial assistance to Greece in the form of guarantees and to back the borrowing activities of the EFSF with guarantees.[8] Such an authorisation is required by the Basic Law whenever the Federal Government assumes liabilities in the form of guarantees which may lead to future expenditure.[9]

The applicants put forward several pleas in law, the most important of which centred on the alleged erosion of the *Bundestag*'s budgetary autonomy. The German Federal Constitutional Court held that this complaint was admissible but ultimately rejected it.[10] The other constitutional complaints were held to be inadmissible.[11]

The applicants invoked their right to vote enshrined in Article 38(1) of the Basic Law in conjunction with the principle of democracy (Article 20(1) and (2)) and a constitutional provision basically stipulating that Article 20 of the Basic Law cannot be amended (Article 79(3)), in order to strike down two Acts of the directly elected *Bundestag*.[12] Taking its judgment on the Maastricht Treaty into account,[13] the German

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Finanzstabilitätsgesetz – WFStG, of 7 May 2010 <Federal Law Gazette (Bundesgesetzblatt – BGBI.) I p. 537>.

7 Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – StabMechG – of 21 May 2010 (Federal Law Gazette I p. 627).

8 For an English translation of the Acts see BVerfG, 2BvR 987/10 of 7 September 2011, paras 6-12, 20-30.

9 Article 115(1) of the Basic Law.

10 BVerfG, 2BvR 987/10 of 7 September 2011 paras 93, 119.

11 ibid paras 93, 108-112, 113-118.

12 See Article 38(1) of the Basic Law.

13 BVerfGE 89, 155 of 12 October 1993.

Federal Constitutional Court held that such a constitutional complaint may exceptionally be admissible when the *Bundestag* transfers powers to the EU institutions to such an extent that its powers are 'substantially curtailed'.[14] Moreover, it added that an applicant may be entitled to lodge a constitutional complaint under Article 38(1) of the Basic Law when the *Bundestag* gives an authorisation to grant guarantees which 'may by their nature and extent result in massive adverse effects on budgetary autonomy'.[15]

The Court's reasoning is premised on a particular conception of the right to vote. According to the Court, 'the act of election does not consist solely in a formal legitimation of state power on the federal level under Article 20.1 and 20.2 of the Basic Law', and the right to vote 'also comprises the fundamental democratic content of the right to vote, that is, the guarantee of effective popular government'.[16] Consequently, Article 38 of the Basic Law protects the voters 'from a loss of substance of their power to rule … by far-reaching or even comprehensive transfers of duties and powers of the *Bundestag*, above all to supranational institutions'.[17] In the Court's opinion, such a conferral of tasks would entail a loss of their 'democratic possibilities of influence'.[18] Accordingly, the constitutional framework of Germany prohibits a transfer of powers which would legally or *de facto* deprive the present or future *Bundestag* of its capacity to give effect to the will of the people through the enactment of legislation.[19]

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14 BVerfG, 2BvR 987/10 of 7 September 2011, para 100.

15 ibid para 103.

16 ibid para 98.

17 ibid para 98.

18 ibid paras 98, 101.

19 ibid para 102.

Such a violation of the constitution would occur if the *Bundestag* were to effectively relinquish its budgetary powers, namely its power to decide on public revenue and expenditure. The Court ruled that:

> The fundamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy. Article 38.1 sentence 1 of the Basic Law excludes the possibility of depleting the legitimation of state authority and the influence on the exercise of that authority provided by the election by fettering the budget legislature to such an extent that the principle of democracy is violated...[20]

The Court went on to admit that openness to European integration means that Germany's fiscal sovereignty is not absolute, nor should does it need to be so under the German Constitution. Fiscal commitments, including those of a substantial size, may not be declared unconstitutional, as long as the *Bundestag* 'remains the place in which autonomous decisions on revenue and expenditure are made'.[21] As such, the right to elect the *Bundestag* and the principle of democracy require that the *Bundestag*'s consent be sought by the Government prior to making fundamental budgetary decisions, and the *Bundestag* may not 'deliver itself up to any mechanisms with financial effect which ... may result in incalculable burdens with budget relevance without prior mandatory consent'.[22]

The Court held that:

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20 ibid para 104.

21 ibid para 124.

22 ibid para 125.

> For this reason, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate. The *Bundestag* must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level. Insofar as supranational agreements are entered into which by reason of their magnitude may be of structural significance for Parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participation in equivalent financial safeguarding systems, not only every individual disposal requires the consent of the *Bundestag*; in addition it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with...[23]

Moving on to appraise the impugned guarantees against these standards, the Court employed a narrow standard of review: only a manifest violation of the *Bundestag*'s budgetary autonomy would make do; and a margin of appreciation is accorded to the Legislature in this respect.[24] Accordingly, the Court may not substitute its own opinion for that of the Legislature on the maximum amount of guarantees to be given in the light of the risk of them being called upon and the resultant repercussions for the federal budget.[25] The Court would only step in 'if in the case where the guarantee [was] called upon the guarantees took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed'.[26]

The Court held that no such manifest overstepping of the budgetary boundaries set by the Basic Law had taken place, and that the *Bundestag* had not delivered itself up

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23 ibid para 128.

24 ibid para 130.

25 ibid paras 131-32.

26 ibid para 135.

to a supranational mechanism in a way which would have depleted its budgetary powers. The *Bundestag* had specified the precise amount of guarantees to be given for the purposes of the EFSF and the Greek rescue package, and it had further laid down the conditions under which these were to be granted.[27] However, the Court noted that § 1.4 sentence 1 of the Euro Stabilisation Mechanism Act was to be interpreted in conformity with the constitution in that, save for the exceptional occurrences provided for in sentence 3 therein,[28] the Federal Government was to obtain the prior consent of the *Bundestag*'s budget committee before granting financial assistance.[29]

The ruling on the ESM Treaty and the Fiscal Compact

In the case concerning the ESM Treaty and the Fiscal Compact, the applicants brought constitutional complaints against the Act on the European Council Decision of 25 March 2011 to Amend 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,[30] the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism,[31] the

27 ibid paras 133-40.

28 Sentence 3 is applicable whenever 'compelling reasons' mean that a guarantee must be given before an agreement is reached between the Federal Government and the *Bundestag*'s budget committee.

29 BVerfG, 2BvR 987/10 of 7 September 2011, para 141.

30 Gesetz zu dem Beschluss des Europäischen Rates vom 25. Marz 2011 zur Änderung des Artikels 136 des Vertrages über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist, Bundestag printed papers (Bundestagsdrucksachen – BTDrucks) 17/9047, 17/10159.

31 Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus – Bundestag printed papers 17/9045, 17/10126.

Act for Financial Participation in the European Stability Mechanism,[32] and the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union.[33] They sought an interim injunction which would effectively stop the Federal President from signing these statutes and ratifying the relevant treaties.[34]

The applicants sought to argue that through the challenged statutes the German *Bundestag* took incalculable risks; that democratic decision processes were shifted to the supranational or intergovernmental level; and that it was no longer possible for the German *Bundestag* to exercise overall budgetary responsibility. The applicants argued that the permanent budgetary autonomy of the German Bundestag was impaired and that their rights under Articles 38(1), 20(1)-(2) and 79(3) of the Basic Law were violated.[35]

The Court held that the constitutional complaints were admissible only to the extent that the applicants had asserted their rights under Articles 38(1), 20(1) and (2) and 79(3) of the Basic Law.[36] All the impugned Acts were ultimately found to be in conformity with the constitution provided that the Federal Government would make a number of declarations under international law, as will be explained below.

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32 Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus – Bundestag printed papers 17/9048, 17/10126.

33 Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion – Bundestag printed papers 17/9046, 17/10125.

34 BVerfG, 2 BvR 1390/12 of 12 September 2012, para 1.

35 ibid para 92.

36 ibid para 91.

Citing its judgement on the Greek rescue package and the EFSF,[37] the Court reiterated in greater detail its interpretation of the right to elect the *Bundestag*.[38] It noted that imprecise budgetary authorisations were incompatible with the constitution,[39] and that the *Bundestag* could not exercise its overall budgetary responsibility without having access to the information that it needed in order to assess the budgetary implications of its decisions.[40] Consequently, the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism was found to be potentially problematic for two reasons. First, the provisions of the ESM Treaty on capital calls to restore the level of paid-in capital[41] or to prevent the ESM from defaulting on any payment obligation[42], and the provision on revised increased capital calls whenever an ESM member fails to meet the required payment under a capital call,[43] were found to be in conformity with the constitution only as long as they meant that the ceiling of all payment obligations for Germany would be its portion of the authorised capital stock.[44] In view of the different views that ESM members might reasonably hold on this issue, Germany would have to make sure by means of a declaration made under international law that Article 8(5) of the ESM Treaty capped its payment obligations to the amount listed in Annex II to the Treaty, and that the treaty provisions on capital calls would only be interpreted in such a

37 BVerfGE 129, 124 of 7 September 2011.

38 BVerfG, 2 BvR 1390/12 of 12 September 2012, paras 104-125.

39 ibid para 108.

40 ibid para 111.

41 ESM Treaty, Article 9(2).

42 ESM Treaty, Article 9(3).

43 ESM Treaty, Article 25(2).

way that they could not give rise to any higher payment obligations for Germany. If the reservation made to this effect was proven to be ineffective, Germany would not be bound by the ESM Treaty in its entirety.[45]

Second, the Court held that Germany ought to ensure, again by means of a declaration, that the treaty provisions on professional secrecy and inviolability of documents would not stand in the way of the German Parliament's right to be informed. The *Bundestag* and the *Bundesrat* could only make an informed decision on budgetary issues, as mandated by the Basic Law, if the requisite information was made available to them.[46]

Furthermore, the Court examined the constitutionality of the suspension of an ESM Member's voting rights in case it failed to pay any part of the amount due in respect of its obligations.[47] Since this suspension would also apply to ESM decisions with budgetary implications for its members, the *Bundestag*'s overall budgetary responsibility could be put in jeopardy, since the latter would not be able to exert an influence on such decisions through the German representatives in the ESM bodies.[48] Nevertheless, the Court held that this treaty provision did not infringe the applicants' rights because in view

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44 BVerfG, 2 BvR 1390/12 of 12 September 2012, paras 138ff; ESM Treaty, Article 8(5).

45 BVerfG, 2 BvR 1390/12 of 12 September 2012, paras 147-49.

46 ibid paras 150-56.

47 ESM Treaty, Article 4(8).

48 BVerfG, 2 BvR 1390/12 of 12 September 2012, para 162.

of the stringent provisions of German fiscal law, a suspension of Germany's voting rights could 'virtually be ruled out'.[49]

As regards the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union, the Court noted that the content of the Fiscal Compact was very similar with the constitutional requirements under Articles 109, 109a, 115 and 143d of the Basic Law and was also similar to the fiscal requirements laid down by the TFEU and 'six-pack' legislation.[50] Moreover, the Court held that the ratification of the Fiscal Compact would not constitute an irreversible commitment to a particular fiscal policy in that the Federal Republic of Germany could always withdraw from the treaty.[51]

Gauweiler and Outright Monetary Transactions

The latest 'big case' that confronted the Bundesverfassungsgericht in the context of the Euro crisis concerned the legality of Outright Monetary Transactions (OMTs) and led to the first-ever reference from the German Federal Constitutional Court to the CJEU for a preliminary ruling.[52] As regards the background to the case, it will be recalled that, as explained in Chapter 2, the ECB had established a number of bond-buying programmes. In the case of OMTs, the programme involved outright transactions in secondary

49 ibid paras 164-66.

50 ibid paras 196ff.

51 ibid paras 214ff.

52 This section partly draws on the discussion of the BVerfG's ruling in Paul Craig and Menelaos Markakis, '*Gauweiler* and the Legality of Outright Monetary Transactions' (2016) 41 ELRev 4, 6-8.

sovereign bond markets with the aim of 'safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'.[53]

The complainants in the *Gauweiler* case challenged the *Bundesbank*'s participation in the implementation of the OMT programme, and the perceived failure by the Federal Government and the *Bundestag* to act regarding the OMT decision.[54] It was argued that the ECB had exceeded its mandate for twofold reasons: the OMT programme was economic and not monetary policy and therefore fell outside the ECB's remit; and it circumvented, in the opinion of the complainants, the prohibition of monetary financing of national budgets, which is enshrined in Article 123 TFEU.

The Bundesverfassungsgericht ruled that it was 'likely' that the OMT decision did not fall within the ECB's powers, and that it was incompatible with Article 123 TFEU.[55] However, it could be saved if it were interpreted 'in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism … and would only be of a supportive nature with regard to the economic policies in the Union'.[56] 'This require[d], in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded … that government bonds of selected Member States [were] not purchased up to unlimited

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53 European Central Bank, 'Technical Features of Outright Monetary Transactions' (6 September 2012) <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 17 October 2016.

54 BVerfG, 2 BvR 2728/13 of 14 January 2014, para 1.

55 ibid paras 69, 84.

56 ibid para 100.

amounts … and that interferences with price formation on the market [were] to be avoided where possible.'[57]

The case went up to Luxembourg, and the Court of Justice delivered its much-anticipated ruling on 16 June 2015, essentially giving the green light to the OMT programme under a number of conditions.[58] The case went back to Karlsruhe, with the Second Senate holding that if the conditions set out in the CJEU's judgment were met, the OMT programme would not 'manifestly' exceed the powers of the ECB, nor would it 'currently' impair the *Bundestag*'s overall budgetary responsibility.[59] It is particularly noteworthy that the Bundesverfassungsgericht criticised the CJEU's decision at some length, listing its 'serious objections' with respect to 'the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted'.[60] Nevertheless, the Bundesverfassungsgericht held that, if interpreted in accordance with the CJEU's judgment, the OMT programme did not manifestly exceed the competences attributed to the ECB, 'because on the level of the exercise of competences the Court of Justice ha[d] essentially performed the restrictive interpretation of the policy decision that the Senate's request for a preliminary ruling … held to be

57 ibid para 100.

58 Case C-62/14 (Grand Chamber) *Peter Gauweiler and Others v Deutscher Bundestag* ECLI:EU:C:2015:400. See further Paul Craig and Menelaos Markakis (n 52) 8-21.

59 BVerfG, 2 BvR 2728/13 of 21 June 2016.

60 Bundesverfassungsgericht, 'Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful' (Press Release No. 34/2016, 21 June 2016) <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html;jsessionid=1D8EF6A7783CC76B78D84FAF443413AB.2_cid392> accessed 17 October 2016, para 3b.

possible'.[61] Likewise, as regards the prohibition of monetary financing, the CJEU's ruling was found to meet the standards set by the Bundesverfassungsgericht in its reference for a preliminary ruling and thus the OMT programme was compatible with the Treaties.[62] Last, the Federal Government and the *Bundestag* were exhorted to 'closely monitor' the implementation of the OMT programme, in order to 'determine not only whether the abovementioned conditions [were] met, but also whether there [was] a specific threat to the federal budget'.[63]

Other judgments in lender States

The discussion thus far has focused on the jurisprudence of the Bundesverfassungsgericht. We now turn to consider important rulings from other jurisdictions. We will focus on cases from France, Estonia, and Finland.

France

France is clearly one of the 'large' creditor States, also in terms of its contribution to financial mechanisms. In the case concerning the Fiscal Compact, the French Conseil d'Etat was asked to decide whether a constitutional amendment would be required prior to the TSCG being ratified by the French President. Such amendment of the constitution is in principle required whenever there is a treaty clause which is unconstitutional,

61 ibid para 3c.

62 ibid para 3d.

63 ibid para 3g.

breaches the rights and freedoms guaranteed by the constitution or is contrary to 'the essential conditions for the exercise of national sovereignty'.[64]

The fiscal targets set by the TSCG were found to be in conformity with the constitution. More specifically, the Conseil d'Etat noted that the provisions of the TSCG '[did] not result in the transfer of any powers over economic or fiscal policy and [did] not authorise any such transfers', and that 'the commitment to comply with these new rules [did] not infringe upon the essential conditions for the exercise of national sovereignty any more than the earlier commitments of budget discipline'.[65]

As regards the correction mechanism, the Conseil d'Etat noted that 'the direct introduction of provisions of binding force and permanent character mandating compliance with rules on balanced public finances require[d] that these constitutional provisions [setting out the prerogatives of Government and Parliament with respect to finance laws and social security financing laws] be amended'.[66] In which case, authorisation to ratify the TSCG could only be granted, said the Court, 'after the Constitution ha[d] been amended'.[67] However, the proviso 'or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes' in Article 3(2) TSCG meant that the French Government was free, said the Court, to amend the institutional act concerning financial laws in order to give effect to the TSCG rules.[68]

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64 Decision no. 2012-653 DC of 9 August 2012, para 10.

65 ibid para 16.

66 ibid para 21.

67 ibid para 21.

68 ibid paras 22-24.

Considering the nature of the correction mechanism, the Court noted that 'these provisions [did] not define either the procedures according to which this mechanism must be triggered or the measures which must be implemented as a result'; that 'they therefore [left] the States free to determine these procedures and measures in accordance with their constitutional law'; that 'according to the last phrase of paragraph 2, this correction mechanism [could not] breach the prerogatives of the national parliaments'; and that 'it [did] not breach either the principle of freedom in the administration of local government bodies or the constitutional requirements referred to above'.[69] Furthermore, the Conseil d'Etat ruled that 'no constitutional requirement preclude[d] one or more independent institutions being charged on national level with monitoring adherence to the rules set forth in paragraph 1 of Article 3 of the Treaty'.[70] Interestingly, the Court also noted that economic partnership programmes '[did] not have any binding consequences under national law'.[71]

Estonia

Estonia could be set to form part of a subset of lender States which are fairly 'small' in terms of geographical size, population, and size of national economy. As such, the anxieties facing the Bundesverfassungsgericht were particularly acute in the Estonian Supreme Court case concerning the ESM. The emphasis was again on the principle of democracy, parliamentary prerogatives, and the budgetary powers of the Estonian

69 ibid para 25.

70 ibid para 26.

71 ibid para 32.

Parliament (*Riigikogu*).[72] Though a tiny bit of the ESM's financial resources (0.1860%), Estonia's contribution to the ESM amounts to 8.5% of the country's GDP (€148.8 million of paid-in capital and €1153.2 million of callable capital).[73] To put this in perspective, Estonia's contribution to the IMF amounts to 0.7% of its GDP.[74] The problem facing the Court was that Article 4(4) of the ESM Treaty established an 'emergency voting procedure' for the granting of financial assistance, according to which only a qualified majority of 85% of the votes cast was needed for the proposal to be approved where 'a failure to urgently adopt a decision … would threaten the economic and financial sustainability of the euro area'. This deviated from the normal rule of unanimity and essentially meant that the Estonian Government could not veto such proposals.[75]

The Supreme Court held that there was an interference 'with the financial competence of the *Riigikogu* with a possibility that in the future the ESM may make a capital call to Estonia'.[76] A ratification of the ESM Treaty by the *Riigikogu* '[would] not thereby restrict only its own possibilities for exercising financial competence within the same year's state budget, but [would] also restric[t] the budgetary-political choices of next compositions of the *Riigikogu*'.[77] 'Such an interference with the financial competence of the *Riigikogu* [brought] about also an interference with the principle of a

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72 Judgment No 3-4-1-6-12 of the Estonian Supreme Court *en banc* of 12 July 2012, para 9.

73 ibid paras 10, 144, 184.

74 ibid para 13.

75 ibid para 11.

76 ibid para 149.

77 ibid para 151.

democratic state subject to the rule of law and of the state's financial sovereignty since indirectly the people's right of discretion [was] restricted.'[78]

The Supreme Court held that 'the economic and financial sustainability of the euro area [was] contained in the constitutional values of Estonia as of the time Estonia bec[a]me a euro area Member State'.[79] 'Estonia is a part of the euro area and therefore economically and financially integrated with the other euro area Member States.'[80] Moreover, 'a threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia'.[81] The Supreme Court's reasoning is worth quoting in some length:

> Estonia's economy and finance are closely related to the rest of the euro area and if there are economic and financial problems in the euro area, then it inevitably affects Estonia – export and import of goods and services, state budget and thereby also social and other fields. Problems in the euro area harm also Estonia's competitiveness and reliability. The ESM as a financial assistance system may help to ensure that the euro area as a whole as well as a part of it, Estonia, would be economically and financially competitive. It is necessary to guarantee people's income, quality of life and social security. In a situation where the rest of the euro area would be in difficulties it is not probable that Estonia would be financially or economically successful, including in the field of people's income, quality of life and social security.[82]

The Supreme Court drew a link between economic and financial stability, on the one hand, and Estonia's constitutional obligations to guarantee fundamental rights and 'to

78 ibid para 153.

79 ibid para 163.

80 ibid para 164.

81 ibid para 165.

82 ibid para 165.

strengthen and develop the state which is founded on liberty, justice and the rule of law', on the other hand.[83] 'By disregarding the common purpose of the euro area Member States or the measure planned for the achievement thereof, Estonia [could not] follow its objectives arising from the Constitution.'[84] 'Consequently, the purpose of safeguarding the efficiency of the ESM also in case the states [were] unable to take a unanimous decision to eliminate a threat to the economic and financial stability of the euro area, including of Estonia, [was] legitimate.'[85]

Moving on to assess the proportionality of the said interference, the Supreme Court noted that it was indeed the case that one of the six largest contributors to the ESM could block the granting of financial assistance even under the emergency voting procedure, and that there was no guarantee that national constitutional requirements in those States would be met faster than in other Member States participating in the ESM. However, the Supreme Court ruled that the emergency voting procedure was nevertheless appropriate for the achievement of the objective pursued. 'Appropriateness of a measure does not mean that it must guarantee the achievement of the purpose in every situation.'[86] 'The Chancellor of Justice [did] not point out in his request [to] any alternative measure which would facilitate the achievement of the purpose as much but would interfere with constitutional values less.'[87] Moreover, the impugned voting procedure was necessary, said the Court, for the achievement of the objective pursued, as there were not any less

83 ibid paras 166-67.

84 ibid para 168.

85 ibid para 168.

86 ibid para 180.

87 ibid para 181.

restrictive means for the attainment of the objective pursued.[88] 'In essence, the seriousness of the interference for Estonia would decrease only if unanimous decisions would be provided for in Article 4(4) of the Treaty', but that 'would not facilitate the achievement of the purpose as much'.[89]

Balancing the seriousness of the interference against the importance of the objective pursued, the Supreme Court noted that 'the interference with the financial competence of the *Riigikogu* [was] not serious merely because it constitute[d] a vast financial obligation', and that Commission and ECB officials with 'profound special expertise' would assess the need to urgently grant financial assistance.[90] Given that ESM assistance should be granted only under strict conditionality and that the recipient Member States had also ratified the Fiscal Compact, 'it must be presumed that the recipient of the assistance fulfil[led] the obligations it ha[d] assumed'.[91] The Estonian Parliament could still decide on how the financial obligations that could be incumbent on Estonia in the future would be fulfilled.[92] Moreover, such capital calls would not come out of the blue, as it were, as the activities of the ESM are audited and the annual financial statements are made available to national parliaments.[93] The Court further noted for yet one more that if Estonia were to fulfil its constitutional obligations in terms of fundamental rights and freedoms, it 'must insure itself against possible future economic

88 ibid para 182.

89 ibid para 184.

90 ibid paras 190-92.

91 ibid paras 193-95.

92 ibid para 196.

93 ibid para 197.

recessions'.[94] The Supreme Court concluded that 'the interference arising from Article 4(4) of the Treaty [was] not disproportionate to the purpose'.[95]

Finland

The focus now shifts to a 'mid-sized' creditor State, Finland. *Ex ante* constitutional review is carried out by the Constitutional Law Committee of the Finnish Parliament, whose decisions are well documented in the relevant literature.[96] 'The principal constitutional criteria it has employed are Parliament's budgetary power, combined with Finland's national sovereignty, and the state's fiscal ability to meet its constitutional obligations.'[97] 'In assessing possible infringement of these criteria, the Committee has examined the amount of potential liabilities, the risk of their realisation and Parliament's power to influence their future specification.'[98] The Constitutional Law Committee has thus far scrutinised the EFSF Framework Agreement;[99] the ESM Treaty;[100] and the revised EU economic governance framework ('six-pack', 'two-pack', and TSCG).[101] All

94 ibid paras 199-201.

95 ibid para 202.

96 Kaarlo Tuori and Klaus Tuori (n 5) 195-99.

97 ibid 196.

98 ibid 196.

99 Opinion of the Finnish Constitutional Law Committee PeVL 5/2011; Opinion of the Finnish Constitutional Law Committee PeVL 14/2011, cited in Kaarlo Tuori and Klaus Tuori (n 5) 197 fn 16.

100 Opinion of the Finnish Constitutional Law Committee PeVL 22/2011; Opinion of the Finnish Constitutional Law Committee PeVL 25/2011; Opinion of the Finnish Constitutional Law Committee PeVL 13/2012, cited in Kaarlo Tuori and Klaus Tuori (n 5) 197 fn 17, 198 fn 18, 199 fn 19.

101 Opinion of the Finnish Constitutional Law Committee PeVL 24/2011, cited in Kaarlo Tuori and Klaus Tuori (n 5) 199 fn 20.

measures put to the test eventually survived scrutiny. Kaarlo Tuori and Klaus Tuori comment that:

> Constitutional mutation at the European level has instigated changes to national constitutional doctrine which have allowed for unprecedented transnational substantive and procedural interference in the national budgetary process; articulated the criteria for assessing the constitutional acceptability of international or transnational fiscal liabilities; and consented to potentially significant cuts in future parliaments' budgetary powers.[102]

Review by national courts in borrower States: the Greek Council of State

The discussion thus far has focused on case law from lender States. The focus now shifts to the crisis-related jurisprudence in borrower States. The emphasis will be on the jurisprudence of the Greek Council of State (*Συμβούλιο της Επικρατείας*).

Unsurprisingly, there is a copious literature on the role played by the Greek courts during the crisis.[103] This section could not realistically cover all the case law of the Greek Council of State which could be said to be related, in one way or another, to the economic crisis. Given the language barrier, the judgment which normally features in

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102 Kaarlo Tuori and Klaus Tuori (n 5) 199. The idea that the EU has undergone a constitutional mutation is a central tenet of their thesis. For a different view, see Bruno De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 E.C.L. Review 434.

103 Amongst the copious Greek literature, see particularly Spyridon Vlachopoulos, *Η δυναμική ερμηνεία του Συντάγματος: Η προσαρμογή του συνταγματικού κειμένου στις μεταβαλλόμενες συνθήκες* (Ευρασία 2014) 102-16; Constantin Yannakopoulos, 'Το δημόσιο συμφέρον υπό το πρίσμα της οικονομικής κρίσης. Σκέψεις με αφορμή τις αποφάσεις ΣτΕ Β' 693/2011, ΣτΕ Στ' 1620/2011 και ΣτΕ Α' 2094/2011' (2012) 7 Εφημερίδα Διοικητικού Δικαίου 100; Constantin Yannakopoulos, 'Η μετάλλαξη του υποκειμένου των συνταγματικών δικαιωμάτων' (2012) 7 Εφημερίδα Διοικητικού Δικαίου 146; Constantin Yannakopoulos, 'Το ελληνικό Σύνταγμα και η *επιφύλαξη του εφικτού* της προστασίας των κοινωνικών δικαιωμάτων: «να είστε ρεαλιστές, να ζητάτε το αδύνατο»' (2015) 10 Εφημερίδα Διοικητικού Δικαίου 417.

specialist monographs is *the first MoU case*, which was examined in Chapter 6.[104] However, one should not be misguided to believing that this was the only occasion on which the Greek courts adjudicated on crisis-related measures, nor should one be driven to believe that the Greek Council of State was equally sympathetic to arguments advanced by the Government in other cases. Suffice it to say for present purposes that a recent study by three Greek lawyers identified 130 judgments handed down by the Greek Council of State only (that is, to the exclusion of other Greek supreme courts and lower courts), which touched upon the vexed issue of fundamental rights protection in times of economic crisis.[105] Consequently, this chapter will give a few powerful examples to illustrate that even in the EU Member State which was, objectively speaking, most severely hit by the Euro crisis, there is, in the words of Damian Chalmers, 'a space for resistance'.[106]

The legal pedigree of the contested measures

It is important to note from the outset that the Greek Council of State was not put off by the fact that the measures challenged before it were linked to bailout conditions set out in the MoU and/or the relevant Council decision. The searching attitude of the Greek Council of State towards bailout measures dates back to *the first MoU ruling*. It will be recalled that the Council of State ruled that the MoU was merely the Government's economic plan, setting out the objectives to be pursued and the means of achieving them.

104 Greek Council of State (Plenary Session) Decision No 668/2012.

105 E Galani, M Nanou and A Papathomas, 'Επισκόπηση Νομολογίας για τα Θεμελιώδη δικαιώματα στην Οικονομική κρίση' Θεωρία και Πράξη Διοικητικού Δικαίου τ. 8-9/2015 (last updated on 13 February 2016).

106 Damian Chalmers (n 5).

The act of annexing the MoU to a statute merely had expressive value, and some of the measures contained in the MoU were already included in the country's stability programme. It being the Government's plan, it did not confer powers on bodies of international organisations, nor did it set out other rules, nor did it have direct effect. For the policies set out in the MoU to be implemented, it was necessary that the competent Greek authorities adopt primary or secondary law instruments. Nor did the MoU constitute an international treaty, because the signatory parties did not take up mutual obligations, and there were no legal mechanisms or sanctions to –directly or indirectly– force the Greek authorities to fulfil their commitments. Nor did it follow from the text of the MoU, said the Court, that the signatory parties wished to make the MoU legally binding.[107]

An often-ignored aspect of the Court's reasoning in *the first MoU ruling* is that the Greek Council of State did not exclude the possibility that there might be an obligation incumbent on the Greek authorities to take measures to achieve the objectives pursued flowing from the loan facility agreement or the relevant Council decision. However, the Court did not come clean on this point, as it further stated that the loan facility agreement or Council decision might simply set out the consequences flowing from not implementing the measures agreed between Greece and its creditors. In any event, the Court was not willing to look into the legality of the loan facility agreement or the Council decision, as the contested acts in *the first MoU case* were based on a statute

[107] The analysis follows, as closely as possible (given the *Conseil d'Etat*-like reasoning of the Greek Council of State, though with the length and complexity of the Bundesverfassungsgericht's), the wording of Greek Council of State (Plenary Session) Decision no 668/2012, para 28.

that had been adopted before the loan facility agreement was signed or the relevant Council decision was adopted.[108]

It will be seen in the cases examined in the next section that the Greek Council of State has followed this line of reasoning in subsequent cases concerning the legality of various bailout measures. As such, the 'bailout pedigree' of the impugned measures has not thus far dissuaded the Court from striking down a number of them, and in those cases where litigants were disappointed the reason did not lie in the legal quality of the bailout measures. However, bailout conditionality *does* feature in the Court's reasoning as an aspect of the public interest in attaining the objectives pursued by the Government. Accordingly, it may sometimes tip the balance in favour of the legality of the contested measures.

Social rights adjudication and the economic crisis

There is no doubt that austerity measures can have massive repercussions for the enjoyment of social rights, and the Greek Council of State is no stranger to this logic. However, there are limits to the extent to which the national authorities can circumscribe social rights. These are of course policed by the Greek courts. More specifically, the various limitations have to respect *the core of those rights,* thereby securing dignified living conditions for the subjects of those rights (the *Existenzminimum* requirement); respect *the principles of social solidarity* (Article 25(4) of the Constitution) *and of equality in the distribution of fiscal burdens* (Article 4(5) of the Constitution), which mandate that all citizens contribute their fair share of taxes and 'shoulder' the burden of

[108] ibid para 28.

fiscal adjustment in proportion to their income and property; and comply with the *principle of proportionality* (Article 25(1) of the Constitution), which requires that the impugned measure be suitable and necessary for addressing the pressing challenges facing the Greek authorities.[109]

The case concerning the salary and pension cuts on members of the police and armed forces

A good starting point is *the case concerning the salary and pension cuts on members of the police and armed forces*.[110] There is a special wage grid which is applicable to the members of the police and armed forces, as well as to other professions (judges, diplomats, and so on). The contested cuts were introduced with retrospective effect and should be seen in the light of the second Greek MoU. The Greek Government had undertaken in the relevant Memorandum of Economic and Financial Policies to readjust the remuneration received by such officers in order to generate net savings of about 0.2% of GDP on an annual basis.[111] Moreover, the Memorandum on Specific Economic Policy Conditionality stipulated that the Greek Government would, as a prior action, introduce a 10% wage reduction on average, thereby delivering savings of at least €114 million.[112] Furthermore, Council Decision 2011/734/EU, as was then in force, provided that:

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109 Constantin Yannakopoulos, 'Το ελληνικό Σύνταγμα και η *επιφύλαξη του εφικτού* της προστασίας των κοινωνικών δικαιωμάτων: «να είστε ρεαλιστές, να ζητάτε το αδύνατο»' (2015) 10 Εφημερίδα Διοικητικού Δικαίου 417, 428.

110 Greek Council of State (Plenary Session) Decision No 2192/2014.

111 ibid para 13; European Commission, *The Second Economic Adjustment Programme for Greece* (EUROPEAN ECONOMY Occasional Paper 94/2012, European Union 2012) 97.

112 ibid para 13; European Commission (n 111) 125.

> Greece shall adopt the following measures by the end of June 2012: … (e) a reduction by 12%, on average, in the 'special wages' of the public sector, to which the new wage grid does not apply. This will apply as from 1 July 2012 and deliver savings of at least EUR 205 million (net after taking into account the impact on taxes and social contributions)…[113]

The linkage between the Council Decision and the contested measures was clear, and the Court drew a clear connection between the two instruments in its ruling.[114] However, in line with *the first MoU ruling*, the Court noted that these measures had been adopted by a sovereign Parliament.[115] As regards the substance of the case, the Court noted that the Legislature had no regard to the duties incumbent upon the members of the police and armed forces but simply decided to reduce the remuneration received by the persons covered by the so-called 'special wage grids' (including judges, diplomats, doctors, university professors, airport employees, and department secretaries) by 10% on average. Moreover, the percentage of such reduction was merely determined by the size of their salary, such that the higher the salary of the members of the armed forces the bigger the reduction that would be made and vice versa, again without the Legislature having regard to the various tasks conferred on such officers.[116]

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113 Council 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 [2011] OJ L296/38, as amended by Council Decision 2011/791/EU 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 [2011] OJ L320/28 and Council Decision 2012/211/EU 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] OJ L113/8, Article 2(9)(e).

114 Greek Council of State (Plenary Session) Decision No 2192/2014, para 13.

115 ibid para 17.

116 ibid para 17.

The Court engaged in a very detailed analysis of the special regime applicable to members of the police and armed forces, outlining the main provisions, either enshrined in statute or in the constitution itself, which set out their special duties as well as the special wage grid applicable to them.[117] It stressed that the constitution, as well as other relevant statutes, explicitly prohibited the members of the armed forces from going on strike and from manifesting their opinion in favour of or against a political party.[118] It ruled that the special wage grid applicable to them served to 'counterbalance' the legal restrictions that were applicable to them and the special conditions under which they exercised their profession. It further added that such a special wage grid had existed for many years, in recognition of the importance of the mission that they were called to fulfil.[119] The Court went on to develop a constitutional principle of 'special wage treatment of the members of the armed forces' on the basis of a number of constitutional provisions. Such a principle operated, said the Court, as an 'added institutional guarantee' which sought to ensure that the members of the police and armed forces performed their tasks in an effective manner by means of boosting their morale. It added that this principle should also be seen as a 'right' conferred on those officers, insofar as they were subject to a number of prohibitions and restrictions enshrined in the constitution and had to fulfil a very dangerous mission.[120]

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117 ibid paras 7-10.

118 ibid para 11; Articles 23(2) and 29(3) of the Greek Constitution.

119 ibid para 12.

120 ibid para 12; Articles 45, 23(2) and 29(3) of the Greek Constitution.

The Court did not go as far as ruling that Parliament could never legislate to reduce the salary of the members of the armed and police forces. However, it did hold that Parliament had to balance the fiscal savings to be generated from such a wage reduction against the effects that it could have on the armed forces. This was all the more so, because the Legislature was, said the Court, under an obligation to take into account the special conditions under which these officers exercised their profession, as well as how dangerous their mission was. Given that they were further prohibited from seeking employment elsewhere, their remuneration should be 'adequate to ensure dignified living conditions' and 'commensurate with the importance of their mission'.[121]

Judicial review could have hardly been more searching. The Greek Council of State noted that the Legislature had not taken into account the importance of the mission that the members of the police and armed forces were called to fulfil, nor the special conditions under which they exercised their profession, but had instead only relied on a 'purely numerical' criterion, which was, in the opinion of the Court, 'manifestly insufficient'.[122] The Court noted that there had been no assessment of the effects of such cuts on the operational capacity of the armed forces, nor had these effects (if any) been balanced against the expected fiscal gains. What is more, the Legislature had not examined whether there were any alternative measures that could generate the same savings with fewer costs incurred by the members of the police and armed forces.[123] Nor had there been any analysis of whether the newly-adjusted salary would have been

121 ibid para 12.

122 ibid para 21.

123 ibid para 21.

adequate to ensure dignified living conditions as well as commensurate with the importance of the tasks incumbent on them.[124] The Government had in fact adduced a study on wage developments in the public sector, but the Court found it inadequate to justify such cuts, as it merely consisted of general assertions about special wage grids and did not set out any specific reasons why the salary received by members of the police and armed forces ought to be reduced. Such an austerity measure was not under consideration by the Government at the time when the study was written.[125]

The Court listed all the losses incurred by the members of the police and armed forces by means of successive legislative measures that had been adopted from the onset of the crisis onwards,[126] and held that the latest round of such cuts, taken in conjunction with the previous cuts as well as other tax measures, went beyond the limit set by the constitutional principles of proportionality and of equality in the distribution of fiscal burdens (or, in other words, fair burden-sharing).[127] This was so notwithstanding the public interest in achieving the goals set by the country's medium-term fiscal framework, i.e. in meeting the conditions for the disbursement of further instalments under the financial assistance programme.[128] The axe had again fallen, said the Court, on the same group of citizens (a recurring theme in debates in Greece), whereas *all* citizens were under a constitutional obligation to 'fulfil the duties flowing from national and social

124 ibid para 21.

125 ibid para 21.

126 ibid para 20.

127 ibid para 21.

128 ibid para 21.

solidarity'.[129] The impugned measures could not be justified on grounds of forming part of a comprehensive fiscal adjustment programme which mandated a series of measures; nor could they be justified by the size of the economic recession, which was larger than had been forecasted; nor by their perceived effectiveness, as the axe had again fallen on the same type of income. Furthermore, the Court held that Council Decision 2012/211/EU '[did] not free the Legislature from the obligation to respect the aforementioned constitutional provisions and principles when making fiscal policy decisions for the purposes of fulfilling the international commitments entered into by the country'.[130]

The Court concluded that the statutory provisions on which the contested measures were based were unconstitutional and hence the State had to reimburse the members of the police and armed forces for the money they had returned to the State pursuant to these rules.[131] A senior official of the Greek Ministry of Finance has reportedly told Reuters that the fiscal impact of the Court ruling could be as high as €500 million.[132]

The PSI case

The linkage between the impugned austerity measures and the conditionality attached to an EU bailout programme has never discouraged the Greek Council of State from

129 ibid para 21; Article 25(4) of the Greek Constitution.

130 ibid para 21.

131 ibid para 23.

132 'Reuters: Στα 500 εκατ. το κόστος της απόφασης του ΣτΕ για ένστολους' (skai.gr, 22 January 2014) <http://www.skai.gr/news/finance/article/250389/reuters-sta-500-ekat-to-kostos-tis-apofasi-tou-ste-gia-enstolous-/> accessed 10 March 2016.

reviewing the contested measures. However, not all challenges have been successful. The *case concerning the Private Sector Involvement (PSI) agreement* provides a telling illustration of this. By means of this agreement, Greek Government bonds held by private investors were exchanged for short-term EFSF notes and new long-term Greek Government bonds, 'which equated to a reduction of 53.5 per cent in nominal terms and around 75 per cent in net present value terms'.[133] The aim was to bring the Greek public debt-to-GDP ratio to a sustainable downward path.

The essence of the dispute brought before the Court was that the Government had chosen to include in the PSI programme bonds held by natural and legal persons alike (including bonds held by 'micro-investors') without seeking their consent, because the Greek law voted for in anticipation of such a 'haircut' (Law No 4050/2012) allowed 'the restructuring of the Greek-law bonds with the consent of a qualified majority, based on a quorum of votes representing 50 per cent of face value and a consent threshold of two-thirds of the face-value taking part in the vote'.[134] The large majority of Greece's sovereign bonds contained no such collective action clauses (CACs), and could have otherwise only been restructured 'with the unanimous consent of all bondholders'.[135]

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133 Reserve Bank of Australia, 'The Greek Private Sector Debt Swap' <http://www.rba.gov.au/publications/smp/boxes/2012/may/b.pdf> accessed 6 September 2015; Paul Craig and Menelaos Markakis (n 52) 22.

134 Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, 'The Greek Debt Restructuring: An Autopsy' (July 2013) <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=faculty_scholarship> accessed 12 March 2016, 11; Law No 4050/2012 on the rules governing the changes to the securities issued or guaranteed by the Greek State with the consent of the bondholders (*Κανόνες τροποποιήσεως τίτλων, εκδόσεως ή εγγυήσεως του Ελληνικού Δημοσίου με συμφωνία των ομολογιούχων*) Government Gazette A' 36/23-02-2012.

135 Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati (n 134) 11.

The impugned Law No 4050/2012 had not given a clear mandate to the administration to impose a 'haircut' on the bonds held by micro-investors, and the Vice-President of the Greek Government had in fact promised in Parliament that the Government would afford protection to such investors. This naturally prompted inquiry as to the compatibility of the impugned law with such salient rights and principles as economic freedom, equality, legal certainty, and the protection of legitimate expectations. What is more, the new bonds had longer maturities (perhaps too long a maturity given the lifespan of a natural person) and a much lower nominal value. If the bondholders wished to sell such bonds during their lifetime, they could only do so at a fraction of their new nominal value (roughly 20% in the applicants' opinion). The applicants further claimed that the PSI programme had violated their right to property.

As regards the admissibility of the case, the Court rejected the argument that the contested acts constituted *actes de gouvernement* which could not be reviewed by courts.[136] The proximate connection between the challenged act and various EU law instruments was again made clear in the Court's ruling.[137] More specifically, the Greek Council of State noted that the PSI was a 'fundamental element' of the second economic programme for Greece which was first contemplated by the Eurogroup Working Group and the Institute of International Finance in June 2011.[138] The Euro Summit conclusions of 21 July 2011 referred to the PSI as an 'exceptional and unique solution'.[139] Moreover,

136 Greek Council of State (Plenary Session) Decision No 1116/2014, para 6.

137 ibid para 18.

138 ibid para 18.

139 ibid para 18; Council of the European Union, 'Statement by the Heads of State or Government of the Euro Area and EU Institutions' (Brussels, 21 July 2011)

on 26 October 2011, the Euro Summit 'welcomed' the then-ongoing discussion between Greece and its private investors to 'find a solution for a deeper PSI', which would, together with an 'ambitious reform programme for the Greek economy', 'secure the decline of the Greek debt to GDP ratio with an objective of reaching 120% by 2020'. To this end, the Euro Summit 'invite[d] Greece, private investors and all parties concerned to develop a voluntary bond exchange with a nominal discount of 50% on notional Greek debt held by private investors'. The Euro Summit stated that the Euro area Member States 'would contribute to the PSI package up to 30 bn euro' and that 'the official sector [stood] ready to provide additional programme financing of up to 100 bn euro until 2014, including the required recapitalisation of Greek banks'. 'The new programme should be agreed by the end of 2011 and the exchange of bonds should be implemented at the beginning of 2012.'[140]

Furthermore, on 21 February 2012, the Eurogroup stated that:

> The Eurogroup acknowledges the common understanding that has been reached between the Greek authorities and the private sector on the general terms of the PSI exchange offer, covering all private sector bondholders. This common understanding provides for a nominal haircut amounting to 53.5%. The Eurogroup considers that this agreement constitutes an appropriate basis for launching the invitation for the exchange to holders of Greek government bonds (PSI). A successful PSI operation is a necessary condition for a successor programme. The Eurogroup looks forward to a high participation of private creditors in the debt exchange, which should deliver a significant positive contribution to Greece's debt sustainability. … The respective contributions from the private and the official sector should ensure that Greece's public debt ratio

<http://www.consilium.europa.eu/en/european-council/pdf/20110721-statement-by-the-heads-of-state-or-government-of-the-euro-area-and-eu-institutions-en_pdf/> accessed 11 March 2016, 3 para 6.

140 ibid para 18; 'Euro Summit Statement' (Brussels, 26 October 2011) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf> accessed 11 March 2016, 4 para 12.

> is brought on a downward path reaching 120.5% of GDP by 2020. On this basis, and provided policy conditionality under the programme is met on an ongoing basis, the Eurogroup confirms that euro area Member States stand ready to provide, through the EFSF and with the expectation that the IMF will make a significant contribution, additional official programme of up to 130 bn euro until 2014. It is understood that the disbursements for the PSI operation and the final decision to approve the guarantees for the second programme are subject to a successful PSI operation and confirmation … of the legal implementation by Greece of the agreed prior actions. The official sector will decide on the precise amount of financial assistance to be provided in the context of the second Greek programme in early March, once the results of PSI are known and the prior actions have been implemented.[141]

The Court further discussed at some length the ECB opinion on the terms of securities issued or guaranteed by the Greek State.[142] The majority of the Court was adamant that the impugned laws nos 4046/2012 and 4050/2012 had been adopted upon consultations with the Euro Summit, the Eurogroup, the Commission, and the ECB.[143] However, these were, said the Court, 'consultations carried out at a political or expert level, during the course of which no acts were adopted by the EU institutions in implementation of EU law'.[144] Moreover, the Court noted that the EFSF '[was] not an EU institution with power to implement EU law but [was] instead a private law entity set up by the Euro area Member States for the purpose of safeguarding economic stability in the Eurozone by means of granting financial assistance to its members'.[145] Furthermore, at

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141 ibid para 18; 'Eurogroup Statement' (21 February 2012) <http://www.efsf.europa.eu/attachments/2012-02-21%20Eurogroup%20statement%20Bailout%20for%20Greece.pdf> accessed 11 March 2016, 2-3.

142 Opinion of the European Central Bank of 17 February 2012 on the terms of securities issued or guaranteed by the Greek State (CON/2012/12).

143 Greek Council of State (Plenary Session) Decision No 1116/2014, para 27.

144 ibid para 27.

145 ibid para 27.

the time the PSI programme was concluded, there were no EU norms on sovereign debt restructuring, nor were there any EU rules governing the purchase of public debt by private investors.[146] Accordingly, there was no reason, said the Court, to send an Article 267 TFEU preliminary reference to the CJEU.[147] The dissenting judges did not question the validity of the aforementioned propositions but opined that free movement of capital was engaged and that therefore the Greek Council of State should have sent a reference to the CJEU for a preliminary ruling.[148]

On the merits of the case, the majority rejected the argument put forward by the claimants that the inclusion of the bonds that were held by them in the PSI programme had not been adequately justified by the Greek Government.[149] It further ruled that the PSI programme did not violate their economic freedom or contravene the principles of legal certainty and the protection of legitimate expectations.[150] The *pacta sunt servanda* principle was said to be qualified by the *rebus sic standibus* doctrine. In light of the risk of debt default and the concomitant risk of economic collapse, the debt renegotiation sought by the Greek Government did not breach the constitution. No procedural rights of the applicants were found to be breached, and the inclusion of CACs was in line with international and European practice.[151] Furthermore, the majority of the judges held that there had been no violation of the applicants' right to property, as a 'fair balance' had

146 ibid para 27.

147 ibid para 27.

148 ibid para 28.

149 ibid para 21.

150 ibid para 24; Articles 5 and 25(1) of the Greek Constitution.

151 Greek Council of State (Plenary Session) Decision No 1116/2014, para 24.

been struck between the demands of the general interest of the community and requirements of the protection of the individual's fundamental rights.[152] The new EFSF notes that were given to the applicants were short-term in nature, and the market value of the new government bonds that had been given to them in return for their old bonds was steadily increasing.[153] Further, the infringement of the applicants' property rights was 'very serious' but not unsuitable, unnecessary or excessive.[154] An overwhelming majority of private creditors had agreed to such a 'haircut', and there was no reason to conclude that the reduction in the bonds' value exceeded what was necessary to achieve the objective pursued by the Greek Government or that it was not suitable for achieving the aim pursued.[155] A debt default would have had economic and social repercussions that could not have been predicted, and would have jeopardised the enjoyment of the rights of all natural and legal persons who had invested in Greek sovereign debt.[156]

The majority further ruled that the PSI programme did not breach the constitutional principle of equality, as there was no reason why the applicants should have been treated more favourably than other investors, notwithstanding the fact that they might have regarded their investments as 'savings'.[157] Any political promises that they might had been given were irrelevant in this respect, and the favourable tax treatment of

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152 ibid para 30; Articles 5(1), 17(1) and 25(1) of the Greek Constitution; Article 1 of the First Additional Protocol to the ECHR.

153 Greek Council of State (Plenary Session) Decision No 1116/2014, para 31.

154 ibid para 32.

155 ibid para 32.

156 ibid para 32.

157 ibid para 36.

the bonds held by them with a view to ensuring that they would not sell them on the secondary market was not material either.[158] However, it should be noted that the Court clearly did not exclude the possibility of bringing an action against the Greek State for damages.[159] Furthermore, the favourable tax treatment accorded to certain financial institutions and the financial assistance granted to them in the wake of the successful conclusion of the PSI agreement were not material either, as the economic viability and the credibility of such institutions were clearly crucial for the national economy.[160] The constitutional principle of fair burden-sharing had not been violated either, as the axe had already fallen on the income of other citizens and their tax contributions had been increased.[161] As will be seen below, the case went up to Strasbourg, and the ECtHR found no breach of the Convention.

The cases concerning pension cuts

The aforementioned cases clearly do not exhaust the Greek Council of State's rich and diverse jurisprudence. The Court's *decisions concerning pension cuts* served to upset all economic planning during the course of the second bailout programme.[162] The applicants in the four different cases that were brought before the Greek Council of State sought to

158 ibid para 36.

159 ibid para 24.

160 ibid para 36.

161 ibid para 39.

162 Greek Council of State (Plenary Session) Decision No 2287/2015; Greek Council of State (Plenary Session) Decision No 2288/2015; Greek Council of State (Plenary Session) Decision No 2289/2015; Greek Council of State (Plenary Session) Decision No 2290/2015.

challenge the legality of various cuts on their main and/or supplementary pensions that were effectuated during the crisis years.

Being very pragmatic, the Court did not deny that the Legislature may, in exceptional circumstances, cut pensions to meet pressing fiscal needs. However, it made the following very courageous statement that is worth quoting in some length:

> However, even when such exceptional circumstances occur, the Legislature does not have an unlimited power to cut benefits, but is instead circumscribed by the principles of social solidarity (Article 25(4) of the Constitution) and of equality in the distribution of fiscal burdens (Article 4(5) of the Constitution), which require that the fiscal burden be shared among all citizens in a fair manner, as well as by the principle of proportionality (Article 25(1) of the Constitution), which requires that the said measure be genuinely suitable and necessary for addressing the problem (see Greek Council of State (Plenary Session) Decisions nos 2192-2196/2014). In any event, pension cuts cannot violate the aforementioned constitutional core of the right to social insurance [Article 22(5) of the Constitution], which consists in providing the pensioner with such benefits that would allow her to live with dignity – not just securing the means of her physical existence (food, clothing, accommodation, basic home goods, heating, hygiene and health coverage) but also her participation in social life in a manner which is not substantially different from the respective conditions of her previous working life (see BVerfG judgment of 9.2.2010, 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09, esp. para 135). In order to meet these commitments and to avoid overstepping the boundaries drawn by the Constitution, the Legislature has … to draw a specific, substantiated and scientifically reasoned study, from which it would follow that these measures are genuinely suitable and necessary for effectively addressing the problem of ensuring the pensions funds' viability, taking into account the factors which gave rise to it in the first place, so that the adoption of the said measures could be compatible with the aforementioned constitutional principles of proportionality and equality in the distribution of fiscal burdens; and that the implications flowing from these measures for the standard of living of those persons affected by them, taken in conjunction with other measures previously adopted (tax measures, etc.) as well as with the totality of the socioeconomic conditions existing at that time, do not result, on aggregate, in a constitutionally impermissible violation of the core of the right to social insurance. Given the complex, technical nature of such issues, judicial review of the constitutionality of such measures would in practice not be possible without the existence of such a study, which would further have to be framed in an easily comprehensible manner that would allow

> the judiciary to check its basic findings. Judicial control in this area might not extend to the correctness of political estimations and choices, but nevertheless needs to be exercised in a meaningful and effective manner with respect to the constitutional commitments incumbent on the Legislature. The lack of such a study or derogations from the content of such a study as indicated above could only be justified in exceptional circumstances, when there is a direct threat of economic collapse facing the country and the particular measures are urgently adopted to avert such risk. Under such circumstances, it could be said to be true that, given the nature of the case, a reasoned opinion by the Legislature concerning the existence, significance and the immediate nature of such a threat, as well as the necessity of those particular measures for immediately dealing with this situation, would have been enough. However, this too would be subject to the requirement that the said measures do not appear manifestly inappropriate or unnecessary and that there are no serious indications that they go beyond the limits of sacrifice of those affected by them…[163]

The Greek Council of State went on to list all the cuts that had been legislated on by the Government in the previous years.[164] It ruled that the first round of such cuts could be said to be justified by the urgency of the matter.[165] Such cuts were roughly associated with the first MoU. However, the pension cuts linked to the second MoU were legislated on more than two years after the onset of the crisis and the Legislator should not have introduced such cuts, which again concerned the same people, without relying on the aforementioned study, which did not exist.[166] This was all the more so, said the Court, because the previous cuts had not attained their objective and recession had deepened.[167] The Legislature should have further inquired about various alternatives and examined

163 Greek Council of State (Plenary Session) Decision No 2287/2015, para 7. The translation is provided by the present author and is not an official translation of the said decision by the Court.

164 ibid paras 11-20.

165 ibid para 21.

166 ibid para 24.

167 ibid para 24.

their pros and cons in light of the aims pursued.[168] Clearly, none of this had happened. As such, the Court concluded that the impugned cuts on main and supplementary pensions were unconstitutional. It further added that the contested cuts did not strike a fair balance between the requirements of the general interest and the pensioners' property rights, thereby also violating Article 1 of the First Added Protocol to the ECHR.[169]

The effect of the Court's ruling was that the main and supplementary pensions that had been cut should be adjusted to their previous levels.[170] There are no official estimates at the time of writing, but the fiscal impact of the Court's ruling was said to be €1-1.5 billion, whereas others estimate that the implementation of the Court's judgment would cost the Greek State up to €3.5 billion (roughly 2% of the country's GDP).[171]

Other cases

The Court has further ruled in favour of the applicants in *the case concerning the suspension and dismissal of civil servants*,[172] as well as in *the case concerning the reduction in the allowances to faculty members*.[173] Another famous ruling concerns *the privatisation of the state water company*, which was found to be unconstitutional because

168 ibid para 24.

169 ibid para 24.

170 ibid para 26.

171 Eva Karamanoli, 'Απόφαση ΣτΕ για συντάξεις με κόστος 1-1,5 δισ.' (kathimerini.gr, 11 June 2015) <http://www.kathimerini.gr/818743/article/epikairothta/ellada/apofash-ste-gia-synta3eis-me-kostos-1-15-dis> accessed 24 April 2016; Thanos Tsiros, 'Βόμβα 3,7 δισ. από την απόφαση ΣτΕ για τις συντάξεις' (thetoc.gr 13 June 2015) <http://www.thetoc.gr/oikonomia/article/bomba-37-dis-apo-tin-apofasi-ste-gia-tis-suntakseis> accessed 24 April 2016.

172 Greek Council of State (Plenary Session) Decision no 3354/2013.

173 Greek Council of State (Plenary Session) Decision no 4741/2014.

'any uncertainty about the continued provision of accessible services in the general interest which are of such importance' was not permissible by Article 5(5) of the Constitution, which enshrines the right to health, as well as Article 21(3) of the Constitution, which mandates that the State protect the health of the citizens.[174] The Court was of the opinion that 'the continued provision of accessible services in the general interest, and indeed of high-quality services, … [was] not fully secured by state oversight,' such that the State should be a majority shareholder in the company and thus control the majority of members of the Management Board.[175]

Further, the Court took a moral stand against a property tax which was collected through the electricity bill and was backed by the explicit threat of cutting off one's supply.[176] Though dignity would have been an obvious ground on the basis of which to strike down such a measure, the Court relied on the (less politically contentious) ground of breach of contractual freedom (Article 5(1) of the Constitution), because 'the aforementioned provision does not permit the Legislature to change the terms of a signed contract when such intervention does not aim to remove the effects of the contract that are prejudicial to the public interest but instead pursues an aim which is foreign to the contract.'[177] However, it should be noted that the Court found no violation of the right to property,[178] such that the Government was given the flexibility to retain the tax, albeit

174 Greek Council of State (Plenary Session) Decision no 1906/2014, para 22.

175 ibid para 22.

176 Greek Council of State (Plenary Session) Decision no 1972/2012.

177 ibid para 25.

178 ibid para 16; Article 1 of the First Added Protocol to the ECHR and Article 17 of the Greek Constitution.

with less draconian enforced recovery methods (which were themselves found unconstitutional, as explained above). Other, less-known to an international audience, rulings concern *Sunday trading*[179] (hugely controversial in a 97% Christian country) and *the abrogation of unilateral recourse to arbitration for the resolution of collective disputes*.[180]

In a number of other cases, applicants were disappointed. One of those cases was *the first MoU ruling* which concerned wage and pension cuts.[181] *Wage cuts concerning the employees of independent regulatory authorities*, too, survived judicial scrutiny.[182] And so did *the reduction in allowances to employees working at the Finance Ministry*.[183] Another one of those cases was *the PSI case* which was examined above.[184] The Greek Council of State further ruled in favour of the State in *the case concerning the retrospective imposition of an 'exceptional surcharge'*,[185] as well as in *the case concerning the interest rate applicable in the case of late payments*.[186]

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179 Greek Council of State (Suspension Committee) Decision no 307/2014.

180 Greek Council of State (Plenary Session) Decision no 2307/2014.

181 Greek Council of State (Plenary Session) Decision no 668/2012.

182 Greek Council of State (Plenary Session) Decisions nos 3402, 3404, 3405/2014.

183 Greek Council of State (Plenary Session) Decision no 3177/2014.

184 Greek Council of State (Plenary Session) Decisions nos 1116-1117/2014 and 238/2014.

185 Greek Council of State (Plenary Session) Decision no 1685/2013; Greek Council of State (Session B') Decision no 693/2011.

186 Greek Council of State (Session St') Decision no 1620/2011; Greek Supreme Special Court Decision no 25/2012.

Review by other national, supranational and international courts or bodies

It should not be forgotten that the aforementioned rulings of the Greek Council of State should be seen in the light of very many rulings by other courts in Europe which have not hesitated to declare a host of austerity measures unconstitutional, whenever they deemed it appropriate. There is lengthy discussion of austerity-related court rulings in, e.g., Latvia,[187] Romania,[188] Italy,[189] France,[190] Spain,[191] and Portugal[192] in the leading articles

187 Latvian Constitutional Court Case 2009-08-01 (cancellation of pension indexation); Case 2009-43-01 (reduction of pensions); Case 2009-44-01 (50% cut to benefit for working parents); Case 2009-76-01 (cuts to pensions of Ministry of Interior staff); Case 2009-88-01 (cuts to retirement pensions for military personnel not yet in receipt of old-age pension); Case 2009-11-01 (cuts in judicial pay); Case 2010-17-01 (changes to incapacity for work benefits); Case 2010-21-01 (cuts to funding of occupational pensions), cited in Claire Kilpatrick (n 1) 7 fn 29-30 and discussed in Zane Rasnača, 'Constitutional Change Through Euro Crisis Law: Latvia' (16 January 2014) <http://eurocrisislaw.eui.eu/latvia/> accessed 27 October 2016.

188 Romanian Constitutional Court Decision 1415/2009 (constitutionality of capping salary additions and a new regime for compensating overtime); Decisions 872/2010 and 874/2010 (constitutionality of cuts to pensions, public sector salaries, judges' salaries); Decision 873/2010 (constitutionality of cuts to judicial pensions); Decision 1237/2010 (constitutionality of changes to basis for calculating public pensions); Decision 1655/2010 (prolongation of salary cuts in 2011); Decision 1658/2010 (cap on bonuses for public employees); Decision 765/2011 (cut in maternity leave and monthly child-raising allowance); Decision 1533/2011 (compatibility of scheduling state compensation to those whose pensions had been unconstitutionally reduced); Decision 575/2011 (replacing collective bargaining on teachers' salaries to setting them by law); Decision 574/2011 (outlawing right of association, collective bargaining and industrial action for liberal professions and magistrates; repeal of certain rights of unions to formulate proposals to local authorities); Decision 1414/2009 (constitutionality of various measures concerning public sector employment conditions); Decision 383/2011 (changes to labour code eg increase in probation period, possibility to suspend labour contract, dilution of unions' rights during elaboration of labour norms), cited in Claire Kilpatrick (n 1) 7-8 fn 31-33 and discussed in Viorica VIŢĂ, 'Constitutional Change Through Euro Crisis Law: Romania' (3 November 2014) <http://eurocrisislaw.eui.eu/romania/> accessed 27 October 2016.

189 See Cristina Fasone, 'Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective' EUI Working Paper MWP 2014/25, 17-19, who discusses the following court rulings: Italian Constitutional Court Decision no 223/2012 (concerning salary cuts on magistrates); Italian Constitutional Court Decision no 310/2013 (concerning salary cuts on non-contracted people working in the public sector); Italian Constitutional Court Decisions nos 7 and 154/2014 (concerning, again, the suspension of the salary adjustment mechanism). See also Judgment No 70/2015 of the Italian Constitutional Court (concerning pension cuts), discussed in Giorgio Monti, 'Judgment 70/2015 of the Italian Constitutional Court: Pension Cuts' (6 May 2015) <http://eurocrisislaw.eui.eu/news/judgment-702015-of-the-italian-constitutional-court-pension-cuts/> accessed 17 March 2016.

and monographs in the area of EMU. At the same time, it should be noted that applicants were disappointed in a number of other cases, and the mere fact that the cases normally attracting the attention of scholars from other countries are the ones in which courts vindicated the applicants should not be taken to mean that courts in, say, Portugal constantly declare economic policy measures unlawful. The opposite also holds true, and it cannot just be assumed that courts in, say, Greece have largely adopted a deferential approach to austerity measures because the academic debate sometimes centres on those cases where the contested measures were allowed to stand.

Moreover, it should not be forgotten that other international bodies too –notably, the European Court of Human Rights[193] and the European Committee of Social

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190 Conseil Constitutionnel Décision nº 2012-662 DC du 29 décembre 2012 [Loi de finances pour 2013] (concerning President François Hollande's 75% 'supertax' on earnings over €1,000,000); for a recent case see Conseil Constitutionnel Décision nº 2015-723 DC du 17 décembre 2015 [Loi de financement de la sécurité sociale pour 2016].

191 Spanish Constitutional Court Decision No 69/2014 of 10 February 2014; Spanish Constitutional Court Decision No 115/2015 of 8 April 2014 (concerning evictions related to mortgage foreclosures), cited in Claire Kilpatrick and Bruno De Witte (n 1) 3 fn 9. See also Cristina Fasone (n 189) 20-24.

192 Portuguese Constitutional Court Decision no 353/2012 (concerning the suspension of holiday and Christmas allowances for civil servants and pensioners), discussed in European Labour Law Network, 'Unconstitutionality of Suspension of Holiday and Christmas Allowances for Public Servants and Pensioners – Portuguese Constitutional Court Decision No. 353/2012 (05-07-2012)' <http://www.labourlawnetwork.eu/national_labour_law/court_decisions/court_decisions/prm/64/v__detail/id__2281/category__28/size__1/index.html> accessed 23 April 2016; Portuguese Constitutional Court Decision no 413/2014, discussed in European Labour Law Network, 'Constitutional Court Decision No. 413/2014, of 30 May 2014 on Law No. 83-C/2013, of 31 December 2013 (State Budget Law for 2014)' <http://www.labourlawnetwork.eu/national_labour_law/national_court_rulings/court_decisions/prm/64/v__detail/id__4535/category__28/index.html> accessed 23 April 2016.

193 See, e.g., *Koufaki and ADEDY v Greece* App nos 57665/12 and 57657/12 (ECtHR, 7 May 2013) (concerning wage and pension cuts in the context of the first Greek MoU); *Mamatas and Others v Greece* App nos 63066/14, 64297/14 and 66106/14 (ECtHR, 21 July 2016) (concerning the 'haircut' on Greek government bonds), discussed in Menelaos Markakis, 'European Court of Human Rights Rules on Greek Debt Restructuring' (OxHRH Blog, 31 July 2016) <http://ohrh.law.ox.ac.uk/european-court-of-human-rights-rules-on-greek-debt-restructuring/> accessed 10 September 2016; *DA CONCEIÇÃO MATEUS and SANTOS JANUÁRIO v Portugal* App nos 62235/12 and 57525/12 (ECtHR, 8 October 2013) (concerning a reduction in holiday and

Rights[194]– have a role to play in fundamental rights protection in Europe. Though their jurisprudence is not examined in this thesis, the ILO bodies, too, adjudicated disputes related to, e.g., the Greek crisis.[195] Further, UN experts were involved in assessing the impact of the financial crisis and economic adjustment programmes on the enjoyment of human rights.[196] In this connection, Claire Kilpatrick and Bruno De Witte rightly note

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Christmas subsidies in the context of the Portuguese MoU); *Frimu and Others v Romania* App nos 45312/11, 45581/11, 45583/11, 45587/11 and 45588/11 (ECtHR, 13 November 2012) (concerning divergent court rulings on pension reduction; no violation of Articles 6 and 14); *Mihăieş and Senteş v Romania* App nos 44232/11 and 44605/11 (ECtHR, 6 December 2011) (concerning a temporary salary reduction; no violation of Article 1 of the First Added Protocol to the ECHR); *Maggio and Others v Italy* App nos 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08 (ECtHR, 31 May 2011) (concerning the method of calculation of old-age pensions); *Stefanetti and Others v Italy* App nos 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10 (ECtHR, 15 April 2014) (the circumstances of the case are analogous to those described in *Maggio and Others v Italy*, but the applicants in *Stefanetti and Others v Italy* had suffered a 67% loss of their respective pensions).

194 See the decisions of 23.5.2012 *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* collective complaints nos 65-66/2011 (concerning 'special apprenticeship contracts' with workers aged 15-18 and the reduction in the minimum wage for young workers); and of 7.12.2012 *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*, *Panhellenic Federation of Public Service Pensioners (POPS) v Greece*, *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece*, *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* collective complaints nos 76-80/2012 (concerning a reduction in holiday, Christmas and Easter bonuses; pension cuts; a levy entitled 'the pensioners' solidarity contribution'; and a reduction in the social solidarity benefit paid to private sector pensioners).

195 See Case No 2820 (Greece) – Complaint date: 21-OCT-2010, *Greek General Confederation of Labour (GSEE), Civil Servants' Confederation (ADEDY), General Federation of Employees of the National Electric Power Corporation (GENOP–DEI–KIE) and Greek Federation of Private Employees (OIYE) supported by the International Confederation of Trade Unions (ITUC)*; International Labour Office Governing Body 313th Session, Geneva, 15-30 March 2012, 'Reports of the Committee on Freedom of Association: 363rd Report of the Committee on Freedom of Association' GB.313/INS/9. I am grateful to Ioannis Katsaroumpas for providing this material.

196 See, e.g., United Nations Human Rights Office of the High Commissioner, 'Greece: UN Expert to Assess Impact of Financial Crisis and Structural Adjustment' (Geneva, 26 November 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16808&LangID=E> accessed 22 October 2016; UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, Report Mission to Greece (22-27 April 2013) to the UN Human Rights Council 25th Session, 11 March 2014 (A/HRC/25/50/Add.1) <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-50-Add1_en.doc> accessed 27 October 2016.

that 'there are interesting indications that the crisis has fostered an opening to a broader range of sources'.[197] They add that:

> In a comparative perspective it is important also to underline that different avenues of challenge are available depending on the opportunity structures created by national rules on constitutional challenges as well as the international human rights channels accepted by different states. […] Nonetheless, the availability of a channel is a necessary but not a sufficient condition for its utilisation…[198]

Again, this does not mean that applicants were successful in all cases, the point made here being that they were afforded with the opportunity to put their case before a national court or an international court or body. This does not hold true for all jurisdictions: for example, the Supreme Court of Cyprus declined jurisdiction when asked to assess the legality of the Cypriot banking sector restructuring.[199]

Addendum: Protecting human rights in times of economic crisis

The preceding discussion naturally prompts inquiry as to the respective role of Courts, Executives and Legislators in safeguarding human rights in times of economic crisis. This is clearly very challenging terrain, and it might therefore be useful to first focus on foundational matters and shift the attention to more detailed issues thereafter.

It is almost trite to say that economic policy measures (austerity or otherwise) can have massive repercussions for human rights (notably, social and labour rights). Given

197 Claire Kilpatrick and Bruno De Witte (n 1) 4.

198 ibid 5.

199 Supreme Court of Cyprus Case No 551/2013 *Christodoulou v Central Bank of Cyprus*, discussed in Anastasia Karatzia, 'An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States' in Marcel Szabó and others (eds), *Hungarian Yearbook of International and European Law 2016* (Eleven Publishing 2017) ch 34.

'the indivisibility, interdependence and interrelatedness of human rights, other human rights also are threatened in this process'.[200] 'The whole spectrum of human rights has been affected',[201] though scholarly attention naturally centres on seminal court rulings and emblematic cases of regression in the enjoyment of human rights.

It is perhaps equally trite, yet arguably very important, to stress that human rights obligations still bite at times of economic crisis. Economic exigency does not somehow give a carte blanche to Governments to violate human rights. 'Economic policy is not exempt from the duty of member states to implement human rights norms and procedural principles.'[202] 'As embodied in international human rights law, civil, political, economic, social and cultural rights are not expendable in times of economic hardship, but are essential to a sustained and inclusive recovery.'[203] As such, any infringements of rights would have to be justified.

It does not take a lawyer to recognise that 'some adjustments in the implementation of some Covenant rights [or indeed other rights] are at times inevitable'.[204] This has been the daily reality of millions of people across Europe since the onset of the crisis. The question is how one should go about justifying such measures

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200 Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.

201 Council of Europe Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis' (November 2013) <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2664103&SecMode=1&DocId=2215366&Usage=2> accessed 4 August 2016, 7.

202 ibid 7.

203 ibid 7.

204 Letter by the Chairperson of the Committee on Economic, Social and Cultural Rights (n 200).

or indeed –from the perspective of Courts– what the appropriate test and standard of review are. The Council of Europe Commissioner for Human Rights notes that:

> Human rights standards do not represent precise policy prescriptions. Economic policy in times of crisis requires a complex decision-making calculus, and governments enjoy a margin of discretion in choosing the means for safeguarding rights in times of economic constraint which best fit their circumstances. Nonetheless, human rights and equality do provide a universal normative framework and operational red lines within which governments' economic and social policies must function.[205]

Having regard to human rights in order to prioritise cuts is easier said than done. The Council of Europe Commissioner for Human Rights has made a wealth of recommendations in this respect, such as timely access to key information; the use of disaggregated social indicators to measure the cumulative effects of austerity on different population groups; setting up channels for social dialogue and citizen participation, in addition to periodic elections; the systematic conduct of human rights and equality impact assessments of social and economic policies and budgets; stepping up the combat against racism and discrimination, also by means of positive measures in favour of disadvantaged groups; protecting the minimum core levels of economic and social rights at all times; and guaranteeing the right to decent work.[206] He has further suggested that States 'regulate the financial sector in the interest of human rights', notably by means of promoting transparency, penalising harmful practices, and not wasting '[v]ital public

[205] Council of Europe Commissioner for Human Rights (n 201) 8. See also Letter by the Chairperson of the Committee on Economic, Social and Cultural Rights (n 200).

[206] Council of Europe Commissioner for Human Rights (n 201) 9-10, recommendations 1-5.

funds … to rescue financial institutions that engage in short-sighted and irresponsible practices'.[207]

An interesting aspect of the Council of Europe issue paper is that the Commissioner rightly points out that it does not just fall on States on the brink of insolvency to safeguard human rights. The official sector, too, could be said to bear human rights obligations under international law instruments:

> Member States should consider the human rights impacts of their decisions taken within international and European institutions of economic governance. Governments have a responsibility to demonstrate that their decisions prioritise, and at the very least do not impede, the realisation of human rights.[208]

This sentiment is echoed by the Chairperson of the Committee on Economic, Social and Cultural Rights, who argues that 'international cooperation is a fundamental obligation for the progressive universal realization of economic, social and cultural rights'.[209] In this connection, States should, says the Chairperson, 'respect their obligations in relation to economic, social and cultural rights when making decisions, including on official development assistance, in international financial institutions, such as the World Bank, the International Monetary Fund, regional financial institutions and regional integration organizations'.[210] The EU is one of them.

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207 ibid 10, recommendation 6.

208 ibid 10, recommendation 7.

209 Letter by the Chairperson of the Committee on Economic, Social and Cultural Rights (n 200).

210 ibid.

The Council of Europe Commissioner for Human Rights further notes that '[s]ystematic dialogue, consultation and co-operation should be promoted between authorities and civil society to make budgeting and austerity measures more effective and tailor them to existing needs'.[211] 'Governments must guarantee effective access to justice during economic downturns', which can be 'enhanced through public interest litigation and simplified and less costly procedures'.[212] A 'rights-based approach' should permeate the workings of 'public administration at all levels', including 'the formulation of economic policies and budgeting', in order to 'ensure that human rights and equality duties are taken into account in responses to the economic crisis'.[213] In this connection, 'Member States should consider the adoption of a national action plan for human rights to increase the effectiveness of, and participation in, human rights work while identifying priorities for addressing the effects of the crisis on enjoyment of human rights'.[214]

Moreover, 'Member states should strengthen the effectiveness and independence of [national human rights structures], such as ombudsmen, national human rights commissions and equality bodies, which can protect people in an accessible way against infringements of human rights resulting from austerity'.[215] Governments are further enjoined to consult such bodies prior to making decisions on austerity measures and the

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211 Council of Europe Commissioner for Human Rights (n 201) 10-11, recommendation 8.

212 ibid 11, recommendation 9.

213 ibid 11, recommendation 11.

214 ibid 11, recommendation 11.

215 ibid 11, recommendation 12.

budget, so that they 'benefit from their expert advice on human rights and equality, and the groups that need the most protection'.[216]

What then of the requirements that such economic policy measures have to meet so that they be allowed by Courts to stand? There is rich debate on the interplay between social rights and economic policy conditionality, but exigencies of space preclude detailed analysis of this.[217] Instead we will highlight certain themes which are of particular importance. For one, the Chairperson of the Committee on Economic, Social and Cultural Rights notes that:

> In such cases, the Committee emphasizes that any proposed policy change or adjustment has to meet the following requirements: first, the policy must be a temporary measure covering only the period of crisis. Second, the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Third, the policy must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected. Fourth, the policy must identify the minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times.[218]

I assume that the reference to the temporary nature of crisis-related measures should be taken to mean that '[f]unding levels have to be restored when more resources

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216 ibid 11-12, recommendation 12.

217 For further references, see Claire Kilpatrick (n 5); Jeff King, *Judging Social Rights* (CUP 2012).

218 Letter by the Chairperson of the Committee on Economic, Social and Cultural Rights (n 200).

become available'.[219] It should not be taken to mean that a Member State cannot pursue an 'effective and lasting correction' of the public deficit, as mandated by EU rules.

As regards the proportionality requirement, most measures that did not survive scrutiny fell on this hurdle. The problem here is that in most cases the Executive argues that failure to act would be *more detrimental* to the enjoyment of rights, as the State or banks or indeed other financial institutions would become insolvent. I see the case law of the Greek Council of State (as well as the recommendations of the Council of Europe Commissioner for Human Rights) requiring the Executive to provide an assessment of the effects of the proposed measure on austerity-hit citizens and the budget as an effective way to ensure compliance with the principle of proportionality. This study, together with the use of social indicators and human rights/equality impact assessments, should ensure that Executives do not just claim in Court that 'there is no alternative' or that the effects on citizens are not detrimental, but that they see to it that their fundamental rights obligations are observed. To use the words of Catherine Barnard, 'there is a risk to this exercise becoming merely a "filing-cabinet" exercise, prompting a politically correct paper trail'.[220] But Courts 'would surely be wise to this',[221] as evidenced by the stance of the Greek Council of State whenever the Government adduced studies which merely consisted of general assertions not strictly related to the issue at hand. We cannot and should not generalise the experiences of one Court, but this is, in my opinion, the way to go.

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219 Council of Europe Commissioner for Human Rights (n 201) 9, recommendation 2.

220 Catherine Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Legal Studies Research Paper 18/2013, 15.

221 ibid 15.

The twin requirement that groups be not discriminated against and that other measures be enacted to mitigate the disparate impact (if any) of such measures is fairly uncontroversial. The problem is that there might not be available fiscal space or that Governments might not even be sure how to mitigate such inequalities. Further, there might be reasonable disagreement as to 'the minimum core content of rights' or 'social protection floor', and it is nevertheless somewhat problematic if a large number of citizens are only protected against extreme poverty and destitution. To be fair, one of the few positive contributions of the 'notorious' Troika on this front was its insistence that a minimum guaranteed income be legislated in Greece. But that would have to be funded from somewhere.

We need however to press beyond statements of this generality, if this part of the thesis were to be of any value to judges, lawyers and litigants in the Member States. I proceed to make seven distinct, albeit interrelated, claims about rights-based review of economic policy measures, notably in times of crisis.

1. Courts should not substitute their own assessment of the economic and fiscal situation for that of the Executive (or Parliament). Unless the latter is vitiated by a manifest error of assessment, Courts should use it as a basis for their assessment of the legality of the contested measures.
2. This proposition is predicated on the assumption that the Legislators and/or administrative decision-makers have applied their mind and expertise to the problem at hand. If the Legislature and/or the Executive has not focused on the issue, or in cases where there is a clear failure of expertise, there can be no case for deference, other than preserving as much latitude of judgment as possible for the primary decision-maker.
3. Courts should be in a position to check the compatibility of the impugned cuts with the constitution and human rights instruments. For example, there can be no 'fair balance' between the requirements of the general interest and the protection of the rights of the individual, if the 'minimum core' of such rights is violated. Depending on the substantive content of the constitution concerned, other possible grounds for annulment or invalidation of the

contested cuts could be proportionality, the rule of law, the equality principle, the right to property, social rights, and so on.

4. Unless provided otherwise by the constitution concerned, Courts should not substitute their own economic policy mix for the choices made by the Government and Parliament. In those cases where the constitution does not opt for a specific economic model (or when that model is, as it would be in most cases, rather 'accommodating' to a plethora of possible measures), Courts should defer to the choice of measures made by elected politicians to combat the crisis. To be sure, those measures could still be in breach of the constitution (e.g., they could violate the proportionality or equality principle). The point here is that Courts should not say something along the lines of 'you shouldn't have raised taxes, because you could have cut public expenditure' and vice versa.[222]

5. Courts are more likely to interfere with 'micro-level' reforms, where the impact of a court ruling can be relatively modest. The more 'macro-level' the nature of the reform, the less likely it is that Courts will seek to upset the plans of Government. This makes good sense, as judges are called upon to adjudicate complex or polycentric problems, with considerable uncertainty about the consequences following from a ruling of unconstitutionality.

6. When the applicable legal standard speaks clearly to the resolution of the dispute at issue, judges should not be invited to look the other way or to exercise restraint in light of the allocative impact of the court's ruling. Deference in constitutional or social rights adjudication is not meant to undo the law. In such cases, there could perhaps be some scope for suspending the effect of a remedy, or looking for other ways or techniques to preserve some latitude of judgment for the primary decision-maker. By way of example, a constitutional provision limiting retrospective taxation (as is Article 78(2) of the Greek Constitution) is either violated or is not.[223] The point is simply that Government cannot violate the constitution and then invoke the huge allocative impact that a court finding of such a violation might or might not have, so as to escape the consequences of illegality.[224] To draw on Jeff King's theory of incrementalism: 'Incrementalism and the principles of restraint, on this view, cannot dispense with the rule of law. They remain a supplementary guide to its interpretation.'[225]

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222 This does not hold true when further cuts would jeopardise the enjoyment of the minimum core of such rights or indeed the protection of human dignity.

223 See the 'notorious' Greek Council of State (Plenary Session) Decision No 1685/2013 (concerning the compatibility of the 'exceptional surcharge' with the constitutional prohibition of retrospective taxation).

224 See also Jeff King (n 217) 293-94, 319-20.

225 ibid 321.

7. Courts can and should be more intrusive in their review of economic and social policy measures in those cases where the contested measures were rushed through Parliament or adopted by means of emergency laws.[226]

Conclusion

This chapter has focused on review of economic, monetary and fiscal policy measures by national courts. We have seen that the quality of a Member State as borrower or lender State has largely conditioned the types of challenge that were brought before its courts. Accordingly, courts in lender States were preoccupied with challenges brought against financial mechanisms set up for the purposes of providing assistance to crisis-hit States, with litigants arguing that their impact on the principle of democracy, national sovereignty, budgetary autonomy and parliamentary prerogatives went beyond what was permissible by the constitution. This was evidenced by the cases examined from Germany, Estonia, and Finland. Other crisis-induced measures, such as the Fiscal Compact and the revised EU economic governance framework, were also beset with similar legal challenges, as evidenced by the experience in Germany, France, and Finland.

On the other hand, courts in borrower States were primarily preoccupied with rights challenges brought against measures forming part of bailout packages or national economic recovery programmes. We reviewed the case law of the Greek Council of State in great detail, but the reader should bear in mind that such challenges were of course not confined to Greece. Similar (sometimes near-identical) disputes were adjudicated by courts in Portugal, Spain, Latvia, and Romania. Austerity measures were also challenged

[226] See also Claire Kilpatrick (n 5) 19-20.

in *lender* States, as evidenced by the cases from Italy and France that were mentioned above.

The material examined in this chapter shows that social rights (or, more broadly speaking, fundamental rights and other constitutional guarantees) *did* make a difference at the Member State level. There are very many examples of national courts striking down economic or fiscal policy measures on grounds of their incompatibility with the constitution. If anything, the concern in some cases was, as we saw in Chapter 3, that Greek courts, for example, might have gone too far in protecting private persons against the effects of austerity measures. Similar arguments were made with respect to cases from the Portuguese Constitutional Court. In my opinion, a more nuanced approach might be warranted, in that each case should be judged on its merits, meaning that it is exceptionally hard to generalise a feeling stemming from one or a couple of cases and to apply it across the board to a vast array of different cases. Insofar as it could be said to be true that courts in Member States might have vindicated applicants in cases where this was not 'warranted', it is equally true that those courts did not strike down measures which, according to the argument, should have perhaps been struck down. The reality is far more nuanced, and it bears mentioning that judgments which upheld the legality of the impugned measures normally do not attract as much scholarly attention.

Litigants who were not able to see a glimpse of legal light in national courts took their cases to international courts and bodies. We have seen that crisis-related measures were put to the test by the European Court of Human Rights and the European Committee of Social Rights. Again, this is not quite the same as review by EU courts, which were not, as we saw in Chapter 6, equally 'dangerous', but it does provide

additional avenues for austerity-hit litigants to challenge the legality of various cuts. The complimentary nature of such mechanisms might even create pressure on national judges to think long and hard before kicking the can down the road or upholding the legality of the impugned measures.

Notwithstanding the force of the preceding argument, it is true that defence of the EU's values was sometimes left to non-EU bodies.[227] The EU's predicament flies in the face of core rule of law values, such as 'effective judicial review including respect for fundamental rights',[228] and the legitimacy of the EU is undermined. Even the existing EU mechanisms for monitoring compliance with fundamental rights were not put into use.[229] This is not an anti-austerity critique hidden under the cloak of fundamental rights. The point here is simply that persons affected by the implementation of bailout programmes should be given the opportunity to put their substantive case before a court, and that EU institutions, bodies, offices, and agencies should see to it that EU-coordinated bailouts respect the values on which the EU is based. National courts have been largely carrying the torch for EU courts thus far.

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227 See Article 2 TEU.

228 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (Brussels, 19 March 2014) COM(2014) 158 final/2, 4. See also Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, paras 38-39; Joined Cases C-402/05 P and C-415/05 P (Grand Chamber) *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, para 316.

229 Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis' (2016) 22 ELJ 61.

CHAPTER EIGHT: CONCLUSION

The thesis has thus far examined the revised EU economic governance framework (Chapter 2) and its implications for national economic policy (Chapter 3); the accountability and transparency arrangements in EU economic governance (Chapter 4) and the Banking Union (Chapter 5); and review of economic and monetary policy measures by the EU and national courts (Chapters 6 and 7 respectively). There are at least two themes that are playing out in this entire doctoral thesis. First, the extent of reform in the area of EMU and the concomitant transfer of powers from the national to the EU (and other non-EU) authorities have only partially been matched by increased democratic controls and robust accountability mechanisms. Second, the job of reforming the EMU is not yet finished, and we have not yet created a lasting structure for the EMU.

Looking forward, there are two questions over the future of Economic and Monetary Union (including the Banking Union, as well as financial regulation and supervision more broadly). Should there be more or less integration? And how to make the (existing or reformed) EMU more democratically legitimate?

To begin with the former question, carrying on with the status quo, which is indeed scenario 1 in the Commission's White Paper on the Future of Europe, should be regarded in my opinion as necessitating more integration, insofar as this option connotes 'incremental progress on improving the functioning of the single currency'.[1] 'Nothing but the single market' (scenario 2) is not really an option for EMU, the whole point of which is moving beyond the single market in terms of economic

[1] European Commission, 'White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025' COM(2017)2025 (1 March 2017) <ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf> accessed 14 April 2017, 16.

integration.[2] This strategy could be taken, however, to signal economic disintegration. Enhanced cooperation (Scenario 3: Those who want more do more) would mean more (but differentiated) integration;[3] 'doing less more efficiently' (scenario 4) seems to connote a peculiar mix of both more and less integration;[4] and 'doing much more together' (scenario 5) clearly means more integration in EMU.[5]

As regards the question of democratic legitimacy, there are those who equate democracy with a national demos; a European demos; or many demoi. If one is concerned about the disconnection between the locus of power and the locus of political life in Europe, it is indeed possible to argue for less integration in the area of EMU or more generally in the EU. As more powers are transferred from the national to the EU level, the fact remains that the demos is mainly domestically constituted, and those who are concerned about the democratic credentials of the EU might indeed opt for the repatriation of some EU powers to the national level.[6] On the other hand, it is also possible to argue for more democratic politics at the level of the EU, thereby complementing legitimacy intermediation by the Member States with democratic controls at the centre. This is all the more so if the economic crisis is viewed as an opportunity to bring us closer together. A fully-fledged political union would, in this view, be desirable, but clearly does not yet exist. A blend of national and European democratic controls seems more plausible. The theorists of demoicracy argue in favour of 'respecting the integrity of *national* democracies, enhancing *transnational*

2 ibid 18-19.

3 ibid 20-21.

4 ibid 22-23.

5 ibid 24-25.

6 Fritz Scharpf, 'The Costs of Non-Disintegration: The Case of the European Monetary Union' in Damian Chalmers and others (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (CUP 2016) ch 2.

democracy, or the demoi commitment to their common 'cratos', and constraining the *supranational* locus of democracy through genuine politics'.[7]

In my opinion, more integration is required for an economically and socially sustainable EMU. Admittedly, there are path dependencies created by the measures adopted thus far to deal with the crisis, but I believe that these measures were adopted at the height of the crisis for broadly sound reasons. The reforms proposed here concern both the input and output legitimacy of the EU. The discussion begins with measures intended to 'complete' and 'deepen' the EMU, as a discussion on democratic legitimacy needs to begin with what needs to be legitimated.

Starting with the economic pillar of EMU, a well-functioning currency area with a multi-level economic and fiscal governance needs to address three key challenges: ensuring fiscal discipline; addressing structural imbalances or inequalities; and countering asymmetric shocks.[8] In cases of 'involuntary non-compliance' with the EU's rules and recommendations, where a Member State lacks the capacity to comply with a given rule or the bailout terms,[9] the EU could bolster fiscal discipline and counter asymmetric shocks more effectively by:

- the provision of technical assistance to Member States which are implementing structural reforms; and

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7 Kalypso Nicolaidis and Max Watson, 'Sharing the Eurocrats' Dream: A Demoicratic Approach to EMU Governance in the Post-Crisis Era' in Damian Chalmers and others (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (CUP 2016) ch 3, 57.

8 Alicia Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU' (2013) 50 CML Rev. 1621, 1622-24.

9 Fabian Amtenbrink and René Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU' in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP 2017) ch 9.

- creating a fiscal stabilisation function for the Euro area 'to better deal with shocks that cannot be managed at the national level alone'.[10] This Euro area stabilisation function 'should improve the cushioning of large macroeconomic shocks and thereby make EMU overall more resilient.[11]

Further, in the absence of powerful fiscal tools at the centre as well as a 'more binding' convergence process, the burden for addressing structural and regional imbalances falls for the moment on:

- the EU's structural and regional funds; and
- the Macroeconomic Imbalance Procedure (MIP) and the proposed Euro area system of Competitiveness Authorities.[12]

The setting up of national competitiveness authorities and fiscal councils responds to 'a need to strengthen domestic institutions so that both systemic stability risks and externalities – including those arising from interdependency under EMU – are better internalized'.[13]

As regards financial regulation and supervision, I regard the following key reforms as necessary for a sustainable EMU:

- completing the Banking Union, with a common backstop to the Single Resolution Fund (e.g., through a credit line from the ESM) and a European Deposit Insurance Scheme (EDIS);[14]

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10 Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (22 June 2015) <https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf> accessed 14 April 2017 (Five Presidents' Report) 14.

11 ibid 14.

12 ibid 7-8.

13 Kalypso Nicolaidis and Max Watson (n 7) 70-71.

14 Five Presidents' Report, 11.

- strengthening the role and powers of the European Systemic Risk Board (ESRB) and the European Supervisory Authorities (ESAs), which are responsible for macroprudential and microprudential supervision respectively;[15] and
- making progress towards a Capital Markets Union, which 'would also provide a buffer against systemic shocks in the financial sector and strengthen private sector risk-sharing across countries'.[16]

Addressing the yawning legitimacy gap in EMU governance is a task which cannot easily be disentangled from wider efforts to address the EU's democratic deficit. This is not to say that the Euro crisis has not exacerbated the legitimacy problems facing the EU. There is, however, a degree of commonality between the challenges facing the EMU as a specific policy area and those facing the EU more generally. Moreover, the efforts to bolster transparency and accountability in the workings of EMU are perforce embedded in a socio-political context characterised by lack of a European demos and a disjunction between political power and electoral accountability. The efforts to enhance the democratic legitimacy of the EMU governance framework are critically dependent on the socio-cultural underpinnings of the integration project as well as the existing Treaty framework. Consequently, there are limits to the extent to which democratic legitimacy can be engineered into existence.[17]

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15 ibid 12.

16 ibid 12.

17 For a view on this, see Peter Lindseth, 'National Parliaments and Mediated Legitimacy in the EU: Theory and History' in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (OUP 2017) ch 3, 41-44.

The principal default line is between those reforms on the 'input side' that could be achieved without a Treaty revision; and those reforms that would indeed require a comprehensive Treaty revision. Starting with the former, I have argued in Chapters 4 and 5 that the following reforms could bolster transparency and accountability in the workings of EMU (including the Banking Union):

- carrying out impact assessments prior to the adoption of key legislative instruments;
- engaging the EU Fundamental Rights Agency in the efforts to combat the crisis;[18]
- enhancing citizen participation through online consultation exercises;
- more transparency in the workings of the Eurogroup and the Eurogroup Working Group (EWG), in the manner explained in Chapter 4;
- more transparency in the operations of the European Stability Mechanism (ESM) bodies, as argued by Transparency International EU (2017);[19] and
- greater supervisory data transparency for banks.[20]

Though not a reform in a strict sense, I would further caution against an unduly narrow interpretation of the (complex) rules governing access to information in the area of Banking Union, which were examined in Chapter 5 of the thesis.[21]

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18 Alicia Hinarejos, 'A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis' (2016) 22 ELJ 61.

19 Transparency International EU, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) <transparency.eu/wpcontent/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> accessed 7 April 2017.

20 Christopher Gandrud and Mark Hallerberg, 'Does Banking Union Worsen the EU's Democratic Deficit? The Need for Greater Supervisory Data Transparency' (2015) 53 JCMS 769; Christopher Gandrud and others, 'The European Union Remains a Laggard on Banking Supervisory Transparency' (10 May 2016) <http://bruegel.org/2016/05/the-european-union-remains-a-laggard-on-banking-supervisory-transparency/> accessed 16 April 2017.

21 A new study by Transparency International EU focuses sharply on the ECB: Transparency International EU, 'Two Sides of the Same Coin? Independence and Accountability of the

The thesis has focused less on more far-reaching reforms of EMU which would require an amendment of the EU Treaties, as this option does not seem to be immediately available. For example, incorporating all the intergovernmental agreements that were used to reform the EMU into the EU law framework would require, in the author's opinion, a comprehensive Treaty revision as well as various amendments to EU secondary law. The ESM should be transformed into an EU institution within the meaning of Article 13 TEU, in order to avoid a replication of the complex, byzantine governance structures that currently obtain in the Banking Union. As regards the ESM's governance structures upon its suggested incorporation into the EU Treaties, I believe that there should be more equality between large and small Member States in the ESM's decision-making processes or indeed that the ESM should be 'supranationalised'.

In the future, the supervisory function may be institutionally separated from the monetary function of the ECB and conferred on a new EU institution.[22] The Single Resolution Board, which would also manage – according to the Commission's proposal – the EDIS,[23] could also perhaps be turned into an EU institution, though I suspect that the Member States would wish to keep its current EU agency form (coupled with the intergovernmental agreement on the transfer of contributions to the Fund) so as to maximise political control over its activities. They might still, however, need to give more financial power to the Single Resolution Fund, as its current

European Central Bank' (2017) <https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf> accessed 16 April 2017.

22 See the discussion in Menelaos Markakis, 'Political and Legal Accountability in the European Banking Union: A First Assessment' in Marcel Szabó and others (eds), *Hungarian Yearbook of International and European Law 2016* (Eleven Publishing 2017) ch 32.

23 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme COM/2015/0586 final – 2015/0270 (COD).

financial strength is insufficient. Furthermore, a Treaty revision would constitute an opportunity to address the position of non-Euro area Member States participating in the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).

The role of EU courts in the EMU's dealings with the crisis is also circumscribed by wider restrictions which are written down in the Treaties (notably, with respect to the informal nature of Euro area bodies and standing for non-privileged applicants). The only glimpse of legal light has thus far come from *Ledra Advertising*,[24] though it is not yet crystal clear what the respective obligations of the ECB and Commission in the ESM framework are; or whether *all* EU law (and not just the EU Charter) is applicable on their activities in the ESM. Incorporating the existing intergovernmental agreements into the EU Treaties would in principle expand the role of EU courts in this area, unless it was coupled with explicit restrictions on their jurisdiction in an AFSJ fashion. Pending such incorporation, litigants would have to rely on formally binding secondary EU law instruments (when these exist). In this connection, it is not yet clear what the impact of 'two-pack' legislation on judicial control of the bailout conditions will be.

It is not, however, inconceivable that the Member States might opt to keep the ESM outside the fabric of the EU. An alternative strategy to increase legal (and political) accountability would be to give a formal nature to the Eurogroup and the Euro Summit. The Eurogroup could, for example, become a Council configuration or a separate EU institution. To be sure, there would still be loopholes in fundamental rights protection (as well as accountability and transparency) with respect to the decisions of ESM bodies. However, the principle of supremacy would go a long way

[24] Joined Cases C-8/15 P to C-10/15 P (Grand Chamber) *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C:2016:701.

in addressing these concerns, as the MoU signed with the ESM would not take precedence over formal EU law measures. Furthermore, the Euro area bodies are – with their current composition – very much 'joined at the hip' with the ESM bodies.

A final note on 'optimism vs pessimism' in EU affairs. Rightly or wrongly, the Euro crisis and the problems facing crisis-hit countries are often used as an argument against the EU or against EU membership. Reforming the EMU would bolster the EU's legitimacy more broadly. I remain optimistic that this can be achieved. It would, however, be a tall order, and it should not be forgotten that the EU is currently facing multiple – one would say existential – crises. Moreover, there will no doubt be another economic crisis at some point in the future, which would probably stem from a source of systemic risk which has thus far gone unnoticed or is not properly kept in check (e.g. the shadow banking sector, digital currencies, and so on). For want of better words, let us finish with the words of Albert Camus which very much echo my own sentiments: 'Each generation doubtless feels called upon to reform the world. Mine knows that it will not reform it, but its task is perhaps even greater. It consists in preventing the world from destroying itself.'[25] This is an apt metaphor for the EU.

[25] Albert Camus' speech at the Nobel Banquet at the City Hall in Stockholm, December 10, 1957.

BIBLIOGRAPHY

Books and articles

Alcidi C and others, 'Enhancing the Legitimacy of EMU Governance' (2014) CEPS Special Report 98/2014 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2561211> accessed 3 March 2015.

Amtenbrink F, 'On the Legitimacy and Democratic Accountability of the European Central Bank: Legal Arrangements and Practical Experiences' in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) ch 9.

Amtenbrink F and Van Duin K, 'The European Central Bank before the European Parliament: Theory and Practice After Ten Years of Monetary Dialogue' (2009) 34 E.L. Rev. 561.

Amtenbrink F, 'The Metamorphosis of European Economic and Monetary Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015) ch 28.

Amtenbrink F and Repasi R, 'Compliance and Enforcement in Economic Policy Coordination in EMU' in András Jakab and Dimitry Kochenov (eds), The Enforcement of EU Law and Values: Ensuring Member States' Compliance (OUP 2017) ch 9.

Angeloni I, 'Rethinking Banking Supervision and the SSM Perspective' (Fiesole, 23 April 2015) <www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150423.en.html> accessed 30 July 2016.

Antoš M, 'Fiscal Stability Rules in Central European Constitutions' in Maurice Adams and others (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 10.

Armstrong K, 'The New Governance of EU Fiscal Discipline' (2013) 38 E.L. Rev. 601.

Arons T, 'Judicial Protection of Supervised Credit Institutions in the European Banking Union' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) ch 13.

Bándi G, Darák P, Halustyik A and Láncos P L (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016).

Baratta R, 'Legal Issues of the "Fiscal Compact": Searching for a Mature Democratic Governance of the Euro' (2012 EUDO Dissemination Conference, Florence,

November 2012) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2196998> accessed 2 March 2015.

Barnard C, 'The Charter in Time of Crisis: A Case Study of Dismissal' in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (OUP 2013).

Barnard C, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Faculty of Law Legal Studies Research Paper 18/2013.

Barnard C, *The Substantive Law of the EU: The Four Freedoms* (4th edn, OUP 2013).

Bekker S and Palinkas I, 'The Impact of the Financial Crisis on EU Economic Governance: A Struggle between Hard and Soft Law and Expansion of the EU Competences?' (2012) 17 Tilburg Law Review 360.

Bekker S, 'The EU's Stricter Economic Governance: A Step Towards More Binding Coordination of Social Policies?' (2013) WZB Working Paper SP IV 2013-501 <bibliothek.wzb.eu/pdf/2013/iv13-501.pdf> accessed 30 September 2014.

Bell N, Love P, Markakis M, Oringer E and Stern K, 'Ensuring the Accountability of the Eurozone Treasury' (2016) 2 Review of European and Transatlantic Affairs 7.

Beukers T, 'Constitutional Changes in Euro Government and the Relationship between the ECB and the Executive Power in the Union' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) ch 6.

Bieber R, 'Observer – Policeman – Pilot? On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the European Union' EUI Working Paper LAW 2011/16.

Buiter W, 'Alice in Euroland' (1999) 37 JCMS 181.

Busch D, 'Governance of the Single Resolution Mechanism' in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) ch 9.

Chalmers D, 'Crisis Reconfiguration of the European Constitutional State' in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (CUP 2016) ch 11.

Chiti E and Teixeira P G, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CML Rev. 683.

Chiu I H-Y, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability' (2015) 8 EJLS 67.

Claeys G, Hallerberg M and Tschekassin O, 'European Central Bank Accountability: How the Monetary Dialogue Could Evolve' (March 2014) Bruegel Policy Contribution Issue 2014/04.

Contiades X, ‘Introduction: The Global Financial Crisis and the Constitution’ in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013).

Contiades X and Fotiadou A, ‘Constitutional Reactions in Comparative Perspective: How Constitutions React to the Financial Crisis’ in Xenophon Contiades (ed), *Constitutions in the Global Financial Crisis: A Comparative Analysis* (Ashgate 2013) ch 1.

Craig P and de Búrca G, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011).

Craig P, ‘Integration, Democracy, and Legitimacy’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) ch 2.

Craig P, *EU Administrative Law* (2nd edn, 2012).

Craig P, ‘Subsidiarity: A Political and Legal Analysis’ (2012) 50 JCMS 72.

Craig P, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 E.L. Rev. 231.

Craig P, ‘Two-Speed, Multi-Speed and Europe’s Future: A Review of Jean-Claude Piris on the Future of Europe’ (2012) 37 E.L. Rev. 800.

Craig P, ‘Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications’ (The Constitutionalization of European Budgetary Constraints: A Comparative and Interdisciplinary Perspective conference, Tilburg, May 2013).

Craig P, ‘*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance’ (2013) 9 EuConst 263.

Craig P, ‘The Nature of Reasonableness Review’ (2013) 66 Current Legal Problems 131.

Craig P, ‘Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications’ in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 2.

Craig P, ‘The Financial Crisis, the EU Institutional Order and Constitutional Responsibility’ (2014) Oxford Legal Studies Research Paper 1/2015 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2517434> accessed 2 May 2015.

Craig P and de Búrca G, *EU Law: Texts, Cases, and Materials* (6th edn, OUP 2015).

Craig P, ‘The Financial Crisis, the EU Institutional Order and Constitutional Responsibility’ in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone* (Hart Publishing 2015) ch 2.

Craig P, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015).

Craig P and Markakis M, '*Gauweiler* and the Legality of Outright Monetary Transactions' (2016) 41 ELRev 4.

Craig P, 'The Eurogroup, Political Power and Accountability' (Governing Finances in Europe: Shifting Regimes and Shifting Powers conference, Uppsala, 27-28 May 2016).

Craig P and Markakis M, 'The Euro Area, its Regulation and Impact on Non-Euro Member States' in Panos Koutrakos and Jukka Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) ch 14.

Curtin D and Mendes J, 'Article 42 – Right of Access to Documents' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014).

Curtin D, 'Democratic Accountability of EU Executive Power: A Reform Agenda for Parliaments' in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) ch 10.

Davies G, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev. 63.

Dawson M, 'The Legal and Political Accountability Structure of "Post-Crisis" EU Economic Governance' (2015) 53 JCMS 1.

De Gregorio Merino A, 'Institutional Report' in Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016).

De Haan J and Gormley L, 'The Democratic Deficit of the European Central Bank' (1996) 21 E.L. Rev. 95.

De Streel A, 'EU Fiscal Governance and the Effectiveness of its Reform' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 5.

De Witte B, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 EuConst 434.

Deakin S, 'The Evolution of Theory and Method in Law and Finance' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) ch 1.

Delledonne G, 'A Legalization of Financial Constitutions in the EU? Reflections on the German, Spanish, Italian and French Experiences' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) ch 9.

Dellis G, *Η Διοικητική Δικαιοσύνη σε αναζήτηση ταχύτητας: Ανατρέποντας το μύθο της «ωραίας κοιμωμένης»* (Nomiki Bibliothiki 2013).

Douglas-Scott S, ‘Justice and Pluralism in the EU’ (2012) 65 Current Legal Problems 83.

Douglas-Scott S, *Law After Modernity* (Hart Publishing 2013).

Drosos Y, ‘Yesterday – The Way to Forget about Tomorrow: The Greek Crisis as a European Case’ (Democracy and the Financial Crisis in Europe conference, Amsterdam, June-July 2015).

Englisch J, Vella J and Yevgenyeva A (now Cédelle), ‘The Financial Transaction Tax Proposal under the Enhanced Cooperation Procedure: Legal and Practical Considerations’ (2013) 2 British Tax Review 223.

European Labour Law Network, ‘Unconstitutionality of Suspension of Holiday and Christmas Allowances for Public Servants and Pensioners – Portuguese Constitutional Court Decision No. 353/2012 (05-07-2012)’ <www.labourlawnetwork.eu/national_labour_law/court_decisions/court_decisions/prm/64/v__detail/id__2281/category__28/size__1/index.html> accessed 23 April 2016.

European Labour Law Network, ‘Constitutional Court Decision No. 413/2014, of 30 May 2014 on Law No. 83-C/2013, of 31 December 2013 (State Budget Law for 2014)’ <www.labourlawnetwork.eu/national_labour_law/national_court_rulings/court_decisions/prm/64/v__detail/id__4535/category__28/index.html> accessed 23 April 2016.

Fabbrini F, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2015).

Fasone C, ‘Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective’ EUI Working Paper MWP 2014/25.

Fasone C, ‘European Economic Governance and Parliamentary Representation. What Place for the European Parliament?’ (2014) 20 ELJ 164.

Ferran E, ‘European Banking Union: Imperfect, But It Can Work’ in Danny Busch and Guido Ferrarini (eds), *European Banking Union* (OUP 2015) ch 3.

Follesdal A and Hix S, ‘Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 JCMS 533.

Galani E, Nanou M and Papathomas A, ‘Επισκόπηση Νομολογίας για τα Θεμελιώδη δικαιώματα στην Οικονομική κρίση’ Θεωρία και Πράξη Διοικητικού Δικαίου τ. 8-9/2015 (last updated on 13 February 2016).

Gandrud C and Hallerberg M, ‘Does Banking Union Worsen the EU’s Democratic Deficit? The Need for Greater Supervisory Data Transparency’ (2015) 53 JCMS 769.

Gandrud C, Hallerberg M and Véron N, ‘The European Union Remains a Laggard on Banking Supervisory Transparency’ (10 May 2016) <bruegel.org/2016/05/the-european-union-remains-a-laggard-on-banking-supervisory-transparency/> accessed 16 April 2017.

Garben S, ‘Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers’ (2015) 35 OJLS 55.

Gerapetritis G, ‘Europe’s New Deal: A New Version of an Expiring Deal’ (2014) 38 Eur J L Econ 91.

Gerapetritis G, ‘The New Economic Constitutionalism in Europe’ (Oxford, 20 January 2016).

Giscard d’Estaing V, *Europa: La Dernière Chance de l’Europe* (XO 2014).

Gordon J and Ringe W-G, ‘Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take’ (2015) 115 Columbia Law Review 1297.

Grant R and Keohane R, ‘Accountability and Abuses of Power in World Politics’ (2005) 99 American Political Science Review 29.

Haar B, ‘Organizing Regional Systems: The EU Example’ in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) ch 6.

Hansen S, McMahon M and Prat A, ‘Transparency and Deliberation within the FOMC: A Computational Linguistics Approach’ (2014) Centre for Economic Performance Discussion Paper 1276/2014.

Harlow C, *Accountability in the European Union* (OUP 2002).

Hinarejos A, ‘Fiscal Federalism in the European Union: Evolution and Future Choices for EMU’ (2013) 50 CML Rev. 1621.

Hinarejos A, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015).

Hinarejos A, ‘A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis’ (2016) 22 ELJ 61.

Hinarejos A, ‘Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising’ (EU Law Analysis Blog, 25 September 2016) <eulawanalysis.blogspot.nl/2016/09/bailouts-borrowed-institutions-and.html> accessed 26 September 2016.

Jančić D, ‘National Parliaments and EU Fiscal Integration (2016) 22 ELJ 225.

Karatzia A, ‘An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States’ in Marcel Szabó, Petra Lea Láncos and Réka Varga (eds), *Hungarian Yearbook of International and European Law 2016* (Eleven Publishing 2017) ch 34.

Kilpatrick C and De Witte B, ‘A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone’ (2014) Sieps European Policy Analysis 2014:7.

Kilpatrick C, ‘Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?’ (2014) 10 EuConst 393.

Kilpatrick C, ‘Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry’ (2015) EUI Working Paper LAW 2015/34.

Kilpatrick C, ‘On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe’s Bailouts’ (2015) 35 OJLS 1.

King J, *Judging Social Rights* (CUP 2012).

Kreilinger V, ‘Inter-Parliamentary Cooperation and Its Challenges: The Case of Economic and Financial Governance’ in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015) ch 15.

Kuosmanen J, ‘Taking the Needs of Future Generations into Account: The Case of Wales’ (OxHRH Blog, 20 May 2015) <ohrh.law.ox.ac.uk/taking-the-needs-of-future-generations-into-account-the-case-of-wales/> accessed 6 June 2015.

Lamandini M, Muñoz D R and Álvarez J S, ‘Depicting the Limits to the SSM’s Supervisory Powers: The Role of Constitutional Mandates and of Fundamental Rights’ Protection’ (2015) Quaderni di Ricerca Giuridica della Consulenza Legale 79/2015 <www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2015-0079/index.html?com.dotmarketing.htmlpage.language=1> accessed 25 February 2016.

Lastra R M, ‘Financial Institutions and Accountability Mechanisms’ in Pablo Iglesias-Rodríguez (ed), *Building Responsive and Responsible Financial Regulators in the Aftermath of the Global Financial Crisis* (Intersentia 2015) 31-42.

Lenaerts K, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 EuConst 375.

Lenaerts K, ‘EMU and the EU’s Constitutional Framework’ (2014) 39 ELRev 753.

Lenaerts K, Maselis I and Gutman K, *EU Procedural Law* (OUP 2015).

Lindseth P, ‘National Parliaments and Mediated Legitimacy in the EU: Theory and History’ in Davor Jančić (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (OUP 2017) ch 3.

Lord Carnwath CVO, ‘From Rationality to Proportionality in the Modern Law’ (2014) 44 Hong Kong L.J. 447.

Louis J-V, ‘Democracy and the European Central Bank. Some Comments on Independence and Accountability’ in Gregorio Garzón Clariana (ed), *Democracy in the New Economic Governance of the European Union* (Marcial Pons 2015) 109-50.

Maduro M P, ‘A New Governance for the European Union and the Euro: Democracy and Justice’ (2012) RSCAS Policy Paper 2012/11 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2180248> accessed 3 March 2015.

Maduro M P and others, ‘The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis’ in Miguel Poiares Maduro and others, ‘The Democratic Governance of the Euro’ (2012) RCAS Policy Paper 2012/08 <cadmus.eui.eu/bitstream/handle/1814/23981/RSCAS_PP_2012_08.pdf?sequence=> accessed 3 March 2015.

Majone G, ‘Europe’s “Democratic Deficit”: The Question of Standards’ (1998) 4 ELJ 5.

Majone G, ‘Rethinking European Integration after the Debt Crisis’ (2012) UCL European Institute Working Paper 3/2012 <www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf> accessed 2 March 2015.

Markakis M, ‘European Court of Human Rights Rules on Greek Debt Restructuring’ (OxHRH Blog, 31 July 2016) <ohrh.law.ox.ac.uk/european-court-of-human-rights-rules-on-greek-debt-restructuring/> accessed 10 September 2016.

Markakis M, ‘Political and Legal Accountability in the European Banking Union: A First Assessment’ in Marcel Szabó, Petra Lea Láncos and Réka Varga (eds), *Hungarian Yearbook of International Law and European Law 2016* (Eleven Publishing 2017) ch 32.

Menon A and Stephen Weatherill S, ‘Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union’ (2007) LSE Law, Society and Economy Working Paper 13/2007 <www.lse.ac.uk/collections/law/wps/WPS13-2007MenonandWeatherill.pdf> accessed 16 January 2015.

Monti G, ‘Judgment 70/2015 of the Italian Constitutional Court: Pension Cuts’ (6 May 2015) <eurocrisislaw.eui.eu/news/judgment-702015-of-the-italian-constitutional-court-pension-cuts/> accessed 17 March 2016.

Moravcsik A, ‘In Defence of the “Democratic Deficit”: Reassessing Legitimacy in the European Union’ (2002) 40 JCMS 603.

Mundell R, ‘A Theory of Optimum Currency Areas’ (1961) 51 American Economic Review 657.

Nicolaidis K, ‘The Idea of European Demoicracy’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012) ch 10.

Nicolaidis K and Watson M, ‘Sharing the Eurocrats’ Dream: A Demoicratic Approach to EMU Governance in the Post-Crisis Era’ in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (CUP 2016) ch 3.

Odendahl C, ‘We Don’t Need No Federation: What a Devolved Eurozone Should Look Like’ (Centre for European Reform, December 2015) <www.cer.org.uk/publications/archive/report/2015/we-dont-need-no-federation-what-devolved-eurozone-should-look> accessed 22 January 2016.

Panagiannaki K, ‘Die neue Bankenaufsicht in der Praxis’ (IKYDA 4 conference, Thessaloniki, 7 November 2015).

Peers S, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8 EuConst 404.

Peers S, ‘Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework’ (2013) 9 EuConst 37.

Piris J-C, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press 2011).

Rasnača Z, ‘Constitutional Change Through Euro Crisis Law: Latvia’ (16 January 2014) <eurocrisislaw.eui.eu/latvia/> accessed 27 October 2016.

Sangiovanni A, ‘Solidarity in the European Union’ (2013) 33 OJLS 1.

Scharpf F, ‘Economic Integration, Democracy and the Welfare State’ (1997) 4 Journal of European Public Policy 18.

Scharpf F, ‘Legitimacy Intermediation in the Multilevel European Polity and Its Collapse in the Euro Crisis’ (2012) MPIfG Discussion Paper 12/6 <www.mpifg.de/pu/mpifg_dp/dp12-6.pdf> accessed 2 March 2015.

Scharpf F, ‘The Costs of Non-Disintegration: The Case of the European Monetary Union’ in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats’ Dream: Adjusting to European Diversity* (CUP 2016) ch 2.

Schmidt S and Wonka A, ‘European Commission’ in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (OUP 2012) ch 24.

Schmidt V, ‘Changing the Policies, Politics, and Processes of the Eurozone in Crisis: Will This Time Be Different?’ in David Natali and Bart Vanhercke (eds), *Social Policy in the European Union: State of Play 2015* (ETUI, OSE 2015) 33-64.

Schwarz M, ‘A Memorandum of Misunderstanding – The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation’ (2014) 51 CMLRev 389.

Sinn H-W, *The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs* (OUP 2014).

Stiglitz J, *The Price of Inequality* (Penguin 2012).

Ter Kuile G, Wissink L and Bovenschen W, ‘Tailor-Made Accountability within the Single Supervisory Mechanism’ (2015) 52 CMLRev 155.

Transparency International EU, ‘From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable’ (2017) <transparency.eu/wpcontent/uploads/2017/03/ESM_Report_DIGITAL-version.pdf> accessed 7 April 2017.

Transparency International EU, ‘Two Sides of the Same Coin? Independence and Accountability of the European Central Bank’ (2017) <transparency.eu/wp-

content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf> accessed 16 April 2017.

Tridimas T, 'General Report' in Gyula Bándi and others (eds), *European Banking Union – Congress Proceedings Vol. 1* (Wolters Kluwer 2016).

Tuori K, 'The European Financial Crisis – Constitutional Aspects and Implications' (2012) EUI Law Working Papers No. 28, 11-21.

Tuori K and Tuori K, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014).

VIȚĂ V, 'Constitutional Change Through Euro Crisis Law: Romania' (3 November 2014) <eurocrisislaw.eui.eu/romania/> accessed 27 October 2016.

Vlachopoulos S, *Η δυναμική ερμηνεία του Συντάγματος: Η προσαρμογή του συνταγματικού κειμένου στις μεταβαλλόμενες συνθήκες* (Ευρασία 2014).

Von Bogdandy A, 'European Law Today: A Contemporary Concept and Its Functions' (XXVII FIDE Congress, Budapest, 19 May 2016).

Walker A, 'ECB Publishes Secret Irish Bailout Letters' (BBC, 6 November 2014) <www.bbc.co.uk/news/business-29942060> accessed 20 November 2015.

Weatherill S, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827.

Weatherill S, *EU Law* (12th edn, OUP 2016).

Weiler J and others, 'European Democracy and its Critique – Five Uneasy Pieces' (1995) EUI Working Paper RSC 95/11 <core.kmi.open.ac.uk/download/pdf/6538430.pdf> accessed 16 January 2015.

Weiler J, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 Journal of European Integration 825.

Yannakopoulos C, 'Το δημόσιο συμφέρον υπό το πρίσμα της οικονομικής κρίσης. Σκέψεις με αφορμή τις αποφάσεις ΣτΕ Β' 693/2011, ΣτΕ Στ' 1620/2011 και ΣτΕ Α' 2094/2011' (2012) 7 Εφημερίδα Διοικητικού Δικαίου 100.

Yannakopoulos C, 'Η μετάλλαξη του υποκειμένου των συνταγματικών δικαιωμάτων' (2012) 7 Εφημερίδα Διοικητικού Δικαίου 146.

Yannakopoulos C, 'Un Etat devant la faillite: entre droit et non-droit' (10 December 2013) <www.constitutionalism.gr/wp-content/uploads/2013/12/2013.12_Fin-du-droit_intervention_Yannakopoulos.pdf> accessed 17 March 2016.

Yannakopoulos C, 'Το ελληνικό Σύνταγμα και η *επιφύλαξη του εφικτού* της προστασίας των κοινωνικών δικαιωμάτων: «να είστε ρεαλιστές, να ζητάτε το αδύνατο»' (2015) 10 Εφημερίδα Διοικητικού Δικαίου 417.

Ylonen M, 'The EU Debt Crisis Shifts Power to the EU Commission' (16 January 2012) <www.helsinki.fi/news/archive/1-2012/16-13-52-37.html> accessed 21 April 2014.

Zettelmeyer J, Trebesch C and Gulati M, 'The Greek Debt Restructuring: An Autopsy' (July 2013) <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=faculty_scholarship> accessed 12 March 2016.

Documents from the EU institutions

Angerer J, 'Fact Sheets on the European Union: A New Framework for Fiscal Policies' (September 2016) <www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.2.1.html> accessed 24 November 2016.

Commission Opinion C(2013) 8001 final of 15.11.2013 on the Draft Budgetary Plan of Germany [2013].

Commission proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax COM(2013) 71 final.

Commission Recommendation COM(2014) 406 final Recommendation for a Council recommendation on Germany's 2014 national reform programme and delivering a Council opinion on Germany's 2014 stability programme [2014] <ec.europa.eu/europe2020/pdf/csr2014/csr2014_germany_en.pdf> accessed 2 October 2014.

Committee for the Study of Economic and Monetary Union, 'Report on Economic and Monetary Union in the European Community' (17 April 1989) <aei.pitt.edu/1007/1/monetary_delors.pdf> accessed 29 April 2015 (Delors report).

Committee on Constitutional Affairs, 'Opinion of the Committee of Constitutional Affairs for the Committee on Economic and Monetary Affairs on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' 2012/0242(CNS) (27 November 2012) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-498.084+03+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Regulation Amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure' 2010/0276 (CNS) (18 January 2011) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.690+02+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Directive on Requirements for Budgetary Frameworks of the Member States' 2010/0277 (NLE) (16 December 2010) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-

//EP//NONSGML+COMPARL+PE-
454.691+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Effective Enforcement of Budgetary Surveillance in the Euro Area' 2010/0278 (COD) (11 January 2011) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-
454.626+03+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area' 2010/0279 (COD) (16 December 2010) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-
454.574+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies' 2010/0280 (COD) (17 December 2010) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-
454.680+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Strengthening of Economic and Budgetary Surveillance of Member States Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability in the Euro Area' 2011/0385 (COD) (14 March 2012) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-
//EP//NONSGML+COMPARL+PE-
483.472+02+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area 2011/0386 (COD) (14 February 2012) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-
483.469+01+DOC+PDF+V0//EN&language=EN> accessed 13 April 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' 2012/0242(CNS) (8 October 2012) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-

//EP//NONSGML+COMPARL+PE-497.794+01+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015.

Committee on Economic and Monetary Affairs, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council 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 Single Bank Resolution Fund and Amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' 2013/0253(COD) (25 September 2013) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.706+01+DOC+PDF+V0//EN&language=EN> accessed 14 November 2015.

Committee on Economic and Monetary Affairs, 'MEPs anticipate end of Troika' (16 January 2014) <www.europarl.europa.eu/news/en/news-room/content/20140110IPR32420/html/MEPs-anticipate-end-of-the-Troika> accessed 22 April 2014.

Communication from the Commission, 'A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate' COM(2012) 777 final/2 (Brussels, 30 November 2012) <ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf> accessed 30 March 2017.

Communication from the Commission to the European Parliament, the Council and the Eurogroup COM(2014) 150 final Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances [2014].

Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law (Brussels, 19 March 2014) COM(2014) 158 final/2.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Commission Work Programme 2016: No Time for Business as Usual' COM(2015) 610 final (27 October 2015) <ec.europa.eu/atwork/pdf/cwp_2016_en.pdf> accessed 23 November 2015.

'Conference under Article 13 of the Fiscal Compact' <ue2014.parlamento.it/34?appuntamento=25> accessed 4 December 2015.

Council of the European Union, 'Brussels European Council 18/19 June 2009 Presidency Conclusions' 11225/2/09 REV 2 CONCL 2 (10 July 2009) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf> accessed 22 February 2014.

Council of the European Union, 'Note from Task Force established by the March 2010 European Council to the European Council: Final Report by the Task Force'

15302/10 CO EUR-PREP 57 (21 October 2010) <register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015302%202010%20INIT> accessed 2 March 2015.

Council of the European Union, 'Statement by the Heads of State or Government of the Euro Area and EU Institutions' (Brussels, 21 July 2011) <www.consilium.europa.eu/en/european-council/pdf/20110721-statement-by-the-heads-of-state-or-government-of-the-euro-area-and-eu-institutions-en_pdf/> accessed 11 March 2016.

Council of the European Union, 'Single Resolution Mechanism: Texts Agreed at ECOFIN on 18 December 2013' 18137/13 (20 December 2013) <register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2018137%202013%20INIT> accessed 20 February 2016, Declaration of the representatives of the 28 Member States meeting within the Council.

Council of the European Union, 'Eurogroup' (10 March 2015) <www.consilium.europa.eu/en/council-eu/eurogroup/> accessed 25 May 2015.

Council of the European Union, 'Eurogroup, 11/02/2016' <www.consilium.europa.eu/en/meetings/eurogroup/2016/02/11/> accessed 7 April 2017.

Council of the European Union, 'Eurogroup, 07/03/2016' <www.consilium.europa.eu/en/meetings/eurogroup/2016/03/07/> accessed 7 April 2017.

Council of the European Union, 'Reply from the Eurogroup President to the European Ombudsman's Letter on Eurogroup Transparency' (31 May 2016) <www.consilium.europa.eu/en/press/press-releases/2016/05/31-peg-letter-ombudsman/> accessed 7 April 2017.

Council of the European Union, 'Reply from the Eurogroup President to the European Ombudsman's Letter on Eurogroup Transparency' (1 December 2016) <www.consilium.europa.eu/en/press/press-releases/2016/12/01-eurogroup-peg-letter-ombudsman/> accessed 7 April 2017

EU Independent Fiscal Institutions, 'List of Members' <www.euifis.eu/eng/fiscal/120/members> accessed 3 April 2017.

'Euro Summit Statement' (Brussels, 26 October 2011) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf> accessed 11 March 2016.

'Eurogroup Statement' (21 February 2012) <www.efsf.europa.eu/attachments/2012-02-21%20Eurogroup%20statement%20Bailout%20for%20Greece.pdf> accessed 11 March 2016.

European Central Bank, ‘Technical Features of Outright Monetary Transactions’ (6 September 2012) <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 8 February 2014.

European Central Bank, ‘Details on Securities Holdings Acquired under the Securities Markets Programme’ (21 February 2013) <www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html> accessed 19 April 2014.

European Central Bank, ‘Outright Monetary Transactions’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_011.en.html> accessed 8 February 2014.

European Central Bank, ‘The ECB’s response to the crisis (1)’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_012.en.html> accessed 1 February 2014.

European Central Bank, ‘The ECB’s response to the crisis (3)’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_014.en.html> accessed 1 February 2014.

European Central Bank, ‘The ECB’s response to the crisis (4)’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_015.en.html> accessed 1 February 2014.

European Central Bank, ‘The Monetary Policy Instruments – Non-Standard Measures’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_010.en.html> accessed 8 February 2014.

European Central Bank, ‘Transmission Mechanism – from Interest Rates to Prices’ (1 January 2014) <www.ecb.europa.eu/ecb/educational/facts/monpol/html/mp_007.en.html> accessed 8 February 2014.

European Central Bank, ‘Asset Purchase Programmes’ <www.ecb.europa.eu/mopo/implement/omt/html/index.en.html> accessed 28 March 2017.

European Central Bank, ‘List of Supervised Entities’ (1 January 2017) <www.bankingsupervision.europa.eu/ecb/pub/pdf/list_of_supervised_entities_201701.en.pdf?5500372ba5354abf248e44237ec95aed> accessed 30 March 2017.

European Central Bank, ‘Single Supervisory Mechanism’ <www.bankingsupervision.europa.eu/about/thessm/html/index.en.html> accessed 18 January 2017.

European Commission, ‘Impact Assessment Guidelines’ SEC(2009) 92 (15 January 2009) <ec.europa.eu/smart-

regulation/impact/commission_guidelines/docs/iag_2009_en.pdf> accessed 27 April 2015.

European Commission, 'Commission Staff Working Document - Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council on Community Macro Prudential Oversight of the Financial System and Establishing a European Systemic Risk Board, Proposal for a Council Decision Entrusting the European Central Bank with Specific Tasks Concerning the Functioning of the European Systemic Risk Board, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Banking Authority, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Insurance and Occupational Pensions Authority, Proposal for a Regulation of the European Parliament and of the Council Establishing a European Securities and Markets Authority: Impact Assessment' SEC(2009) 1234 (23 September 2009) <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009SC1234&from=EN> accessed 4 May 2015.

European Commission, *The Economic Adjustment Programme for Greece* (EUROPEAN ECONOMY Occasional Paper 61/2010, European Union 2010).

European Commission, *The Second Economic Adjustment Programme for Greece* (EUROPEAN ECONOMY Occasional Paper 94/2012, European Union 2012).

European Commission, 'Actions Taken with Structural Funds to Promote Growth' (30 January 2012) <ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5735&lang=en> accessed 30 April 2015

European Commission, 'New Crisis Management Measures to Avoid Future Bank Bail-Outs' IP/12/570 (6 June 2012) <europa.eu/rapid/press-release_IP-12-570_en.htm?locale=en> accessed 22 February 2014.

European Commission, 'Bank Recovery and Resolution Proposal: Frequently Asked Questions' MEMO/12/416 (6 June 2012) <europa.eu/rapid/press-release_MEMO-12-416_en.htm> accessed 22 February 2014.

European Commission, 'Proposal for a Council Regulation Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions' COM(2012) 511 final (12 September 2012) <www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0511/COM_COM(2012)0511_EN.pdf> accessed 14 November 2015.

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 Single Bank Resolution Fund and Amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council' COM(2013) 520 final (10 July 2013)

<www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0520/COM_COM(2013)0520_EN.pdf> accessed 14 November 2015.

European Commission, Report from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee COM(2013) 790 final Alert Mechanism Report 2014 (13 November 2013) <ec.europa.eu/europe2020/pdf/2014/amr2014_en.pdf> accessed 2 October 2014.

European Commission, 'Commissioner Barnier Welcomes Trilogue Agreement on the Framework for Bank Recovery and Resolution' MEMO/13/1140 (12 December 2013) <europa.eu/rapid/press-release_MEMO-13-1140_en.htm> accessed 22 February 2014.

European Commission, 'Commissioner Barnier Welcomes Agreement between the European Parliament and Member States on Deposit Guarantee Schemes' MEMO/13/1176 (17 December 2013) <europa.eu/rapid/press-release_MEMO-13-1176_en.htm?locale=en> accessed 22 February 2014.

European Commission, 'A Comprehensive EU Response to the Financial Crisis: Substantial Progress towards a Strong Financial Framework for Europe and a Banking Union for the Eurozone' MEMO/14/57 (24 January 2014) <europa.eu/rapid/press-release_MEMO-14-57_en.htm> accessed 22 February 2014.

European Commission, 'A New Financial System for Europe: Financial Reform at the Service of Growth' (24 March 2014) <ec.europa.eu/internal_market/publications/docs/financial-reform-for-growth_en.pdf> accessed 21 April 2014.

European Commission, 'Draft Budgetary Plans of Euro Area Member States' (19 May 2014) <ec.europa.eu/economy_finance/economic_governance/sgp/budgetary_plans/index_en.htm> accessed 6 October 2014.

European Commission, 'Your Voice in Europe' (30 June 2014) <ec.europa.eu/yourvoice/index_en.htm> accessed 4 May 2015.

European Commission, 'Seventh Activity Report of the Task Force for Greece: Reforms Delivering Results' MEMO/14/495 (23 July 2014) <europa.eu/rapid/press-release_MEMO-14-495_en.htm> accessed 30 April 2015.

European Commission, 'European Semester 2014' (3 September 2014) <ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm> accessed 2 October 2014.

European Commission, *Macroeconomic Imbalances: Germany 2014* (EUROPEAN ECONOMY Occasional Paper 174/2014, European Union 2014).

European Commission, 'Overview of EU Country-Specific Recommendations for 2014-2015'

<ec.europa.eu/europe2020/pdf/csr2014/overview_recommendations_2014_by_member_state.pdf> accessed 2 October 2014.

European Commission, 'Q&A: Country-Specific Recommendations 2014' MEMO/14/388 (2 June 2014) <europa.eu/rapid/press-release_MEMO-14-388_en.htm> accessed 2 October 2014.

European Commission, *The Second Economic Adjustment Programme for Greece: Fourth Review – April 2014* (European Economy Occasional Paper 192/2014, European Union 2014).

European Commission, *One Currency for One Europe: The Road to the Euro* (Publications Office of the European Union 2014).

European Commission, 'List of Impact Assessments' (13 January 2015) <ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2014_en.htm> accessed 4 May 2015.

European Commission, 'Closed Consultations' (12 March 2015) <ec.europa.eu/yourvoice/consultations/2015/index_en.htm> accessed 4 May 2015.

European Commission, 'Better Regulation Agenda: Enhancing Transparency and Scrutiny for Better EU Law-Making' IP/15/4988 (Strasbourg, 19 May 2015) <europa.eu/rapid/press-release_IP-15-4988_en.htm> accessed 25 May 2015.

European Commission, 'Commission Staff Working Document: Assessment of the Social Impact of the New Stability Support Programme for Greece' SWD(2015) 162 final (19 August 2015) <ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/assessment_social_impact_en.pdf> accessed 11 September 2015.

European Commission, 'Financial Assistance to Greece' (8 September 2015) <http://ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/index_en.htm> accessed 10 September 2015.

European Commission, 'A Stronger Banking Union: New Measures to Reinforce Deposit Protection and Further Reduce Banking Risks' (24 November 2015) <europa.eu/rapid/press-release_IP-15-6152_en.htm> accessed 28 November 2015.

European Commission, 'Balance-of-Payments Assistance to Romania' (3 December 2015) <ec.europa.eu/economy_finance/assistance_eu_ms/romania/index_en.htm> accessed 15 February 2016.

European Commission, 'Post-Programme Surveillance for Ireland' (19 January 2016) <ec.europa.eu/economy_finance/assistance_eu_ms/ireland/index_en.htm> accessed 31 March 2016.

European Commission, 'Post-Programme Surveillance of Portugal' (4 February 2016) <ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm> accessed 15 February 2016.

European Commission, ‘European Financial Stabilisation Mechanism (EFSM)’ (1 July 2016) <http://ec.europa.eu/economy_finance/eu_borrower/efsm/> accessed 22 November 2016.

European Commission, ‘White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025’ COM(2017)2025 (1 March 2017) <ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf> accessed 14 April 2017.

European Council, ‘European Council 24/25 March 2011 Conclusions’ EUCO 10/1/11 REV 1 (Brussels, 20 April 2011) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf> accessed 1 June 2016.

European Council, ‘Statement by the Euro Area Heads of State or Government’ (Brussels, 9 December 2011) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf> accessed 10 February 2014.

European Council, ‘European Council 13/14 December 2012 Conclusions’ EUCO 205/12 CO EUR 19 CONCL 5 (14 December 2012) <register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST+205+2012+INIT> accessed 21 April 2014.

European Council, ‘European Council Meeting (18 and 19 February 2016) – Conclusions’ EUCO 1/16 (Brussels, 19 February 2016) <www.consilium.europa.eu/en/meetings/european-council/2016/02/EUCO-Conclusions_pdf/> accessed 20 February 2016.

European Court of Auditors, *Special Report No 10/2016: Further Improvements Needed to Ensure Effective Implementation of the Excessive Deficit Procedure* (Publications Office of the European Union 2016).

European Financial Stability Facility, ‘Lending Operations’ <http://www.efsf.europa.eu/about/operations/index.htm> accessed 22 November 2016.

European Ombudsman, ‘Recent Initiative to Improve Eurogroup Transparency’ (14 March 2016) <www.ombudsman.europa.eu/resources/otherdocument.faces/en/65359/html.bookmark> accessed 7 March 2017.

European Ombudsman, ‘Follow-up Response from the European Ombudsman to the Reply of President Dijsselbloem to her Letter Concerning Eurogroup Transparency’ (30 August 2016) <www.ombudsman.europa.eu/resources/otherdocument.faces/en/70708/html.bookmark> accessed 7 March 2017.

European Parliament, ‘Report on Constitutional Problems of a Multitier Governance in the European Union’ 2012/2078(INI) (15 November 2013) <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0372+0+DOC+PDF+V0//EN> accessed 18 June 2015.

European Parliament, ‘Table on the Ratification Process of Amendment of Art. 136 TFEU, ESM Treaty and the Fiscal Compact’ <www.europarl.europa.eu/webnp/cms/pid/1833> accessed 8 February 2014.

‘European Parliamentary Week: The Conference under Article 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ <parleu2015.lv/files/fiskala-konference/article_13_conference_en_28_01_2015.pdf> accessed 4 December 2015.

European Stability Mechanism, ‘Before the ESM: EFSF – The Temporary Fiscal Backstop’ <www.esm.europa.eu/efsf-overview> accessed 28 March 2017.

European Stability Mechanism, ‘Board of Directors and Alternate Director’ <www.esm.europa.eu/esm-governance/board-directors-and-alternate-director> accessed 28 March 2017.

European Stability Mechanism, ‘ESM Direct Bank Recapitalisation Instrument Adopted’ <www.esm.europa.eu/press/releases/esm-direct-bank-recapitalisation-instrument-adopted.htm> accessed 22 November 2016.

European Stability Mechanism, ‘FAQ on the Accession of Lithuania to the ESM’ <www.esm.europa.eu/pdf/FAQ%20on%20accession%20of%20Lithuania.pdf> accessed 22 November 2016.

European Stability Mechanism, ‘Frequently Asked Questions on the European Stability Mechanism’ <www.esm.europa.eu/pdf/FAQ%20ESM%2030012014.pdf> accessed 8 February 2014.

European Stability Mechanism, ‘Guidance on Financial Assistance for the Direct Recapitalisation of Institutions’ (8 December 2014) <www.esm.europa.eu/sites/default/files/20141208_guideline_on_financial_assistance_for_the_direct_recapitalisation_of_institutions.pdf> accessed 18 January 2017.

European Stability Mechanism, ‘ESM Programme for Cyprus (Concluded)’ <www.esm.europa.eu/assistance/cyprus/index.htm> accessed 22 November 2016.

European Stability Mechanism, ‘ESM Programme for Greece’ <www.esm.europa.eu/assistance/Greece/index.htm> accessed 22 November 2016.

European Stability Mechanism, ‘ESM Programme for Spain (Concluded)’ <www.esm.europa.eu/assistance/spain/index.htm> accessed 22 November 2016.

Financial Assistance Facility Agreement between European Stability Mechanism and the Hellenic Republic as the Beneficiary Member State and the Bank of Greece as Central Bank and Hellenic Financial Stability Fund as Recapitalisation Fund

<www.esm.europa.eu/pdf/2015-08-19%20GR%20-%20ESM%20-%20FFA%20publication%20version.pdf> accessed 10 September 2015.

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, 'Towards a Genuine Economic and Monetary Union' (5 December 2012) <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf> accessed 21 April 2014 (Four Presidents' Report).

'Interparliamentary Conference on Economic and Financial Governance of the European Union: Contribution' <renginiai.lrs.lt/renginiai/EventDocument/0f6147e3-6125-40b9-93d8-edc7c31e085f/EN%20Contribution%20-%20Vilnius%20IC-EFG.pdf> accessed 4 December 2015.

Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change' (Strasbourg, 15 July 2014) <www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf> accessed 1 May 2015

Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem and Mario Draghi, 'Preparing for Next Steps on Better Economic Governance in the Euro Area: Analytical Note' (Informal European Council, 12 February 2015) <ec.europa.eu/commission/sites/beta-political/files/analytical_note_en.pdf> accessed 30 March 2017.

Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 'Completing Europe's Economic and Monetary Union' (Five Presidents' Report).

Memorandum of Understanding of 23 June 2009 between the European Community and Romania <ec.europa.eu/economy_finance/publications/publication15409_en.pdf> accessed 28 May 2015.

Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece <ec.europa.eu/economy_finance/assistance_eu_ms/greek_loan_facility/pdf/01_mou_20150811_en.pdf> accessed 10 September 2015 (the third MoU).

Opinion of the European Central Bank of 17 February 2012 on the terms of securities issued or guaranteed by the Greek State (CON/2012/12).

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme COM/2015/0586 final – 2015/0270 (COD).

Single Resolution Board, *2015 Annual Report* (Publications Office of the European Union 2016).

Single Resolution Board, ‘List of Other Cross-Border Groups’ (6 June 2016) <srb.europa.eu/sites/srbsite/files/annex_ii_list_of_other_cross_border_06062016.pdf> accessed 30 March 2017.

Documents from the national institutions

Australia

Reserve Bank of Australia, ‘The Greek Private Sector Debt Swap’ <www.rba.gov.au/publications/smp/boxes/2012/may/b.pdf> accessed 6 September 2015.

Germany

Bundesverfassungsgericht, ‘Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful’ (Press Release No. 34/2016, 21 June 2016) <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html;jsessionid=1D8EF6A7783CC76B78D84FAF443413AB.2_cid392> accessed 17 October 2016.

Federal Ministry of Finance, ‘Draft Budgetary Plan According to Regulation (EU) No 473/2013’ (October 2013) <ec.europa.eu/economy_finance/economic_governance/sgp/pdf/dbp/de_2013-10-15_dbp_en.pdf> accessed 6 October 2014.

Greece

Hellenic Republic Asset Development Fund, ‘Asset Development Plan’ (30 July 2015) <www.hradf.com/sites/default/files/attachments/20150907-asset-development-plan-en_0.pdf> accessed 10 September 2015.

Parliamentary Budget Office, ‘First Meeting of the EU Network of Independent Fiscal Institutions (EUNIFI)’ (27 November 2013) <www.pbo.gr/Activities/TabId/1086/ArtMID/2985/ArticleID/84/First-Meeting-of-the-EU-Network-of-Independent-Fiscal-Institutions-EUNIFI.aspx> accessed 3 October 2014.

Parliamentary Budget Office, ‘Quarterly Report: April-June 2014’ (28 July 2014) <www.pbo.gr/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=3&moduleid=5206&articleid=6001&documentid=2305> accessed 3 October 2014.