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EDITORIAL

EUROPE AT WAR

On the 1st of March, speaking in front of the European Parliament, the President of the European Commission, Ms. Von der Leyen, delivered an engaging statement: “our Union, for the first time ever, is using the European budget to purchase and deliver military equipment to a country that is under attack” (European Commission, Speech by President von der Leyen at the European Parliament Plenary on the Russian aggression against Ukraine ec.europa.eu).

This statement follows a declaration released by the High Representative of the Union for Foreign Affairs and Security Policy who, even more explicitly, said: “[a]nother taboo has fallen. The taboo that the European Union was not providing arms in a war. Yes, we are doing it. Because this war requires our engagement to support the Ukrainian army” (European Commission, Further measures to respond to the Russian invasion of Ukraine: Press statement by High Representative/Vice-President Josep Borrell (27 February 2022) ec.europa.eu).

In a few days, we will learn whether this step has been successful and contributed to saving Ukraine from what appears its cruel fate, namely to succumb to the overwhelming Russian forces and to be dismembered, or to cease its existence as an independent State.

What is certain is that this decision, formally adopted by the Council on 28 February 2022 (Council Decision (CFSP) 2022/338 of on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, hereinafter the Decision), marks a significant turn in the international actorship of the Union. By implementing Council Decision 2021/509 of 22 March 2021, establishing the European Peace Facility, devoted “to contribute rapidly and effectively to the military response of third States [...] in a crisis situation” (art. 56), and by accepting to respond to a war of aggression through forcible measures, in accordance to its values and objectives, the Union seems to accept new responsibilities in the management of major international crises.

Supplying lethal military equipment to a belligerent State is not a decision that can be taken lightheartedly. Under the classical law of armed conflicts, this conduct excludes the neutrality of the supplying entity (see art. 6 of the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, largely regarded as a codification of customary law of war). While excluding that supply of arms to a State in-



volved in an international conflict can be equated to an armed attack, in *Nicaragua* the ICJ qualified this conduct as a violation of the prohibition of the use of force, albeit *minoris generis* (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [27 June 1986] paras 230 and 247).

But is this measure legally justified in response to the aggression unleashed by Russia against Ukraine?

The most obvious response can be based on the doctrine of collective self-defence, grounded on customary law and recognized by art. 51 of the UN Charter. If the members of the international community are entitled, upon the request of the attacked State, to use massive military force to halt and repeal an aggression, they are entitled *a fortiori* to react through forcible measures *minoris generis*.

A further, and perhaps more appropriate, answer may come from the qualification of aggression as a violation of a fundamental interest of the international community as a whole, whose breach requires a collective response. Under the law of international responsibility, as emerging from the Articles on State responsibility (International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), hereinafter ASR) and from the Articles on the responsibility of international organizations (International Law Commission, Draft Articles on the Responsibility of International Organizations (2011), hereinafter ARIO), serious breaches of obligations established for the protection of collective interests of the international community entitle every member of that community, be it a State or an international organization, to invoke the responsibility of the wrongdoer (arts 48 ASR and 49 ARIO). The two sets of Articles also establish a duty on every State, and every international organization, to cooperate to bring to an end a serious breach of fundamental interests of the international community as a whole (*jus cogens*), among which, pre-eminently, the prohibition of the use of force (arts 41 ASR and 42 ARIO).

To implement this duty, the members of the international community must put into motion a coordinated chain of measures that should be ultimately able to put the breach to an end. The typology of measures ranges from loose forms of protest to strong, but lawful, actions appropriate to the circumstances. In case of aggression, minor forms of use of force, including the dispatch of military equipment, seems to be the perfect example of collective response, at least for those States which do not want to be directly involved in the armed confrontation. The Union's supply of arms to Ukraine to halt and repeal the Russian aggression, falls inside the scope of this law and contributes to its further development.

Its international personality assuredly empowers the Union to use its competences to implement the rights and to discharge the commitments flowing from international law. Pursuant to art. 24 TEU, the competence of the Union in the field of foreign and security policy covers "the progressive framing of a common defence policy that might lead to a

common defence". A major step in this progression was made with the adoption of the mentioned Decision of 22 March 2021. Ultimately, the pace was precipitously sped up in the "last six days" in which the European security and defence has evolved more ... than in the last two decades", as metaphorically said Ms. Von der Leyen in the statement which opens this editorial.

But is it sufficient to conclude that the Union possesses, under the Treaties, the power to take forcible measures, albeit *minoris generis*, such as dispatch of military equipment to a belligerent State: a conduct capable to drag the EU and its MS in a forcible confrontation? Does the Union really possess the necessary panoply of powers and prerogatives to participate in the management of international crises on equal terms with States, full-fledged actors of international relations? Or is it acting as an agency of coordination of forcible actions attributable to its MS? Is this impetuous progression heralding a new phase in which the Union can use the means of actions, including minor use of force, necessary to implement its values and interests on the international sphere? Or is it simply an optical illusion, which will be exposed as soon as the occasional convergence of the MS toward a common strategic interest will fade away?

Providing an answer to these questions falls well beyond the scope of the present Editorial and remains open for scholarly debate. It would entail entering an insidious ground where new and old categories of international law and European law collide, evolve and interweave each other, creating an almost inextricable legal conundrum.

But the idea of a Common Defence and Security Policy rapidly evolving as an efficient tool for the implementation of the European values may serve as a comfort, in these bitter days, for those who believe, genuinely or ingenuously, in the capacity of integration as a powerful antidote to wars, in Europe and in the world.

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ARTICLES

PROPORTIONALITY IN THE *PSPP* SAGA: WHY CONSTITUTIONAL PLURALISM IS HERE TO STAY AND WHY THE FEDERAL CONSTITUTIONAL COURT DID NOT VIOLATE THE RULES OF LOYAL CONDUCT

MARTIN HÖPNER*

TABLE OF CONTENTS: I. Introduction: when European and constitutional law collide. – II. Constitutional pluralism and the idea of an appeal court. – III. From Karlsruhe to Luxembourg and back: OMT and PSPP. – IV. The many faces of proportionality. – V. Proportionality in the *PSPP* decision of the FCC. – VI. Discussion. – VII. Conclusion: a way out of constitutional pluralism?

ABSTRACT: In May 2020, for the first time in its history, the Federal Constitutional Court (FCC) of Germany declared Union acts as being *ultra vires*. According to the FCC, the European Central Bank (ECB) and the Court of Justice of the European Union (CJEU) had acted beyond their mandates because they did not apply strong proportionality standards to the ECB's Public Sector Purchase Programme (PSPP). The resulting stalemate within constitutional pluralism has revived the discussions about loyalism within constitutional pluralism and about the possible introduction of an appeal court with the "final say" over constitutional conflict. This *Article* shows that, contrary to the assessment of some critics, the controversial ruling of the Federal Constitutional Court was within the bounds of loyal behavior within constitutional pluralism. As the analysis of the PSPP conflict also shows, a European super-judicial authority would reach its limits the more we move from the surface to the core of the struggles between European and national constitutional law. The different readings of proportionality are difficult to bridge, and the mutually exclusive claims about the nature of the supremacy of European law are not accessible to compromise at all. We should therefore not expect too much from an appeal court, if it were introduced.

KEYWORDS: constitutional pluralism – supremacy – proportionality – European Central Bank – *PSPP* – *Weiss*.

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I. INTRODUCTION: WHEN EUROPEAN AND CONSTITUTIONAL LAW COLLIDE

On May 5, 2020, the Federal Constitutional Court (FCC) of Germany handed down its judgment on German participation in the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).¹ According to the Court's decision, two Union institutions had been acting outside of their mandates (*ultra vires*). The ECB, the Second Senate ruled, had overstepped its mandate by failing to document the proportionality of the PSPP. In addition, the FCC found the *Weiss* judgment by the European Court of Justice (CJEU), which had confirmed the legality of the PSPP without applying strong proportionality standards on ECB actions, likewise to be *ultra vires*.² Never before had the FCC declared a legal act of an EU institution lacking binding force at the national level. To that extent, the judgment can indeed be described as historic.

Although the ruling provoked all kinds of reactions, the critical reactions outweighed the affirmative ones.³ For the critics, the main problem was not, however, practical damage done to the monetary operations of the ECB. With regard to the PSPP programme, the conflict was quietly solved with the German Bundestag president's and the finance minister's declarations, both at the end of July 2020, that the proportionality documents, which the Bundesbank had in the meantime handed over to them, met the criteria defined by the FCC; in May 2021, the FCC announced that there will be no further constitutional check of the documents.⁴ Given the almost trivial conclusion of the practical side of the conflict,⁵ it is fair to concede that the FCC did not do harm to the PSPP.

Also, the ruling includes hardly any clearly defined limits for the present Pandemic Emergency Purchase Programme (PEPP) and future asset purchase programmes. This holds true for the symmetry of the purchases (symmetry in accordance with the shares in the ECB's capital) as much as for possible purchase limits. Going further than the

¹ German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 *PSPP* ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

² Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

³ See, for example, the fifteen reactions in issue 5/2020 of the *German Law Review*. Among them, four can be classified as decisively negative and one as slightly negative, compared to only one that can be classified as decisively positive and two as slightly positive. The other seven reactions are neutral or refrain from a respective positioning.

⁴ German Federal Constitutional Court judgment of 18 May 2021 2 BvR 1651/15 ECLI:DE:BVerfG:2021:rs20210429.2bvr165115.

⁵ AJ Perkins, 'The Legal and Economic Questions Posed by the German Constitutional Court's Decision in the Public Sector Purchase Programme (PSPP) Case' (2021) *Athens Journal of Law* 399, 409; LP Feld and V Wieland, 'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy' (2021) *Journal of Financial Regulation* 217, 220; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis? A Critical Commentary on the PSPP Judgment of the German Federal Constitutional Court of May 5, 2020' (2021) *ICON* 188, 205; G Anagnostaras, 'Activating Ultra Vires Review: The German Constitutional Court Decides Weiss' (2021) *European Papers* www.europeanpapers.eu 801, 819.

PSPP with regard to one or more of such criteria does not necessarily make purchase programmes illegal because, as headnote 7 states, it always depends on an “overall [...] appraisal”. Note also that the ruling applies for, the same headnote says, “a programme *like the PSPP*” (my emphasis). A programme with other objectives or under other conditions, we can conclude, would need to be assessed in a different way. If this seems like a pedantic interpretation, it is worth recalling the judicial reviews of the Outright Monetary Transactions (OMT) programme from 2012. This programme aimed at minimizing spreads, that is, at controlling the refinancing conditions of the euro Member States. There was no purchase limit, because it was all about the threat of unlimited central bank intervention: “whatever it takes”. Nor were any symmetric purchases involved. The OMT programme nevertheless successfully passed scrutiny by the CJEU *and the FCC alike*. The *PSPP* ruling lacks any indication that the FCC aimed at correcting its *OMT* decision from June 2016.⁶

Yet the implications of the *PSPP* ruling go beyond the practical impact on asset purchase programmes. Most critics were much more worried about the damage done to the integrity of the European legal order. By dissenting a CJEU ruling and thereby questioning the supremacy of European law, the FCC has, according to this view, granted itself a power of review to which it was not entitled.⁷ As one of the founding members of the European Economic Community and the largest EU country today, Germany has in addition sent a potentially dangerous signal to the highest courts of other member countries.⁸ If the supremacy of European law could be questioned by anyone who dislikes some of its parts, the European legal order would effectively suffer if not even die off, the critics argued. Consequently, some of the critics of the FCC asked the Commission to open an infringement procedure against Germany,⁹ and asked the executive,

⁶ German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 ECLI:DE:BVerfG:2016:rs20160621.2bvr272813.

⁷ Since its *Lisbon* decision from 2009 (German Federal Constitutional Court judgement of 30 June 2009 2 BvE 2/08 *Lisbon* ECLI:DE:BVerfG:2009:es20090630.2bve000208), the FCC distinguishes between two control reservations: it controls whether legal instruments of the European institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral (*ultra vires* control), and it reviews whether the inviolable core content of the constitutional identity is respected (identity control).

⁸ See DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, ‘National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order’ (26 May 2020) *Verfassungsblog verfassungsblog.de* and FC Mayer, ‘To Boldly Go Where no Court Has Gone before: The German Federal Constitutional Court’s Ultra Vires Decision of May 5, 2020’ (2020) *German Law Journal* 1116.

⁹ On June 9, 2021, the Commission initiated infringement proceedings against Germany and sent a letter of formal notice, expressing its legal opinion that the *PSPP* ruling of the FCC qualified as an infringement. The Federal Government responded by letter dated August 3, 2021, stating that Germany recognized the primacy of application of Union law and proposing measures for legal dialogue between the CJEU and the FCC. In addition, the government assured that it would use all means at its disposal to ensure compliance with the principles of autonomy, primacy of application, and effectiveness and uniform application of Union law. On December 2, 2021, the Commission announced its decision to close the infringement proceedings. According

legislative, and judicial branches of the Member States to ultimately accept the supremacy of European law.¹⁰

However, the assumed solution of an unconditional acceptance of European supremacy on the side of all constitutional bodies throughout the EU is remarkably naive because it would presuppose constitutional change in almost all Member States. It is true that supreme courts at Member State level have only rarely declared Union acts as nationally non-binding. This holds true for the Czech Republic (2012)¹¹ and Denmark (2016)¹² before the German PSPP ruling and Poland (2021)¹³ afterwards. A recent judgment of the French Conseil d'État (2021) can be counted as a borderline case (on the Italian Taricco case, see section VI.¹⁴ This modest number of cases, however, must not be confused with the number of highest Member State courts which insist on their final authority to scrutinize the constitutionality of European acts.

Such an insistence is present among almost all of the highest courts of the EU-27. As an expression of their integration friendliness, all supreme courts at Member State level have accepted the supremacy and direct effect of European law, although never written into the Treaties, wherever competences have been delegated to the Union level.¹⁵ The other side of the coin is their readiness to control the limits within which the supremacy

to the Commission's communication, the Federal Government had given an *undertaking* to the Commission that it would use all means at its disposal *to actively avoid further ultra vires findings on the part of the GCC*.

¹⁰ For example, see S Poli and R Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission' (2020) German Law Journal 1078.

¹¹ J Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires. Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII' (2012) EuConst 323; M Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) EuConst 54; AJ Perkins, 'The Legal and Economic Questions Posed by the German Constitutional Court's Decision in the Public Sector Purchase Programme (PSPP) Case' cit. 404 ff.

¹² SA Mair and U Sadl, 'Mutual disempowerment: Case C-441/14 Dansk industri, Acting on Behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen and Case no. 15/2014 Dansk Industri (DI) Acting for Ajos A/S v the Estate Left by A' (2017) EuConst 347; E Gualco, "'Clash of Titans 2.0". From conflicting EU General Principles to Conflicting Jurisdictional Authorities: the Court of Justice and the Danish Supreme Court in the Dansk Industri Case', (2017) European Papers www.europeanpapers.eu 223; AJ Perkins, 'The Legal and Economic Questions Posed by the German Constitutional Court's Decision' cit. 404 ff.

¹³ S Biernat and E Łętowska, 'This Was Not Just Another Ultra Vires Judgment!: Commentary to the statement of retired judges of the Constitutional Tribunal' (27 October 2021) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de); The Committee on Legal Sciences of the Polish Academy of Sciences, 'Resolution 04/2021 of 12 October 2021 in regard to the ruling of the Constitutional Tribunal of October 7, 2021' (15 October 2021) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de).

¹⁴ Compare P Cassia, arguing that the decision violates the primacy of European law, with J Ziller, arguing that the Conseil d'Etat refused to do that. P Cassia, 'Le Frexit sécuritaire du Conseil d'Etat' (23 April 2021) [Le Club de Mediapart blogs.mediapart.fr](https://leclubmediapart.blogs.mediapart.fr); J Ziller, 'The Conseil d'Etat refuses to follow the Pied Piper of Karlsruhe' (24 April 2021) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.verfassungsblog.de).

¹⁵ D Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 25-28.

of European law shall operate: where competences have not been delegated, supremacy shall not apply.¹⁶ The unconditional acceptance of absolute supremacy would imply a European competence-competence, that is, the competence to unilaterally extend the list of supranational competences. This, the highest courts argue, cannot be the content and purpose of the integration programme, at least as long as the EU is not a federal state. The primacy of European law, according to this view, can only be *relative* primacy, subject to certain constitutional control limits.¹⁷

The matter is worth a closer look, given the lack of awareness of the large number of supreme courts that define limits to European supremacy. In the late 1990s, Slaughter, Stone Sweet, and Weiler carried out comparative research on the respective rulings of six of the then-existing 15 highest courts within the EC:¹⁸ Belgium, France, Italy, Germany, the Netherlands, and the UK. They found some forms of constitutional control reservations in all the countries analyzed. Mayer enlarged the picture by examining all 15 EC Member States.¹⁹ According to his findings, only three highest courts had clearly refrained from defining limits to supremacy: those of Luxembourg, the Netherlands (in contradiction to Slaughter *et al.*), and Finland. Two other cases, Portugal and the UK, were unclear; in the other 10 cases, constitutional control reservations were present. More recently, Lindner analyzed a sample of nine countries that also included four Eastern European cases: Latvia, Hungary, Poland, and the Czech Republic.²⁰ He confirmed the presence of control reservations for all his cases.²¹

Limits to the unconditional acceptance of supranational supremacy – of European *monism*, in the terminology of Kumm²² – are, as we see, the rule rather than the exception. It is very unlikely that this will change in the near future. “National Courts Cannot Override CJEU

¹⁶ A Stone Sweet, ‘Constitutional Dialogues in the European Community’ in AM Slaughter, A Stone Sweet and JHH Weiler (eds) *The European Court and National Courts: Doctrine & Jurisprudence. Legal Change in Its Social Context* (Oxford Hart 2000) 319; D Grimm, *The Constitution of European Democracy* cit. 54; U Haltern, ‘Revolutions, Real Contradictions, and the Method of Resolving Them: The Relationship Between the Court of Justice of the European Union and the German Constitutional Court’ (2021) ICON 208, 213.

¹⁷ See D Grimm, ‘A Long Time Coming’ (2020) German Law Journal 944.

¹⁸ See the contributions to the edited volume AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in Its Social Context* (Oxford Hart 2000).

¹⁹ See FC Mayer, *Kompetenzüberschreitung und Letztentscheidung: das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra-vires-Akte in Mehrebenensystemen* (Beck 2000).

²⁰ T Lindner, ‘Richter der Integration: eine rechtsvergleichende Studie über die verfassungsrechtlichen Positionen ausgewählter Mitgliedstaaten zur europäischen Integration’ (PhD Dissertation: Universität Hamburg 2015) ediss.sub.uni.

²¹ See also A von Bogdandy and S Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’ (2011) CMLRev 1417, 1433-1434.

²² M Kumm, ‘Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice’ (1999) CMLRev 351, 353-362.

Judgments”, as a group of 27 European lawyers put it in reaction to the *PSPP* decision,²³ can therefore only be understood as the *normative* expression of a view on how national courts *shall* behave. It is not a clarification of the *status quo* and cannot solve the conflict at hand. There is an alternative, however: a supranational appeal court could reconcile the conflicts between the CJEU and supreme courts if they agree to disagree. The idea has been revived in the aftermath of the judgment from May 5, 2020. In this *Article*, we will use the *PSPP* conflict to carefully think the value-added to this idea through.

The idea of the appeal court will be introduced in more detail in section II, along with a brief introduction to the normative strand of the debate about constitutional pluralism. In section III, I will turn to the prehistory of the *PSPP* ruling and make clear that the concept of proportionality was at the center of the conflict. The concept will therefore be revisited (section IV) before I will analyze its use in the *PSPP* ruling of the FCC (section V). In section VI, I will discuss the persuasiveness of the ruling and defend it against the view that Karlsruhe violated the imperatives of “good”, cooperative conduct within constitutional pluralism. Afterwards, by dividing the *PSPP* conflict into its components, section VII will examine the potential value-added of a legal super-authority. Such an institutional reform, I will argue, would not make the multipolar structure of the European legal order disappear.

II. CONSTITUTIONAL PLURALISM AND THE IDEA OF AN APPEAL COURT

The *PSPP* conflict is an expression of the nonhierarchical judicial order of the EU, a multipolar order in which both the CJEU and highest courts at Member State level claim the “last word” about constitutional conflict. The judicial literature discusses this lack of a final arbiter as “constitutional pluralism” that allows for multiple, unranked, sometimes inconsistent legal sources and rules of recognition.²⁴

The lively debate about constitutional pluralism has an empirical and a normative dimension.²⁵ Empirically, scholars analyze the functioning of non-hierarchical legal orders. Normatively, they wonder both about the desirability of such pluralism (an idea that Kelemen and Pech, for example, strictly oppose)²⁶ and about the imperatives for “good”

²³ RD Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, ‘National Courts Cannot Override CJEU Judgments’ cit.

²⁴ Among others: N Walker, ‘The Idea of Constitutional Pluralism’ (2002) *ModLRev* 317; N Walker, ‘Constitutional Pluralism Revisited’ (2016) *ELJ* 333; M Kumm, ‘Who Is the Final Arbiter of Constitutionality in Europe?’ cit.; NW Barber, ‘Legal Pluralism and the European Union’ (2006) *ELJ* 306; A von Bogdandy and S Schill, ‘Overcoming Absolute Primacy’ cit.

²⁵ K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014); L Pierdominici, ‘The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?’ (2017) *Perspectives on Federalism* 119.

²⁶ RD Kelemen and L Pech, ‘The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland’ (2019) *CYELS* 59. According to Kelemen and Pech, constitutional pluralism is an abnormally dangerous product: “It is time for scholars of constitutional pluralism to issue a recall on the dangerous product they released into the marketplace for ideas.”

conduct within it, if present. Constitutional pluralism, the proponents argue, can work well if the signals which both sides send to each other lead to a productive, innovative constitutional dialogue.²⁷ Opponents put forward that pluralism is prone to misuse by autocrats,²⁸ and that pluralist legal systems run a risk of constitutional crisis if both sides hand down inconsistent instructions and stick to their respective perspectives.²⁹

Both objections from the side of the *monists* have to be taken seriously. Autocrats can misuse the idea of constitutional pluralism in order to justify crude violation of European (or other international) rules indeed. However, the threat of misuse shapes monism as much as pluralism. Unconditional acceptance of supremacy would imply doing away with remaining legal checks and balances and would thereby open the door for (even more) competence drift, with negative consequences for democracy at the Member State level.³⁰ But this clarification does not make pluralism's problem disappear: obviously, the productive, innovative potentials of constitutional pluralism, if present anyway, rely on compliance with implicit norms of "good" behavior within it, in order to minimize potential misuse and crisis due to stalemate.³¹

Flynn has recently made proposals for specification of such rules.³² According to him, defections from the side of Member State level supreme courts do not violate the rules *per se*, but can be expressions of legitimate, loyal opposition if they meet certain criteria. He suggests a two-tiered legitimacy test. First, he asks about the legitimacy of the court in question, that is, whether it is really an independent body. Second, he asks about the quality and coherence of the respective judicial reasoning: whether it is grounded in solid engagement with common European standards; whether there is serious engagement with the point of view of the CJEU; whether there are good faith attempts to enter into dialogue with the CJEU; and whether it respects the equality among the Member States of the EU.

Interestingly, Flynn doubts that the FCC's *PSPP* ruling meets these criteria, mainly for two reasons: due to the lack of a further (second) referral to the CJEU and due to

See also RD Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) *Maastricht Journal of European and Comparative Law* 136.

²⁷ See in particular NW Barber, 'Legal Pluralism and the European Union' cit. 328-329.

²⁸ RD Kelemen, 'On the Unsustainability of Constitutional Pluralism' cit.; RD Kelemen and L Pech, 'The Uses and Abuses of Constitutional Pluralism' cit.; M Ovádek, 'Constitutional Pluralism between Normative Theory and Empirical Fact' (23 October 2018) *Verfassungsblog verfassungsblog.de*; H Canihac, 'Is Constitutional Pluralism (II)liberal? On the Political Theory of European Legal Integration in Times of Crisis' (2021) *German Law Review* 491.

²⁹ NW Barber, 'Legal Pluralism and the European Union' cit. 306.

³⁰ M Baranski, FB Bastos and M van den Brink, 'Unquestioned Supremacy Still Begs the Question' (29 May 2020) *Verfassungsblog verfassungsblog.de*.

³¹ L Viellechner, 'Nach den großen Erzählungen: Möglichkeiten und Grenzen von Verfassungpluralismus in der Krise der Europäischen Union' in C Franzius, FC Mayer and J Neyer (eds), *Die Neuerfindung Europas: Bedeutung und Gehalte von Narrativen für die europäische Integration* (Nomos 2019) 179, 185; T Flynn, *The Triangular Constitution – Constitutional Pluralism in Ireland, the EU and the ECHR* (Hart Publishing 2019) 204 ff.

³² T Flynn, 'Constitutional Pluralism and Loyal Opposition' (2021) *ICON* 241.

the FCC's use of the concept of proportionality, that is, due to the FCC's attempt to impose its own standard of proportionality upon European law.³³ I will engage with these arguments in more detail in the course of this *Article*. My conclusion will differ from the one put forward by Flynn. In particular, I will argue that Karlsruhe's complaint about the CJEU's use of proportionality was legitimate and coherent, and did not confuse proportionality as a concept about the *exercise* of competences with a concept that aims at the *demarcation* of competences.

Returning to the downsides of constitutional pluralism as such: is there really only the choice between unconditional acceptance of absolute supremacy, which would basically abandon the remaining shields against competence creep, and insistence on rules of "good" conduct within pluralism, rules which autocrats may nevertheless not be willing to follow? Some scholars propose a third way. They suggest constitutional reform of the European legal order: an additional "Constitutional Council",³⁴ "European High Court",³⁵ or "Court of Appeal"³⁶ could complement the European judiciary and ultimately decide constitutional conflict.

The most prominent proposal originates from Weiler.³⁷ According to him, the new court shall have jurisdiction over issues of competence only. Any EU institution, including the European Parliament, and any Member State shall be allowed to refer cases to it. The president of the CJEU shall act as the president of the appeal court and its judges shall be sitting members of the highest courts of the Member States. The appeal court would be superior to the CJEU and shall hence be able to revoke the CJEU's rulings. The idea has proponents in remarkably different camps. Weiler is a European law expert who is concerned about potential blockades when the views of the CJEU and supreme courts collide. Other supporters of the reform idea, such as Herzog and Gerken, are CJEU critics who seek to restrict the European highest court in its role as the "engine of integration".³⁸ Still others, such as the rather reluctant proponent Mayer, are decided pro-Europeans.³⁹

The heterogeneity of the proponents becomes less puzzling if one takes a closer look at the suggested composition of the new body. Hatje, for example, suggests an appeal

³³ T Flynn 'Constitutional Pluralism and Loyal Opposition' cit. 257 ff. Without explicit reference to constitutional pluralism, a further critique is that the FCC ruled against its self-imposed integration friendliness; for example, see G Anagnostaras, 'Activating Ultra Vires Review: The German Constitutional Court Decides Weiss' cit. 818.

³⁴ JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999) 322.

³⁵ T Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018) 282.

³⁶ K Weber and H Ottmann, *Reshaping the European Union* (Nomos 2018) 180-181.

³⁷ See JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?"* cit.

³⁸ R Herzog and L Gerken, 'Stoppt den Europäischen Gerichtshof' (8 September 2008) Frankfurter Allgemeine Zeitung docplayer.org.

³⁹ FC Mayer, *Kompetenzüberschreitung und Letztentscheidung* cit. 337.

court not composed of representatives from the Highest National Courts alone, but composed of an equal number of both national and CJEU judges.⁴⁰ This sounds fair, given that the aim is to address conflicts between these two sides. Actually, however, such composition would change the nature of the game, compared to Weiler's original proposal. Imagine a situation in which Member State judges argue that the CJEU has overstepped its mandate. Even if all national judges close ranks, now the maximum they can achieve is stalemate if the European judges stick to the solution proposed by the CJEU. Such a stalemate would most likely be insufficient to overrule the CJEU, implying that the judges from the Member States' highest courts can never succeed against the CJEU's opposition.

Recently, in reaction to the PSPP conflict, Weiler and Sarmiento have updated the original Weiler proposal.⁴¹ The authors suggest a new appeal procedure within the province of the CJEU, with a "Mixed Grand Chamber" being composed of six CJEU judges and six judges from the highest courts of the Member States and presided over by the CJEU president. As in the earlier proposal, the new chamber shall only deal with conflicts over the distribution of competences. But here, a decision *validating* a contested Union measure would have to be supported by at least eight or nine judges. This idea circumvents the structural disadvantage of the national representatives that the parity solution would otherwise bring about.

In the remainder of this *Article*, I will analyze the PSPP conflict in detail, in order to review whether the FCC's complaint about the CJEU's use of proportionality violated the norms of cooperation and in order to think through the potential added value of the appeal court idea.

III. FROM KARLSRUHE TO LUXEMBOURG AND BACK: OMT AND PSPP

Wherever principals delegate competences, the limits of the agents' mandates are prone to conflict.⁴² Yet it is more than coincidental that the first case in which the FCC classified a Union act as *ultra vires* concerned the monetary union and the mandate of the ECB in particular. There were always tensions within the EU's legal order, but monetary union brought *particular* tension. This is due to the extraordinary dynamism of the European Monetary Union (EMU), and central banking beyond the EMU, on the one hand, and the stasis of the contractual basis of the EMU, on the other.⁴³ The concurrence of stasis and

⁴⁰ See A Hatje, 'Gemeinsam aus der Ultra-vires-Falle: Plädoyer für einen "Gemeinsamen Rat der obersten Gerichtshöfe der Europäischen Union"' (4 June 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de).

⁴¹ D Sarmiento and JHH Weiler, 'The EU Judiciary After Weiss' (2 June 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de).

⁴² See MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) *Journal of Financial Economics* 305.

⁴³ Arts 119–127 TFEU assign monetary policy to the European System of Central Banks, while economic policy, including budgetary policy, is to remain with the Member States. Art. 282(2) TFEU defines maintaining price stability as the "primary goal" of the European System of Central Banks. Art. 123(1) TFEU prevents fiscal policy from being pursued through monetary instruments (prohibition on the monetary financing of state budgets). Art. 125(1) TFEU is the no-bailout clause.

dynamism opens room for conflict about the narrowness of the reading of the contractual basis and the strictness of judicial scrutiny.

The euro area was created by countries that blatantly contravened the conditions of an “optimal currency area”.⁴⁴ The necessary convergence did not occur during the first ten years of the euro either. This first decade ended with the financial crisis spilling over from the US, putting the eurozone under maximum stress. With the ensuing euro crisis came a range of rescue measures, such as the introduction of the European Financial Stability Facility (EFSF) (and later the European Stability Mechanism, ESM) and the OMT programme, none of which were envisaged in the Treaties.⁴⁵ Even more, in the meantime, central bank policies had changed worldwide, due to the *quantitative easing* operations responding to secular stagnation and deflationary tendencies, of which the PSPP programme is part.⁴⁶

In January 2014, for the first time in its history, the FCC stayed proceedings in order to refer questions on the interpretation of European law to the CJEU in Luxembourg under the preliminary ruling procedure.⁴⁷ At issue were the criteria for determining whether the ECB was operating within the scope of the Treaties with its OMT programme. It was aimed at shielding risk premia on government bonds from uncontrolled increase, an aim obviously different from inflation steering. According to the ECB, the programme was nevertheless in line with its mandate because it aimed at protecting the transmission mechanism of monetary policy.

Luxembourg responded with its *Gauweiler* judgment of June 2015.⁴⁸ The CJEU discussed separately whether the CJEU blurred the line between monetary and economic policy, whether the OMT programme was an unlawful circumvention of the ban on monetary finance in art. 123 TFEU, and whether the OMT programme was proportional. With regard to the boundary between monetary and economic policy, the CJEU confirmed the necessity of sheltering the functioning of the transmission of monetary policy by the

⁴⁴ A Johnston and A Regan, ‘European Monetary Integration and the Incompatibility of National Varieties of Capitalism’ (2016) JComMarSt 318; FW Scharpf, ‘There Is an Alternative: A Two-Tier European Currency Community’ (MPIFG Discussion Paper 18/7-2018); M Höpner and M Lutter, ‘The Diversity of Wage Regimes: Why the Eurozone Is Too Heterogeneous for the Euro’ (2018) European Political Science Review 71.

⁴⁵ G Anagnostaras, ‘Activating Ultra Vires Review’ cit. 826.

⁴⁶ S Saurugger and F Terpan, ‘The Court of Justice of the European Union, Conflicts of Sovereignty and the EMU Crisis’ (2019) Journal of European Integration 903 is an excellent overview of EMU-related case law of the CJEU before the PSPP conflict.

⁴⁷ German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit.

⁴⁸ Case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400. See A Hinarejos, ‘Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union. European Court of Justice, Judgment of 16 June 2015, Case C-62/14 *Gauweiler and others v Deutscher Bundestag*’ (2015) EuConst 563; V Borger, ‘Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*’ (2016) CMLRev 139; T Tridimas and N Xanthoulis, ‘A Legal Analysis of the *Gauweiler* Case: Between Monetary Policy and Constitutional Conflict’ (2016) Maastricht Journal of European and Comparative Law 17; C Joerges, ‘Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution after the *Gauweiler* Litigation?’ (2016) Maastricht Journal of European and Comparative Law 99.

means of differential bond acquisition.⁴⁹ With regard to the supposed circumvention of the ban on direct state finance, it referred to a number of characteristics that, according to the CJEU, prevented the OMT programme from implying such circumvention, in particular the fact that the number of bonds allowed to be acquired was delimited; that the ECB did not acquire bonds directly from the issuing finance ministries; that the ECB did not intend to announce the amounts of bonds to be acquired *ex ante*; and that holding to maturity would remain an exception to the rule.⁵⁰ In addition, the CJEU performed a proportionality test. It pointed out that the ECB had a wide discretion⁵¹ and found no “manifest error[s] of assessment”⁵² in the ECB’s written assessment that the programme was both appropriate and limited to what was required.⁵³

The FCC accepted the CJEU decision in its *OMT* judgment from June 2016 and thus dismissed the complaints.⁵⁴ Interestingly in the context of this analysis, scholars disagree on whether the *OMT* saga was an expression of the productive functioning of constitutional pluralism, that is, of legitimate and loyal behavior within it. Simon as well as Bobić affirm this, given that the FCC and the CJEU engaged in a dialogue that ended without contradictory instructions given to politicians.⁵⁵ Kelemen (an opponent of constitutional pluralism anyway) as well as Franzius, however, raise doubts because the FCC claimed the “last say” on the matter for itself.⁵⁶ For them, not only every defection on the side of Member State level supreme courts, but also every expression of a respective threat is a violation of the implicit rules of legitimate behavior within pluralism. But this sets the bar unreasonably high: if constitutional pluralism is to be a meaningful concept, it must grant a wider discretion to supreme courts than just behave *as if* they operated within monism. On this I side with Flynn,⁵⁷ who argues that potential or actual defection can be legitimate

⁴⁹ *Gauweiler and Others* cit. paras 46-65.

⁵⁰ *Ibid.* paras 93-127.

⁵¹ *Ibid.* para. 68.

⁵² *Ibid.* para. 74 and para. 81.

⁵³ *Ibid.* paras 66-92.

⁵⁴ German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit. See M Starita, ‘Openness Towards European Law and Cooperation with the Court of Justice Revisited: The Bundesverfassungsgericht Judgment of 21 June 2016 on the OMT Programme’ (2016) *European Papers* www.europeanpapers.eu 395; F Heide, ‘Quo vadis Ultra-vires? – Das abschließende Urteil des Bundesverfassungsgerichts in Sachen OMT-Programm’ (2016) *Zeitschrift für Europarechtliche Studien* 479; M Payandeh, ‘The OMT Judgment of the German Federal Constitutional Court. Repositioning the Court within the European Constitutional Architecture’ (2017) *EuConst* 400.

⁵⁵ S Simon, ‘Konturen des kooperativen Verfassungspluralismus in Europa’ (2016) *Zeitschrift für Staats- und Europawissenschaften* 378, 400; A Bobić, ‘Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice’ (2017) *German Law Journal* 1395, 1427.

⁵⁶ RD Kelemen, ‘On the Unsustainability of Constitutional Pluralism’ cit. 146; C Franzius, ‘Verfassungspluralismus – Was bedeutet das konkret?’ (2016) *Rechtswissenschaft* 62, 77.

⁵⁷ T Flynn ‘Constitutional Pluralism and Loyal Opposition’ cit. 245 ff.

behavior within pluralism if substantive criteria of coherence, good faith attempts to enter into dialogue, and serious engagement with CJEU jurisprudence are met.⁵⁸

We now approach the PSPP conflict. The ECB adopted the PSPP by decisions taken in the fall of 2014. In contrast to OMT, the programme is part of *quantitative easing*, which is, according to the ECB, designed to return (in this case, raise) the rate of inflation to the target of below, but close to two per cent. Once again, complaints were lodged with the FCC in Karlsruhe, with in essence the same objections as in the *OMT* case, and once again Karlsruhe decided to make a referral to the CJEU.⁵⁹ The FCC explicitly, in three of its questions, wondered about the proportionality of the measure (questions 3c, 3d, and 4). In particular, in question 3c, the German highest court asked whether the programme “on account of its strong economic policy effects [...] violated the principle of proportionality”.⁶⁰

The CJEU’s response came with the *Weiss* judgment of December 2018.⁶¹ According to the ruling, as in the *OMT* case, the programme was not an illegal circumvention of the ban on state finance.⁶² The CJEU again emphasized the wide discretion of the ECB⁶³ and performed a proportionality test on the basis of the search for manifest assessment errors in the written ECB statements.⁶⁴ It concluded that the programme was an appropriate measure in order to bring inflation back to the target and did not go beyond what was necessary.⁶⁵ The Second Senate of the FCC, however, perceived the *Weiss* ruling to be superficial in substance and ungracious in tone. A particular source of displeasure was the handling of question 5, which related to risk sharing in the event that a Eurosystem central bank had to be recapitalized. Luxembourg refused to give an answer because the question, it said, was hypothetical.⁶⁶ At the hearing in the *PSPP* case on July 30 and 31,⁶⁷ 2019, the sense of frustration among the Karlsruhe justices about the response was clearly visible.⁶⁸

⁵⁸ One can also put this in game-theoretic language: as Axelrod has shown, the readiness to defect can stabilize cooperation. See R Axelrod, *The Evolution of Cooperation* (Basic Books 1984).

⁵⁹ German Federal Constitutional Court judgment *PSPP* cit.

⁶⁰ Goldmann accuses the FCC of not having “even put much weight on the proportionality principle” in its referral: M Goldmann, ‘The European Economic Constitution After the PSPP Judgment: Towards Integrative Liberalism?’ (2020) *German Law Journal* 1058, 1074.

⁶¹ *Weiss and Others* cit. AAM Mooij, ‘The Weiss Judgment: The Court’s Further Clarification of the ECB’s Legal Framework: Case C-493/17 Weiss and Others, EU:C:2018:1000’ (2019) *Maastricht Journal of European and Comparative Law* 449; M Van Der Sluis, ‘Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)’ (2019) *LIEI* 263; C Dornacher, ‘Schlusskapitel oder Zwischenakt? Anmerkung zum Urteil des EuGH v. 11.12.2018, Rs. C-493/17 (Weiss u.a.)’ (2019) *EuR* 546.

⁶² *Weiss and Others* cit. paras 102–108.

⁶³ *Ibid.* para. 73.

⁶⁴ *Ibid.* paras 24, 56, 78–81, 86, 91–93.

⁶⁵ *Ibid.* paras 71–97.

⁶⁶ *Ibid.* para. 165.

⁶⁷ The author attended the hearing.

⁶⁸ AAM Mooij, ‘The Weiss Judgment: The Court’s Further Clarification of the ECB’s Legal Framework’ cit. 459; W Kahl, ‘Optimierungspotenzial im “Kooperationsverhältnis” zwischen EuGH und BVerfG, 39’ (2020) *Neue Zeitschrift für Verwaltungsrecht* 824, 826.

And so Karlsruhe's *PSPP* judgment came about.⁶⁹ The FCC rejected that the *PSPP* was covert monetary financing of the participating countries. In this respect, the Second Senate raised serious concerns against the interpretation of their Luxembourg colleagues, but argued that their assessments were at least comprehensible and therefore not *ultra vires*.⁷⁰ However, Karlsruhe objected to the way the CJEU had tested the proportionality of the intended monetary effects of the measure, on the one hand, and the unintended side effects on economic policy in competence of the Member States, on the other. Karlsruhe therefore declared the CJEU's earlier *Weiss* judgment to be incomprehensible, objectively arbitrary, and as such an *ultra vires* act not applicable to Germany.

Thus, the concept of proportionality was at the center of the struggle between the CJEU and the FCC. We will trace the reasoning of the FCC in more detail in section V, but beforehand revisit proportionality in theoretical terms and recognize that its application across jurisdictions is far from uniform.

IV. THE MANY FACES OF PROPORTIONALITY

Proportionality is among the most common legal concepts that courts use to rationalize judicial decision making, here in particular to supervise political authority.⁷¹ According to the concept, all kinds of actions of public authorities that affect citizens' fundamental rights⁷² are only lawful if they are proportional, that is, if they pass a special proportionality test. The concept was first developed by German administrative courts in the late 19th century and served as a constraint to police action.⁷³ It spread to many countries and international orders in the course of the 20th century.⁷⁴ The EU is among such orders: according to art. 5(1) TEU, "The use of Union competences is governed by the principles of subsidiarity and proportionality".⁷⁵ In its rulings introduced in section III, the CJEU

⁶⁹ German Federal Constitutional Court judgment *PSPP* cit.

⁷⁰ See in particular German Federal Constitutional Court judgment *PSPP* cit. para. 184.

⁷¹ TI Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) ELJ 158, 160.

⁷² At first glance, the *PSPP* dispute in which public authorities are not conflicting with individual rights but with other public authorities within the same multilevel system falls out of this category. The FCC nevertheless reconstructed the conflict as a fundamental rights conflict: In its view, disproportional interference with the matters of the Member States translates into interference with the citizens' individual right to democracy, as the FCC had famously declared in its *Lisbon* decision from 2009 (*Lisbon* cit. para. 177) and re-emphasized in its *OMT* judgment (German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13 cit. para. 83). In this respect, therefore, the *PSPP* judgement brought no news.

⁷³ M Cohen-Eliya and I Porat, 'American Balancing and German Proportionality: The Historical Origins' (2010) ICON 263, 271-276.

⁷⁴ See S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) ICON 468; A Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); M Klatt and M Meister, 'Verhältnismäßigkeit als universelles Verfassungsprinzip' (2012) Der Staat 159, 160-162; W Sauter, 'Proportionality in EU Law: A Balancing Act?' (TILEC Discussion Paper 003-2013).

⁷⁵ Note that art. 5 TFEU does not narrow the applicability of proportionality down to situations in which public actions interfere with fundamental rights.

has confirmed that the range of applicability of the concept also encompasses actions of the ECB, such as their bond purchase programmes. The struggle between the FCC and the CJEU is about how the proportionality test shall be performed in such cases.

The test consists of four stages: one pre-stage and three main stages.⁷⁶

i) Most jurists describe the proper purpose test as a necessary step before the actual proportionality test begins. The Court asks whether the legislator has a mandate for legislation in the respective field, and whether the act under review pursues a legitimate, lawful aim.

ii) The first main stage is about suitability (alternative terms: appropriateness, rational connection). The Court asks whether the act is capable of achieving its legitimate aim.

iii) The second stage is about necessity. The Court asks whether the act does not go beyond what is necessary, in other words: whether it is minimally intrusive. An act is less intrusive the less it interferes with the constitutionally protected rights of the persons affected.

iv) The third stage is about the balance between cost and benefit (terms: adequateness, appropriateness, proportionality *strictu sensu*). The Court weights the reduction in enjoyment of rights against the gain achieved. In the light of this part of the test, a measure is only proportional if its urgency outweighs the infringement on the side of the persons affected. The Court asks, in the words of Lübke-Wolff: is it worth this?⁷⁷

The third stage – proportionality in the narrow sense – is the contested part, as two examples shall illustrate. The first example is from Grimm, a proponent of testing proportionality in the narrow sense.⁷⁸ Imagine a law that allows the police to fatally shoot someone if this measure is the only way of preventing them from harming another's property. Because property is constitutionally protected in almost all countries and because the aim of the act is therefore lawful, it will pass the pre-test. Shooting the person will in fact prevent him from vandalizing property, therefore the act passes stage one as well. Since shooting him to death is the only possible measure to prevent him from harming property in our thought experiment, and since the measure does not go beyond that, the act also passes the second stage of the test. Without the third stage, the test would be finished now and the act would have passed the test. Only the third stage brings about

⁷⁶ Among others: E Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (1973) *Archiv des öffentlichen Rechts* 568, 571–586; R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) *Ratio Juris* 131, 135–136; T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 139; J Rivers, 'Proportionality and Variable Intensity of Review' (2006) *CLJ* 174, 181; A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit.

⁷⁷ G Lübke-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court' (2014) *HRLRev* 12, 17.

⁷⁸ D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) *University of Toronto Law Journal* 383, 396.

what most certainly every reader thinks is right: the hypothetical act is unlawful because the price of shooting the person in question and killing them is out of proportionality.

The second example comes from Tsakyrakis, a critic of the proportionality test in the narrow sense.⁷⁹ In the 1950s, the US Supreme Court decided a number of landmark cases on ethnic desegregation in schools, according to which the segregation of black school children was unlawful. All readers will agree that the Supreme Court did the right thing: it protected the constitutional rights of people of color. Rephrased in the language of proportionality, the Supreme Court argued that telling black children they cannot be educated together with white children is brutally offensive to their dignity in a way that forcing whites to share their classrooms accordingly is not.

So far, so good. But now imagine whites being so passionately racist and the pain they would feel if their children were co-educated with black children so overwhelming that it outweighs the gain on the side of the children of color or their parents. If that were true, should the US Supreme Court, in the light of the last stage of the proportionality test, have decided differently? Obviously not. The thought experiment, according to Tsakyrakis, reveals a fundamental problem of the proportionality test: it trades moral considerations, which are at the heart of human rights, against a utilitarian perspective.⁸⁰

Khosla has argued that Tsakyrakis' racism example is misleading because even if the US Constitutional Court had fully decided the case on the basis of proportionality (which it did not) and even if the amount of racism among the white persons involved was as overwhelming as assumed in the thought experiment, the decision of the Supreme Court would have nevertheless been the same, because the act in question would not have passed the pre-stage of the test: the aim of the act in question was unconstitutional in the first place.⁸¹ The proportionality test as a whole, Khosla argues, must not be confused with its final balancing stage. Nevertheless, the objection that balancing is misleading because it tends to treat all interests involved with equal legitimacy and thereby deprives fundamental rights of their normative power is widespread and a matter of ongoing controversy. A famous proponent of this line of critique is Habermas.⁸²

Another line of objection to balancing is that it assumes that costs and benefits of public actions come in a common currency and can therefore be objectively weighted by judges. What judges really do when they balance, according to this critique, is deciding which of the interests involved *shall* weigh more. Such decisions, however, are inherently

⁷⁹ S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' cit. 487-488.

⁸⁰ *Ibid.*

⁸¹ M Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) ICON 298, 305.

⁸² J Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992) 312. See also Alexy (R Alexy, 'Constitutional Rights, Balancing, and Rationality' cit. 134), Barak (A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit. 488-490) and Grimm (D Grimm, 'Justiz und Gesetzgebung: Zur Rolle und Legitimität der Verfassungsrechtsprechung' in P Koller and C Hiebaum (eds), *Jürgen Habermas: Faktizität und Geltung* (De Gruyter 2016)), who respond to Habermas.

political. In this view, balancing is a tool that enables courts to overstep their mandate to the disfavor of democracy. Elected politicians, rather than judges, according to this perspective, should ask and answer the question “Is it worth this?”, and take on the responsibility for their answers vis-à-vis their electorates. In Germany, scholars such as Böckenförde and Hillgruber conform to this line of critique.⁸³ Schlink famously asked the FCC to stick to the proportionality test but to abandon its final stage.⁸⁴

Our snapshot of the judicial debate makes clear that the proportionality test is far from uncontroversial. It does therefore not come as a surprise that the actual use of the tool differs widely.⁸⁵ German and Israeli courts, for example, put much weight on the final balancing stage,⁸⁶ while French and Canadian courts use the test more reluctantly.⁸⁷ Nowag argues that proportionality poses a “lost in translation” problem to jurists: the widespread use of the term hides that the legal concepts behind it are significantly different.⁸⁸ It follows from this that the ways the FCC and the CJEU understand and use proportionality are not necessarily the same, too.

V. PROPORTIONALITY IN THE *PSPP* DECISION OF THE FCC

The background knowledge provided in the last section enables zooming into the details of the *PSPP* decision with particular emphasis on the use of proportionality. Remember that the plaintiffs accused the ECB of, first, having circumvented the ban on the use of the central bank for the purpose of monetary finance in art. 123 TFEU and, second, of having overstepped its monetary policy mandate by having intervened in the economic policy matters of the Member States in too intrusive a way. Likewise, they accused the CJEU of having acted *ultra vires* by not having intervened.

With regard to the first objection, the FCC expresses “serious concerns”⁸⁹ against the way the CJEU reviewed the matter, but eventually argues that the CJEU’s conclusions are

⁸³ EW Böckenförde, ‘Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik’ (1990) *Der Staat* 19-20; C Hillgruber, ‘Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren’ (2011) *Juristenzeitung* 861, 862.

⁸⁴ B Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot 1976) 152-153. Barak (A Barak, *Proportionality: Constitutional Rights and Their Limitations* cit. 481-492), a proponent of the proportionality test, categorizes and extensively discusses criticisms.

⁸⁵ See C Knill and F Becker, ‘Divergenz trotz Diffusion? Rechtsvergleichende Aspekte des Verhältnismäßigkeitsprinzips in Deutschland, Großbritannien und der Europäischen Union’ (2003) *Verw* 447.

⁸⁶ A Stone Sweet and J Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) *ColumJTransnatlL* 72, 163.

⁸⁷ See G De Búrca, ‘The Principle of Proportionality and its Application in EC Law’ (1993) *Yearbook of European Law* 105, 110; D Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ cit. 393.

⁸⁸ See J Nowag, ‘The BVerfG’s Proportionality Review in the *PSPP* Judgment and Its Link to *Ultra Vires* and Constitutional Core: Solange Babel’s Tower Has Not Been Finalised’ (2020) *LundLawEUWP* 11.

⁸⁹ German Federal Constitutional Court judgment *PSPP* cit. para. 184.

comprehensible.⁹⁰ The second objection is where different readings of proportionality come in. In direct contradiction to the CJEU in *Gauweiler* and *Weiss*, Karlsruhe points out that the ECB's mandate is *narrowly* defined.⁹¹ Side effects of its decisions on economic policy, the FCC argues, are unavoidable, but have to remain proportional as they affect the citizens' individual right to democracy.⁹² Constitutional supervision over proportionality is therefore essential, but the CJEU, the argument of the FCC goes, did not go beyond a search for manifest assessment errors in the written statements of the ECB and therefore refused to apply a meaningful proportionality test.

Proportionality, the FCC makes clear, is among the general principles of EU law⁹³ and usually consists of three main steps, in accordance with what we have seen in the previous section: suitability, necessity, and appropriateness.⁹⁴ This, according to the FCC, holds true not only for Germany, but for many other Member States as well, such as France, Spain, Sweden, Italy, Austria, Poland, Hungary, and the UK.⁹⁵ The FCC goes on to argue that the CJEU, when it tests the proportionality of acts of EU institutions, uses the concept differently: it tests whether the acts in questions are appropriate for attaining the legitimate objective pursued (pre-test and main stage one), thereby frequently limiting its review to whether the relevant measures are manifestly inappropriate; and it tests whether they do not manifestly exceed the limits of what is appropriate and necessary in order to achieve the objectives (stage two). But "little to no consideration", the FCC complains, "is given to whether the measure is actually proportionate in the strict sense ... As a general rule, the CJEU refrains from reviewing proportionality in the strict sense".⁹⁶

In what follows, the FCC recapitulates the CJEU's proportionality test step by step and finds that the specific manner in which it was applied in *Weiss* "renders that principle meaningless"⁹⁷ for two reasons. First, the application of *all stages* of the test lacked severity because it did not go beyond the search for manifest errors of assessment on the side of the ECB.⁹⁸ According to the Karlsruhe judges, the CJEU refrained from seriously questioning the aim and necessity of the programme. "As a result", the FCC says, "the CJEU allows asset purchases even in cases where the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic fiscal policy agenda".⁹⁹ This

⁹⁰ The official English version of the decision is to be found here: www.bundesverfassungsgericht.de.

⁹¹ German Federal Constitutional Court judgment *PSPP* cit. para. 143.

⁹² *Ibid.* para. 160.

⁹³ *Ibid.* para. 124.

⁹⁴ *Ibid.* para. 125.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* para. 126.

⁹⁷ *Ibid.* para. 127.

⁹⁸ *Ibid.* para. 156.

⁹⁹ *Ibid.* paras 137 and 142.

standard of review, the FCC says, “is by no means conducive to restricting the scope of the competences conferred upon the ECB”.¹⁰⁰

Second, the Second Senate criticizes the lack of test stage three and thereby “the complete disregard of the PSPP’s economic policy effects”.¹⁰¹ The decisive sentence reads as follows: “[T]he review of proportionality is rendered meaningless, given that suitability and necessity of the PSPP are not balanced against the economic policy effects [...] arising from the programme to the detriment of Member State’s competences, and that these adverse effects are not weighted against the beneficial effects the programme aims to achieve”.¹⁰²

Proportionality *strictu sensu* balances cost and benefit. Which side effects of the PSPP need to be considered, according to the FCC, in order to assess its proportionality? The Highest Court of Germany lists the refinancing conditions of the Member States,¹⁰³ the stability of the banking sector, real estate and stock market bubbles and the survival of economically unviable companies under conditions of dysfunctionally low interest rates. The FCC also makes clear that these side effects are examples and that it is not for the FCC to decide how such concerns are to be weighted. Rather, “the point is that such effects, which are created or at least amplified by the PSPP, must not be completely ignored”.¹⁰⁴

The FCC emphasizes, as we have already seen, that the balancing stage of the test is not a German peculiarity but known and practiced in many Member States. It does not necessarily follow that the CJEU has to apply the test accordingly, too. How does the FCC justify its view that the CJEU’s softer testing of proportionality is illegitimate?¹⁰⁵ “[C]ompletely disregarding the economic policy effects of the PSPP”, Karlsruhe argues, “contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law”, the FCC argues.¹⁰⁶ Now the Second Senate uses much space for extensive references to other decisions in which the CJEU performed much harder proportionality tests, including attention to practical effects. The references encompass judicial fields such as fundamental rights protection, indirect discrimination, the common market rules, and state aid, among others. We will come back to this differential application of the proportionality test below.

The lack of a serious test, Karlsruhe argues, “allows the ECB to expand ... its competences on its own authority” and “paves the way for a continual erosion of Member State competences”.¹⁰⁷ It concludes that the ECB, insofar as it did not document the proportionality of its PSPP programme on the basis of a serious test, acted *ultra vires*, as much

¹⁰⁰ *Ibid.* para. 156.

¹⁰¹ *Ibid.* para. 133.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* paras 170-175. The idea that the *improvement* of refinancing conditions could be a disproportional interference into the economic matters of the Member States is surely among the most obscure aspects of the PSPP ruling.

¹⁰⁴ *Ibid.* para. 173.

¹⁰⁵ *Ibid.* paras 146-152.

¹⁰⁶ *Ibid.* para. 146.

¹⁰⁷ *Ibid.* para. 156.

as the CJEU did when it abstained from asking the ECB for a respective documentation and from performing a meaningful proportionality test on its part.

VI. DISCUSSION

In *Gauweiler* and *Weiss*, the CJEU tested the proportionality of ECB actions differently from how German constitutional lawyers would have most likely done it. This alone can hardly justify Karlsruhe's *ultra vires* verdict. As we have seen in sections IV and V, the concept is contested and its application differs among jurisdictions. The EU, consisting of twenty-seven different jurisdictions, has developed its own way of applying legal concepts such as proportionality. Also, while the FCC restricts the proportionality test to interference with human rights, art. 5(1) TFEU states that the use of *all Union competences* is governed by proportionality. It must not come as a surprise that the differing ranges of application come with a different application mode. None of the respective applications are "right" or "wrong" *per se*. Critics accordingly accused the FCC of having illegitimately insisted on "a very German understanding of proportionality";¹⁰⁸ in fact, this line of critique has been made by almost all opponents of the *PSPP* ruling.¹⁰⁹ The critics have a valid point: the FCC cannot impose its own proportionality standards upon the CJEU, at least not without manifestly violating the rules of cooperative behavior within constitutional pluralism.

Therefore, if the FCC had stopped here, its *PSPP* decision would lack persuasive power indeed. But this is not what the FCC did. Karlsruhe went further and gave the argument a particular twist. First, it accused the CJEU not only of a differing but also of a *differential* use of proportionality. Critics may object that such differential use is not necessarily "wrong" *per se* either: why not test public interference with human rights differently from interference with, say, fundamental freedoms? Tridimas¹¹⁰, for example, ar-

¹⁰⁸ J Nowag, 'The BVerfG's Proportionality Review in the *PSPP* Judgment and Its Link to *Ultra Vires* and Constitutional Core' cit. 9; see also I Feichtner, 'The German Constitutional Court's *PSPP* Judgment: Impediment and Impetus for the Democratization of Europe' (2020) German Law Journal 1090, 1097; V Perju, 'Against Bidimensional Supremacy in EU Constitutionalism' (2020) German Law Journal 1006, 1020.

¹⁰⁹ For example, see I Kucina, 'The German Constitutional Court's Challenge to the Court of Justice of the European Union – Problems, Consequences, Possible Solutions: The *PSPP* Judgment of the German Constitutional Court of 5 May 2020' in G Barrett, JP Rageade, D Wallis and H Weil (eds), *The Future of Legal Europe: Will We Trust in It?: Liber Amicorum in Honour of Wolfgang Heusel* (Springer 2021) 431, 441; N Petersen and K Chatziathanasiou, 'Balancing Competences? Proportionality as an Instrument to Regulate the Exercise of Competences After the *PSPP* Judgment of the Bundesverfassungsgericht' (2021) EuConst 314, 320 and 333; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis?' cit. 199; O Scarcello, 'Proportionality in the *PSPP* and *Weiss* Judgments: Comparing Two Conceptions of the Unity of Public Law' (2021) European Journal of Legal Studies 45, 58; G Anagnostaras, 'Activating *Ultra Vires* Review' cit. 812-814 and 822.

¹¹⁰ T Tridimas, *The General Principles of EU Law* cit. 193-194.

gues that it makes sense to differentiate between proportionality as the guardian of individual rights and proportionality as a tool of market integration. "As a result", he says, "the intensity of review varies considerably".¹¹¹

One may therefore again wonder about the legitimacy of the FCC's objection: even the differential use of proportionality can hardly be wrong *per se*. But second, the FCC accused the CJEU of a *specific form* of differential use of proportionality: a form that over time systematically enlarges the discretion of EU institutions to the disfavor of Member State institutions, by the means of systematically applying a softer proportionality test against measures of the former and a harder test against measures of the latter institutions. In the *PSPP* case, according to the FCC, the differential use of the concept resulted in the lack of meaningful judicial control whatsoever, at the cost of disproportional interference with the economic matters of the Member States. This is a legitimate objection, at least from the point of view of national constitutional law.

The differential application of proportionality has been acknowledged by European law scholars for a long time. The FCC could have made its point even more persuasive if it had referred to this literature strand more extensively. According to De Búrca, for example, the CJEU performs a quite rigorous and searching examination of justifications whenever measures at Member State level have been challenged; when action is brought against the Union, by contrast, a looser proportionality test is generally used.¹¹² As Harbo puts it, proportionality in the narrow sense is applied "whenever the Court finds it suitable in order to promote the desired outcome": more integration.¹¹³

Particularly enlightening is Sauter, who identifies three parallel standards of proportionality in the jurisprudence of the CJEU: against private parties under competition law, the Court performs a least restrictive means test and engages in the balancing of costs and benefits (proportionality *strictu sensu*, that is, test stage three); against Member State measures, the Court applies a least restrictive means test; and against Union-level institutions, it runs a manifestly inappropriate test only.¹¹⁴ Harbo wonders about the softness of the test if it is applied against EU institutions and asks whether it should be called a proportionality test after all since it, according to him, "is in fact a reasonableness test in disguise".¹¹⁵ And Tridimas states that the proportionality requirement has turned out to be an unreliable ground on the basis of which to tame Union competences.¹¹⁶ The FCC's objection therefore has a solid ground in the literature.

¹¹¹ *Ibid.* 137.

¹¹² G De Búrca, 'The Principle of Proportionality and Its Application in EC Law' cit. 111, 146; O Scarcello, 'Proportionality in the PSPP and Weiss Judgments' cit. 51.

¹¹³ TI Harbo, 'The Function of the Proportionality Principle in EU Law' cit. 172. See also C Knill and F Becker, 'Divergenz trotz Diffusion?' cit. 463-469.

¹¹⁴ See W Sauter, 'Proportionality in EU Law' cit.

¹¹⁵ TI Harbo, 'The Function of the Proportionality Principle in EU Law' cit. 172. See also C Knill and F Becker, 'Divergenz trotz Diffusion' cit. 184.

¹¹⁶ T Tridimas, *The General Principles of EU Law* cit. 180.

From the perspective of national constitutional law, this specific form of differential use of the concept is hard to accept. This also holds true for a number of possible justifications of the view put forward by the CJEU. The differential use of the test could be easier to justify if the criterion for differentiation was the policy field only. But the actual criterion is the *addressee*, rather than the policy field: proportionality, as the CJEU uses it, constrains EU action systematically less than Member State action, *independently from the kind of action*. The fundamental freedoms illustrate this point nicely, as the CJEU performs a softer proportionality test when the Union lawmaker interferes with fundamental freedoms, compared to situations in which lawmakers at Member State level interfere accordingly.¹¹⁷

Another justification could be that the Union lawmaker needs particular discretion in order to make European democracy work. But the same could be said about national democracy: democratic elections become less meaningful *wherever* the discretion among elected politicians shrinks, at the European as well as at Member State level. Above all, the democratic necessity argument would fail to justify the soft test of ECB action: in the PSPP case, democracy is affected by the side effects (the cost), rather than by a too narrow room of discretion on the side of the ECB (if it is affected at all).

The most straightforward justification of the biased application of proportionality would be to approve it as an expression of the Court's dedication to the goal of an "ever closer Union".¹¹⁸ This, however, is precisely the heart of the problem. Meinel, for example, puts forward that the FCC blurred the line between proportionality as a means to control the *exercise* of competences and proportionality as a means to *demarcate* competencies.¹¹⁹ Analytically, competence exercise and competence demarcation are different things indeed. But the exercise of competences often has side effects on other policy fields and is therefore prone to competence creep. The clear distinction between exercise and demarcation breaks down if one level's exercise of competences – the boundary of a given competence – within a multilevel system is *systematically more tightly controlled* than the other level's. Who would deny that the proportionality test, when differentially applied this way, systematically paves the way for competence drift to the disfavor of the Member State level?¹²⁰ Complaining about this and arguing that competence drift shall

¹¹⁷ See M Höpner and SK Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) CYELS 182, 202; M Höpner, 'Ist der Unionsgesetzgeber an die Grundfreiheiten gebunden?' (2022) EuR (forthcoming).

¹¹⁸ Critically C Knull and F Becker, 'Divergenz trotz Diffusion?' cit. 468.

¹¹⁹ F Meinel, 'Verhältnismäßig grenzenlos' (2020) Merkur 43, 48. See also HJ Hellwig, 'Die Verhältnismäßigkeit als Hebel gegen die Union: ist die Ultra-vires-Kontrolle des BVerfG in der Sache Weiss noch mit dem Grundsatz der Gewaltenteilung vereinbar?' (2020) NJW 2497, 2498 and M Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) German Law Review 979, 985-986.

¹²⁰ In the words of U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 226: "The problem of competences is really a problem of how they are exercised: competence creep exists because of the way competences are being used."

be *equally controlled in both directions* can hardly be a violation of reasonable rules of legitimate and cooperative behavior within constitutional pluralism.

Critics of the *PSPP* ruling (and also some of its defenders) have also argued that the FCC should at least have asked the CJEU for another preliminary ruling before its *ultra vires* verdict.¹²¹ They argue that the FCC should have followed the example of the Italian Constitutional Court (ICC) in the *Taricco* saga from 2015-2018. In this criminal law case, a CJEU judgment¹²² in answer to an Italian referral led to a clash between EU law and Italian constitutional law. The *Corte Costituzionale* could have responded by activating its *controllimiti* doctrine, a control reservation similar to German constitutional identity.¹²³ But the ICC opted for a further referral.¹²⁴ In its *Taricco II* ruling, the CJEU addressed the Italian concerns and therefore avoided defection on the side of the ICC;¹²⁵ some argue that *Taricco II* was an essentially political decision, aiming at preserving constitutional peace at all costs.¹²⁶ According to this view, the *Taricco* saga shows that the CJEU is listening to courts at Member State level, willing to correct previous rulings, and willing to avoid conflict.¹²⁷ But second referrals may from time to time be necessary to activate such willingness on the side of the CJEU – an opportunity which the FCC missed.

My objection is that the scholars quoted above overstate the difference between the approaches chosen by the Italian and German constitutional courts. First, we should consider that the ICC actually made *one* referral to the CJEU in the *Taricco* saga, given that the first preliminary reference came from a first-instance criminal jurisdiction, the District Court of Cuneo, and not from the *Corte Costituzionale*.¹²⁸ Second, the FCC's preliminary reference that led to *Weiss* was already the second referral – if we count the referral on the very similar

¹²¹ For example, S Simon and H Rathke, "Simply Not Comprehensible." Why? (2020) German Law Review 950, 955; J Basedow, J Dietze, S Griller, M Kellerbauer, M Klamert, L Malferrari, T Scharf, D Schnichels, D Thym and J Thomkin, 'European Integration: Quo Vadis?' cit. 204; G Anagnostaras, 'Activating Ultra Vires Review' cit.

¹²² Case C-105/14 *Taricco and Others* ECLI:EU:C:2015:555.

¹²³ F Fabbrini and O Pollicino, 'Constitutional Identity in Italy: European Integration as the Fulfillment of the Constitution' (EUI Department of Law Research Paper 06-2017) 9; R Bruggeman and J Larik, 'The Elusive Contours of Constitutional Identity: Taricco as a Missed Opportunity' (2020) Utrecht Journal of International and European Law 20, 23.

¹²⁴ F Carelli, 'The Judicial Dialogue in the CJEU and the Fake Contradiction of the Taricco Saga' (2020) Trento Student Law Review 37; T Flynn 'Constitutional Pluralism and Loyal Opposition' cit. 248.

¹²⁵ Case C-42/17 *M.A.S and M.B* ECLI:EU:C:2017:936 (*Taricco II*).

¹²⁶ C Peristeridou and J Ouwerkerk, 'A Bridge Over Troubled Water – A Criminal Lawyers' Response to Taricco II' (12 December 2017) Verfassungsblog verfassungsblog.de; M Gappa, 'Der Schutz der mitgliedstaatlichen Verfassungsidentität im Unionsrecht anhand der "Taricco Saga": C-105/14 (*Taricco* u.a.) und C-42/17 (*M.A.S.* u.a. – "Taricco II")' (2020) Zeitschrift für Europarechtliche Studien 641, 666.

¹²⁷ D Burchardt, 'Belittling the Primacy of EU Law in Taricco II' (7 December 2017) Verfassungsblog verfassungsblog.de; D Thym, 'Friendly Takeover, or: The Power of the 'First Word'. The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review' (2020) EuConst 187, 204.

¹²⁸ T Capeta, 'The Weiss/PSPP Case and the Future of Constitutional Pluralism in the EU' ssrn.com11.

OMT case. At least, it is fair to argue that the CJEU should have been sufficiently warned.¹²⁹ Third, we should also not ignore that the second Italian referral clearly threatened activation of the *controlimiti* doctrine – an approach which, according to some scholars, already violates the rules of loyal behavior in constitutional pluralism (a view which I do not share).

It is difficult to determine why Karlsruhe opted against a further referral on the *PSPP* case, in order to at least give each side a chance to rethink their points of view. The CJEU's handling of referral question 5 in *Weiss* at least did not encourage further dialogue. In my view, in order to decide whether the FCC did wrong, the decisive question should be whether there was need for further substantial clarification of matters.¹³⁰ With regard to the CJEU's understanding of the proportionality of ECB actions, however, everything had been said after *Weiss*. The CJEU had already insisted on a wide mandate of the ECB, implying soft scrutiny in the form of a manifest-errors-of-assessment test only, as much as the FCC had already insisted on a narrow mandate of the ECB, implying hard, "meaningful" proportionality requirements. In this regard, Karlsruhe's "final say" did not bring any surprise.

Therefore, both the CJEU and the FCC had made their perspectives clear before they provided their "final says". One may sympathize with one perspective more than the other, but it is fair to concede that both views are, within their respective European law and constitutional law contexts, legitimate, clear, and logically comprehensible. Remember now that the *PSPP* dispute has revived the discussion about a European appeal court as a possible way out of the stalemate that can occur when the judicial dialogue results in disagreement. Imagine such an appeal court after the contradicting *Weiss* and *PSPP* decisions and their different interpretations of proportionality. Which value-added could the appeal court have offered?

VII. CONCLUSION: A WAY OUT OF CONSTITUTIONAL PLURALISM?

We can use the discussion in the previous sections to decompose the *PSPP* conflict and to question the potential value-added of a legal super-authority step by step. Imagine first that the FCC had exclusively insisted that the proportionality of Union-level actions shall be fully tested German-style, or that the CJEU had openly excluded the ECB from the proportionality requirement laid down in art. 5(1) TFEU. If that were true, an appeal court could have corrected the mistakes made by either of the courts. It could have done so by strictly sticking to the judicial code. Given that even highest courts can make manifest mistakes, an appeal court can be of help if they occur. But this is not the constellation of the *PSPP* conflict. The views put forward by both courts were comprehensible and legitimate within their own legal contexts.

¹²⁹ U Haltern, 'Revolutions, Real Contradictions, and the Method of Resolving Them' cit. 218.

¹³⁰ *Ibid.* 227.

An appeal court could also easily have mandated a practical solution of the kind the practitioners came up with in July 2020: it could have asked the ECB to make its proportionality assessment of the PSPP transparent to the public, or to confidentially pass it on to the governments and parliaments of the Member States of the eurozone. That would have been of help. With an appeal court, the judiciary would have not left politicians alone with two contradicting instructions, one indicating the legality and another indicating the unconstitutionality of the PSPP.

Consider, however, the political nature of such conflict resolution.¹³¹ Moderation between the contradicting instructions of both sides must not be confused with the finding of justice on a common legal basis because a guiding hyper norm above both European and national constitutional law does not exist. This does not imply that an appeal court is a bad idea: judicial decisions often are political compromises in disguise (remember the critics of *balancing* in section IV). But the architects of a new judicial conflict resolution body should be aware of the political nature of the task, even if they ask jurists to do the job.

The more we move from the surface to the deep structure of the PSPP conflict, however, the less the matters become accessible to compromise. This holds true for the differing readings of the proportionality requirement, and the softer test that European law runs against Union-level institutions in particular. The differing readings among the two courts can hardly be bridged without suspending long lines of jurisprudence on both sides. An arbitration that successfully overrides one or both of these lines is hard to imagine and most certainly impossible.

Fully non-accessible to compromise is the very core of the PSPP conflict: the claim of an unconditional supremacy of European law, on the one hand, and of constitutional control reservations at national level, on the other.¹³² In the perspective of the CJEU, a denial of full supremacy would undermine the uniformity of Union law application. This is something the CJEU cannot accept. Likewise, the affirmation of unconditional supremacy would be unconstitutional in the perspective of most supreme courts within the EU.

But isn't the struggle over supremacy precisely what would disappear if an appeal court were to be introduced? Certainly not. Imagine an appeal court's arbitration that asks a constitutional court such as the FCC to accept a European measure that, from the national highest court's point of view, interferes with a highly ranked, constitutionally protected human right, or that manifestly overstretches the European competence order. In the view of the affected court, such an arbitration outcome would be no less unconstitutional and therefore nationally non-applicable than the European measure before the arbitration. Everything else would imply asking supreme courts to accept that the EU has a competence-competence, that is, a competence to unilaterally enlarge its list of competences, as long as a new European institution – the Appeal Court – agrees. It would

¹³¹ N Sölter, 'Ein Schiedsgericht für die Gerichte?' (15 June 2020) verfassungsblog.verfassungsblog.de.

¹³² U Haltern, 'Ultra-vires-Kontrolle im Dienst europäischer Demokratie' (2020) *Neue Zeitung für Verwaltungsrecht* 817, 819.

therefore be naive to expect all national-level control reservations to vanish after the introduction of an appeal court.

In sum, an appeal court could offer help in some constellations. But we should not expect too much from it. Even leaving aside all problems related to its composition, the supermajority required for validating contested Union measures,¹³³ and the necessary treaty change, the value-added of such a constitutional reform may remain modest. In particular, the multipolar structure of the European legal order that constitutes the EU's constitutional pluralism would still persist. Even with an appeal court, that order would sometimes confront politicians with inconsistent instructions.

There is therefore no alternative to constitutional pluralism, at least not in the foreseeable medium term. The monists' scandalization of Member States' constitutional review reservations ("National courts cannot override CJEU judgments")¹³⁴ do not point the way out of it, nor does the reform idea of an appeal court. Living with this state of affairs is unlikely to get any easier in the future, as stress in the European legal system increases. On the one hand, the CJEU's differential application of the proportionality test, which was the focus of this *Article*, is biased in favor of "more Europe", as is, for example, the CJEU's extensive reading of European fundamental freedoms.¹³⁵ On the other hand, the call for more flexibility within the more heterogeneous EU is growing louder and the tacit acceptance of "integration by stealth" is declining. One will therefore have to be prepared for more conflict within constitutional pluralism.

Legal scholarship can show ways to deal with these conflicts. But it is not helpful to draw the corridor of cooperative and loyal behavior within constitutional pluralism so narrowly that it ends up being almost indistinguishable from an appeal to subservience, rather than leaving room for necessary correctives that may – hopefully – encourage the CJEU to rank calls for effective autonomy protection higher than in the past. I hope to have convinced at least some readers that Karlsruhe's complaint about the differential application of the proportionality test was well-founded and coherent enough to be covered by a reasonable set of rules of loyal conduct within constitutional pluralism.

¹³³ See D Grimm, 'Eine neue Superinstanz in der EU?' (2020) *Zeitschrift für Rechtspolitik* 129.

¹³⁴ DR Kelemen, P Eeckhout, F Fabbrini, L Pech and R Uitz, 'National Courts Cannot Override CJEU Judgments' cit.

¹³⁵ M Höpner and SK Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining?' cit.



ARTICLES

PEERING INSIDE THE PRELIMINARY REFERENCE BOX: *COLEMAN V ATTRIDGE LAW*

JEFFREY A. MILLER*

TABLE OF CONTENTS: I. Introduction. – II. Passalacqua's theory of EU legal mobilization. – III. The *Coleman v Attridge* litigation. – III.1. Altruism. – III.2. Euro-expertise. – III.3. An open EU legal opportunity structure. – IV. *Coleman* contributes to a new interpretation of national law. – V. EU legal mobilization in theory and practice.

ABSTRACT: The importance of the preliminary reference procedure for the production of EU case-law is widely recognized in EU legal scholarship, but uncovering the motivations and strategies of the individuals that are involved in the preliminary reference procedure is difficult. The conditions that have the potential to influence whether a national judge poses a preliminary reference to the Court of Justice are so varied and complex that generalizations are difficult to discern. In a recent article, Virginia Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. This *Article* tests Passalacqua's theory by applying it to a new area of law. Although Passalacqua derived her theory from an intimate knowledge of EU migration law, her theory "travels well" when it is extended to a new domain, namely, EU disability rights litigation.

KEYWORDS: preliminary reference procedure – legal mobilization – disability rights – EU law – cause lawyering – legal opportunity structure.

I. INTRODUCTION

It is difficult to overstate the importance of the preliminary reference procedure to the development of European Union law. In a document addressed to national judges in 2002, the Court of Justice of the European Union (CJEU) called it "a fundamental mechanism [...] aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union". Roughly two-thirds of the Court's docket is comprised of preliminary reference proceedings.¹ Nearly

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¹ Court of Justice of the European Union, *Annual Report 2020: Judicial Activity* curia.europa.eu 213.



“all of the significant rulings concerning EU law [...] have come via the preliminary reference procedure”.²

The outcome of a careful compromise between Member State preferences in the 1950s that ranged from the creation of a full-blown constitutional court to a technocratic non-permanent court of arbitration,³ art. 177 of the Treaty of Rome (now art. 267 TFEU) provides that Member State national judges may – and in some cases must – pose questions to the Court to provide them with guidance in how to properly interpret EU law. The CJEU has the power to issue judgements, but it relies heavily on national courts to supply it with legal questions.

While there is no serious disagreement about the importance of the preliminary reference procedure for the production of EU case-law, uncovering the motivations and strategies of the individuals involved in the preliminary reference procedure is difficult. The conditions that have the potential to influence whether a national judge poses a preliminary reference to the CJEU are so varied and complex that generalizations are difficult to discern. The vast majority of research in this field has focused on the behaviour of national judges. A number of studies have employed a large-*n* empirical research design to study whether lower courts or higher courts are most likely to refer cases.⁴ Several works have noted that the number of preliminary references vary significantly on a per capita basis, and have sought to explain how national judicial traditions and other contextual variables may help to explain dissimilar use of the procedure.⁵ Another strand of literature has explored indicators, such as familiarity with EU law, that may predict a judge's willingness to engage in

² D Chalmers, G Davies and G Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2014).

³ A Smedt, 'Negotiating the Foundations of European Law, 1950-57: The Legal History of the Treaties of Paris and Rome' (2012) *Contemporary European History* 339 and 349.

⁴ J Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) *Comparative Political Studies* 510; K Alter, 'The European Court's Political Power' (1996) *West European Politics* 458; AS Sweet and T Brunell, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95' (1998) *Journal of European Public Policy* 66. For a revision of this thesis based on new empirical research, see A Dyevre, M Glavina, and A Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' (2019) *Journal of European Public Policy* 1; RD Kelemen and T Pavone, 'Mapping European Law' (2016) *Journal of European Public Policy* 1118; T Pavone and RD Kelemen, 'The Evolving Judicial Politics of European Integration: The European Court of Justice and National Courts Revisited' (2019) *ELJ* 352.

⁵ Studies that examine national judicial context and traditions include M Wind, 'The Nordics, the EU and the Reluctance towards Supranational Judicial Review' (2010) *JComMarSt* 1039; M Wind, DS Martinsen and G P Rotger, 'The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe' (2009) *European Union Politics* 63; A Wallerman, 'Referring Court Influence in the Preliminary Ruling Procedure: The Swedish Example' in M Derlen and J Lindholm (eds), *The Court of Justice of the European Union: Multidisciplinary Perspectives* (Hart Publishing 2018) 153; J Golub, 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice' (1996) *West European Politics* 360; M Galvina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge

the process.⁶ A notably smaller body of research has placed the motivations of *litigants and lawyers*, rather than national judges, at the centre of their analyses.⁷

In a recent article, Virginia Passalacqua provides an intriguing new contribution from the lesser-trodden – and potentially more revealing – perspective of the Euro-lawyer.⁸ Briefly stated, Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. In the discussion below, I test Passalacqua's theory by applying it to a new area of law. Although Passalacqua derived her theory from an intimate knowledge of EU migration law, her theory "travels well" when it is extended to a new domain, namely, EU disability rights litigation.

This *Article* contains four main sections. Section II summarises Passalacqua's theory of preliminary reference legal mobilization and places her contribution in the broader academic discourse on legal mobilization. Sections III and IV analyse the preliminary reference in *Coleman v Attridge Law*. Section V concludes with an examination of the extent to which the *Coleman* litigation is compatible with Passalacqua's theory and proposes some potential avenues for future investigation.

The plaintiff in this case, a legal secretary, sued her former employer for abuses she allegedly suffered in the workplace after she gave birth to a child with a disability. *Coleman* is important to the development of both EU and UK law. The judicial opinions that it produced expanded the scope of coverage of national and European anti-discrimination laws. Because of its considerable significance for caregivers' rights, the case was followed closely in the UK national press.⁹ The *Coleman* litigation is an especially good candidate for an in-depth case study because it produced a large number of lengthy domestic court

to EU Law: A Case Study on Slovenia and Croatia' in Rauegger and Wallerman (eds), *The Eurosceptic Challenge: National Implementation and Interpretation of EU Law* (Hart Publishing 2019) 191.

⁶ U Jaremba and J Mayoral, 'The Europeanization of National Judiciaries: Definitions, Indicators and Mechanisms' (2018) *Journal of European Public Policy* 1.

⁷ Examples include K Alter and J Vargas, 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy' (2000) *Comparative Political Studies* 452; C Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in S Sciarra (ed.), *Labour Law in the Courts: National Judges and the ECJ* (Hart Publishing 2001) 31; E Muir, C Kilpatrick, J Miller and B De Witte, 'How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum' (EUI Working Papers 17-2017); J Hoevenaars, 'Lawyering Eurolaw: An Empirical Exploration into the Practice of Preliminary References' (2020) *European Papers* www.europeanpapers.eu 777.

⁸ V Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' (2021) *CMLRev* 751. For an earlier example of research on EU legal mobilization, see L Conant, A Hofmann, D Soennecken and L Vanhala, 'Mobilizing European law' (2018) *Journal of European Public Policy* 1376.

⁹ See e.g., A Hirsch, 'Woman Forced to Quit Job Wins New Rights for Carers' (28 November 2008) *The Guardian* www.theguardian.com; BBC, 'Legal Ruling Win for Care Mother' (18 July 2008) news.bbc.co.uk; Daily Mail, 'Carers to be given same rights as disabled people in the workplace after landmark ruling' (30 Oct. 2009) www.dailymail.co.uk.

decisions, both before and after the reference to the CJEU. These domestic court decisions provide us with an usually rich body of information which can be used to obtain a clearer picture of the context in which the litigation took place. The present author supplemented his analysis of the public record with a series of semi-structured interviews with the *Coleman* legal team in 2016.

The present *Article* has two objectives. First, it aims to contribute, in a modest way, to a growing body of EU legal research that exploits an interdisciplinary approach to unearth insights that cannot be reached through pure doctrinal analysis.¹⁰ The legal-historical contributions of new EU legal historians,¹¹ recent research grounded in the newly opened archive of the Court of Justice of the European Union,¹² and mixed-method socio-legal research on contemporary EU law cases¹³ have greatly expanded our understanding of – and at times challenged conventional thinking about – how the EU legal system operates. Second, and more specifically, this *Article* provides an extension of Passalacqua's theory of EU legal mobilization to a new area of legal contestation.

Of course, a single case study cannot prove or disprove a general theory, but on the basis of the evidence marshalled in this *Article*, Passalacqua's arguments regarding the factors that contribute to preliminary reference legal mobilization appear to open a promising line of research that deserves further exploration. Passalacqua's theory provides a welcome shift from judge-centric analyses of the preliminary reference procedure to a more holistic approach that includes a stronger focus on lawyers and litigants and the environments in which they operate.

II. PASSALACQUA'S THEORY OF EU LEGAL MOBILIZATION

Passalacqua's contribution builds on an extensive body of research on political and legal mobilization that now dates back several decades. It has its origins in the work of political sociologists who sought to identify the factors that encouraged or impeded collective actors from engaging in political mobilization in national and local political systems.¹⁴ An early example is Eisinger's 1973 study, which attempted to explain why some American cities

¹⁰ See F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 29, observing that "scholarship on EU law has moved beyond simple doctrinal analyses, relevant only for practitioners and judges, to a more nuanced retelling of the cases that have shaped this system within their contextual framework".

¹¹ *Ibid.*; M Rasmussen, 'Towards a Legal History of European Law' (2021) *European Papers* www.europeanpapers.eu 923.

¹² See the contributions included in M Cremona, C Kilpatrick and J Scott, *Using the Historical Archives of the EU to Study Cases of CJEU* (2021) www.europeanpapers.eu 527.

¹³ T Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa' (2019) *Law & Society Review* 851; J Miller 'Explaining Paradigm Shifts in Danish Anti-Discrimination Law' (2019) *Maastricht Journal of European and Comparative Law* 540.

¹⁴ DS Meyer and DC Minkoff, 'Conceptualizing Political Opportunity' (2004) *Social Forces* 1457-1458.

experienced widespread protests in the 1960s while others did not.¹⁵ In aggregate, the factors that appeared to encourage or discourage political mobilization were referred to as the Political Opportunity Structure (POS). POS inspired an offshoot, known as Legal Opportunity Structures (LOS), which places a heavier emphasis on the factors that increase or decrease the likelihood that a group will pursue a *legal* strategy to achieve its objectives.¹⁶

Passalacqua's insight is essentially a modification of the LOS framework to reflect the unique circumstances that art. 267 TFEU poses for litigants. The theory stresses three factors that are particularly important in this context: the first is "altruism". The *Oxford English Dictionary* defines altruism as "Devotion to the welfare of others, regard for others, as a principle of action; opposed to egoism or selfishness". Placed in the context of legal mobilization, this means that the Euro-lawyer need not belong to, or strongly identify with, the complainant's group, but must nevertheless be motivated to assist the group. Stated more concretely, many of the actors that Passalacqua encountered in her research were not migrants themselves, but were determined to remedy the injustice that migrants had suffered.¹⁷

Passalacqua's second factor is "Euro-expertise". By using this term, Passalacqua emphasises that legal mobilization does not occur automatically because actors have the right to bring their grievances before the Court.¹⁸ Meritorious claims will not be pursued unless they are matched with actors that have sufficient financial resources and legal "know-how" to competently pursue the litigation.¹⁹ Passalacqua notes that none of the litigants in her study had sufficient economic resources to pursue litigation on their own. Had the litigants been unable to find free legal representation, it is highly unlikely that their cases would have found their way to Luxembourg. Equally important, the litigants secured not only free legal representation, but legal representation with expertise in EU law. Indeed, Passalacqua found that Euro-expertise was "the single most important, albeit scarce resource". The EU experts in her study had the capacity to identify the opportunities that EU law offered and could translate their knowledge into effective legal strategies.

Passalacqua's third and final factor is an "open EU legal opportunity structure".²⁰ Passalacqua focuses on two facets. First, in the eyes of the Euro-lawyer, does EU law provide an advantage over national law? In effect, Passalacqua found that Euro-lawyers are forum

¹⁵ P Eisinger, 'The Conditions of Protest Behavior in American Cities' (1973) *AmPolSciRev* 11-28.

¹⁶ LOS research (much like the work on POS that predates it) examines a somewhat eclectic range of questions. For instance, Hilson examines the trade-offs that collective actor face when choose between lobbying, litigation and protest. See C Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) *Journal of European Public Policy* 238-255. Another strand of research asks a more focused question: namely, why do groups litigate? See e.g., G De Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States' (2012) *International Journal of Comparative Sociology* 3-22.

¹⁷ V Passalacqua, 'Legal Mobilization via Preliminary Reference' cit. 764-766.

¹⁸ *Ibid.* 756.

¹⁹ *Ibid.* 766-770.

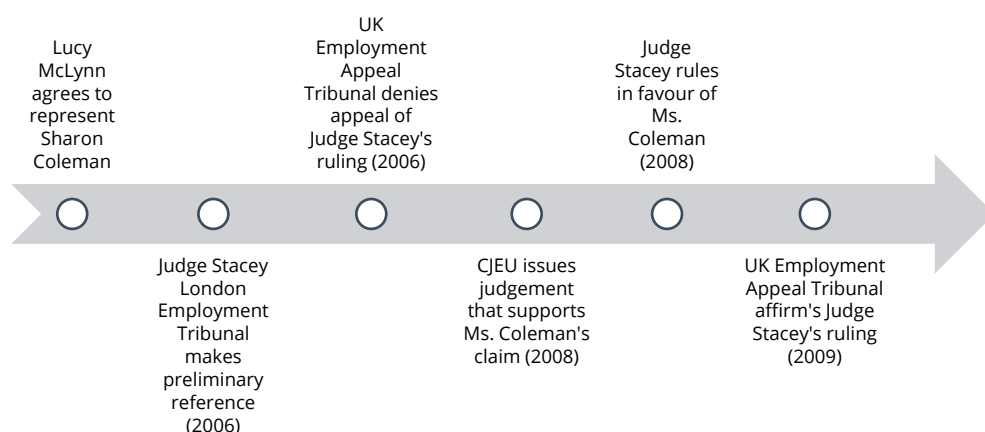
²⁰ *Ibid.* 770.

shoppers. If EU law does not provide a more attractive forum to litigate the case, the case will remain in the national court system and the preliminary reference procedure is unlikely to be activated. The second key facet of the legal opportunity structure concerns the receptivity of national judges to making preliminary references to the CJEU. Jurisdictions in which judges are willing to entertain requests for preliminary references have an “open” legal opportunity structures. In a “closed” legal opportunity structure, we would expect to find less EU legal mobilization, since the hurdles that the actors must traverse to reach a successful outcome are more substantial.²¹

With Passalacqua’s theory in mind, we now turn to section III, which provides a detailed examination of the preliminary reference in *Coleman v Attridge Law*.

III. THE *COLEMAN V ATTRIDGE* LITIGATION

The *Coleman* litigation spanned several years. For ease of reference, the graphic below sets out the key events in chronological order.



III.1. ALTRUISM

The first factor in Passalacqua’s theory of EU preliminary reference legal mobilization is altruism. The lawyer does not need to belong to the group that is affected by the outcome of the litigation, but must be sufficiently motivated to remedy an injustice. As will be shown below, altruism was clearly a driving factor in the *Coleman* litigation.

²¹ *Ibid.* 770-775.

Sharon Coleman worked as a legal secretary in the London law firm, Attridge Law. In 2002, she gave birth to a son who experienced apnoeic attacks and congenital laryngomalacia and bronchomalacia. His condition required specialized care and Ms. Coleman was her son's primary caregiver.²² Ms. Coleman alleged that when she returned from maternity leave, her employer gave her a different job, described her as "lazy" when she requested time off to care for her son, and that she suffered "abusive and insulting comments [...] about both her and her child".²³ After months of frustration with her working conditions, Ms. Coleman resigned. She was outraged at the way she had been treated and wanted to take legal action.

In a critical first step, Ms. Coleman obtained pro bono legal counsel: Lucy McLynn, a solicitor and partner at Bates, Wells & Braithwaite who frequently litigated cases before UK employment and appeal tribunals.²⁴ In an interview with the present author,²⁵ McLynn explained that she met Ms. Coleman through a former client who had suffered discrimination in the workplace. McLynn initially agreed to meet with Ms. Coleman for the limited purpose of advising her about her rights, since Ms. Coleman could not afford legal representation. Ms. Coleman recounted what McLynn described as "an absolutely terrible situation", but felt obliged to deliver the bad news that UK law probably did not cover people in her situation. The issue, in a nutshell, was this: Ms. Coleman did not claim that she had a disability. Rather, she alleged that she suffered discrimination because of her association with her disabled son. UK courts had never ruled that a non-disabled person had the right to bring a discrimination lawsuit solely on the basis of her *association* with a disabled person.

At the time, the UK's anti-discrimination legislation had evolved into a complex patchwork of laws that provided a variety of approaches to discrimination on the basis of association: the Equal Pay Act 1970; the Sex Discrimination Act 1975; the Race Relations Act 1976; the Disability Discrimination Act 1995 (DDA); the Employment Equality (Religion or Belief) Regulations 2003; the Employment Equality (Sexual Orientation) Regulations 2003; the Employment Equality (Age) Regulations 2006; and the Equality Act (Sexual Orientation) Regulations 2007.²⁶ None of the legislation specifically identified discrimination by association as a head of claim.²⁷ The only existing UK case-law on discrimination by as-

²² Case C-303/06 *Coleman* ECLI:EU:C:2008:415 paras 19-20.

²³ *Ibid.* para. 26.

²⁴ A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association: A Case of the Double Yes?' (2011) *Social & Legal Studies* 173 and 178.

²⁵ Case C-303-06 *Coleman* ECLI:EU:C:2008:415. It was a telephone interview with Lucy McLynn, Counsel for Coleman, in *Coleman* on 7 February 2017.

²⁶ UK Government document, Department of Levelling Up, Housing and Communities, Green Paper, 'A Framework for Fairness: Proposals for Single Equality Bill for Great Britain' (Communities and Local Government Publications 2007) Discrimination Law Review webarchive.nationalarchives.gov.uk 31.

²⁷ S Honeyball, 'Discrimination by Association' (2007) Web Journal of Current Legal Issues www.bailii.org.

sociation involved claims of race-based discrimination. The Race Relations Act 1976 section 1(1)(a) prohibited less favourable treatment “on racial grounds”, which did not – on a strict statutory interpretation – confine the scope of the law exclusively to the applicant. And, in fact, UK courts consistently held that association with an individual who belonged to a protected racial group was sufficient to invoke the statute if the claim asserted direct discrimination and/or instructions to discriminate.²⁸

The same “on the ground of” formulation in the Race Relations Act 1976 was reproduced in the corresponding legislation on sexual orientation and religion or belief. That is, the Employment Equality (Religion or Belief) Regulations 2003 section 3(1)(a) prohibited discrimination “on grounds of religion or belief” and the Employment Equality (Sexual Orientation) Regulations 2003 section 3(1)(a) prohibited discrimination on “grounds of sexual orientation”. The DDA, by contrast, did not use the term “on grounds of disability”, but rather stated that it was “unlawful for an employer to discriminate against a disabled person”. Ms. Coleman’s legal team understood and did not deny that the Race Relations Act 1976 and the DDA used different words to explain what kinds of acts were prohibited, and that a literal reading of the DDA suggested that the law protected the person with a disability *only* and not somebody associated with a disabled person.

Indeed, there is a clear record of UK governments carefully considering – and rejecting – recommendations to extend the DDA to cover associational discrimination on the basis of disability. The exclusion of associational disability discrimination from the DDA was not an oversight; it was a deliberate government policy – a policy UK governments defended for many years. When the UK government created a Joint Parliamentary Committee to study a draft bill which eventually became the DDA 2005, it included a discussion of whether the Act should be amended to protect persons associated with persons with disabilities. The Joint Committee’s analysis of the issue notes that there was a difference of opinion between the UK Disability Rights Commission (DRC) and the Government on this matter. The DRC, along with the Discrimination Law Association, the Royal College of Nurses, the Equality Commission for Northern Ireland, the Commission for Racial Equality, and the National Aids Trust, argued in favour of an explicit ban on associational disability discrimination. The Joint Committee recommended that the DDA should be amended to prohibit associational disability discrimination,²⁹ but the UK Government rejected it:

²⁸ UK House of Lords judgment of 27 March 1974 *Applin v Race Relations Board* [UKHL] 3; UK Employment Appeal Tribunal judgment of 28 October 1983 UKEAT/29/83/2810 *Showboat Entertainment Centre Ltd v Owens*; England and Wales Court of Appeal (Civil Division) judgment of 10 December 1998 *Weathersfield Ltd v Sargent* [ICR] 425; UK Employment Appeal Tribunal judgment of 21 June 2004 UKEAT/0907/03/2106 *Carter v Ahsan*; England and Wales Court of Appeal (Civil Division) judgment of 25 May 2006 *Serco Ltd v Redfearn* [IRLR] 623.

²⁹ House of Lords and House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Equality Bill, Twenty-Sixth Report of Session 2008-09* (12 November 2009) publications.parliament.uk para. 86.

“The DDA is unique because it does not generally prohibit discrimination against non-disabled people. Indeed, it actively requires positive action to be taken to ensure a disabled person has equality of access or outcome. This contrasts with the approach taken in other anti-discrimination legislation [...] extending the Act to cover people who associate with disabled people or people who are perceived to be disabled would fundamentally alter the approach taken in the DDA”.³⁰

A UK government Green Paper published while Ms. Coleman’s case was pending before the CJEU in June 2007 included a section on “Where perception and association should be protected”,³¹ which provided the government’s position on associational discrimination for every ground enumerated in Directive 2000/78, and expressed a preference for, essentially, the *status quo*. In the areas of race, religion or sexual orientation, the government acknowledged that UK legislation covered associational discrimination, and took the position that this should not change. In the area of disability discrimination, however,

“the current British legislation takes a narrower approach, limiting protection against discrimination to the actual person who is disabled. Extending protection to people who are perceived to be disabled, but are not disabled, or who associate with disabled people, would potentially extend coverage of the disability legislation to several million extra people who are not themselves disabled. This in turn would significantly extend the responsibilities of those with duties under the legislation. We are not persuaded that this is a proportionate approach, and do not currently propose a change in the law”.³²

The paper trail does not leave much room for speculation. The UK government clearly understood that some anti-discrimination laws recognized associational discrimination while others did not, and it articulated reasons why this should be so. To put it bluntly, the UK government was concerned that extending the law to include associational discrimination in areas such as disability and age had the potential to be extremely expensive for employers.

As luck would have it, Ms. Coleman’s solicitor, Lucy McLynn was intimately familiar with the discrepancy between the scope of coverage under the DDA compared to other UK anti-discrimination statutes. She had attended a conference earlier that year where a member of the UK Disability Rights Commission (DRC) had given a lecture on precisely this issue. The DRC explained that it wanted to find a test case that could be used to

³⁰ Cited in K Monaghan, *Equality Law* (Oxford University Press 2007) 66.

³¹ Green Paper, *A Framework for Fairness* cit. 38.

³² *Ibid.* 38-39. The UK government’s opposition to extending the law to include associational discrimination was not limited to disability. With regard to sex discrimination, the Green Paper states: “We cannot see any practical benefit in extending the law” to include associational discrimination. Regarding age discrimination, the Green Paper concludes: “Extending the definition to include association could potentially bring in parents, carers, teachers, dependants and many others, taking the legislation far beyond its intended scope. We therefore do not propose any extension to association”.

clarify the law and potentially expand the scope of the DDA's protections. McLynn remembered the lecture well and had been thinking about the issue of associative discrimination for several months before Ms. Coleman walked through her door. Once Ms. Coleman began to explain her situation, McLynn identified the legal issue immediately. She explained: "Literally from the first meeting, I was thinking, this could be a test case".³³

McLynn investigated Ms. Coleman's case a bit further, and then wrote to the DRC, informing it that she had come across what she believed to be a good test case to challenge the status of associative discrimination under the DDA. About 10 days before the statute of limitations was set to toll, the DRC responded, thanking McLynn for her referral, but declining to take Ms. Coleman's case. After she recovered from her disappointment, McLynn resolved to represent Ms. Coleman *pro bono*. With just over a week to spare, McLynn started to work on Ms. Coleman's claim to the employment tribunal – the document which sets forth the alleged facts and formally initiates legal proceedings. As McLynn was well aware, she was in the unusual position of alleging a legal violation (associational discrimination) that UK courts had never recognized as a cognizable claim under the DDA – and she had to draft the document under strict time constraints. Around the same time, a team of barristers from the London-based "Cloisters" chambers joined Ms. Coleman's legal team on a *pro bono* basis.

In short, in line with Passalacqua's theory, altruism was indeed a defining feature of the *Coleman* litigation. In the course of the authors' interviews, there was no suggestion that McLynn or her associates identified personally with Ms. Coleman's circumstance as a parent of a child with special needs, but they clearly felt that she has been mistreated and were determined to assist her. As alluded to above and described in more detail below, Ms. Coleman not only secured altruistic legal representation, she also obtained free services from a team of EU law experts.

III.2. EURO-EXPERTISE

The second factor in Passalacqua's EU legal mobilization theory is "Euro-expertise". Even claims that have a high probability of success before the CJEU will not materialise if the plaintiff's lawyers do not possess the legal "know-how" to competently pursue the litigation. Ms. Coleman's legal team was remarkably well versed in both UK and EU Law. In addition to McLynn's substantial expertise, Ms. Coleman's legal team included several barristers with substantial knowledge of EU law. Robin Allen QC³⁴ had already argued before the CJEU in *Kaba* and *Cadman*. After the *Coleman* litigation, he would go on to ap-

³³ Interview with Lucy McLynn cited above.

³⁴ Robin Allen had already appeared as counsel in the following cases: case C-388/07 *Age Concern England* ECLI:EU:C:2009:128; case C-432/17 *O'Brien* ECLI:EU:C:2018:879; case C-17/05 *Cadman* ECLI:EU:C:2006:633; case C-466/00 *Kaba* ECLI:EU:C:2003:127.

pear before the Court in *Age Concern England* and *O'Brien*. Declan O'Dempsey, who represented Ms. Coleman during the early stages of the litigation, would later appear before the CJEU in *Age Concern England* and represent the plaintiff in *Sobhi v Met Police*, a domestic UK case that used EU law and the UN Convention on the Rights of Persons with Disabilities (UNCRPD) to extend the scope of the concept of disability in UK equality law.³⁵ Paul Michell, another member of the *Coleman* team, later appeared (along with Robin Allen QC and Declan O'Dempsey) in a domestic UK case about volunteer workers that focused heavily on the scope of EU anti-discrimination law.³⁶ The legal team developed a sophisticated strategy that demonstrated a deep understanding of the interrelationship between UK and EU law.

On 7 November 2005, the parties held a case management discussion. They agreed to list the case for a pre-hearing review, in the presiding judge's words: "to consider the question whether the Claimant is entitled to bring a claim of unlawful disability discrimination against the Respondents based on the concept of associated discrimination on account of the alleged disability of the Claimant's son".³⁷

On 17 February 2006, Ms. Coleman's case came before Mary Stacey, who was serving at that time as a judge for the London (South) Employment Tribunal, for a pre-hearing review. Ms. Coleman's legal team asked Chairman Stacey to rule that the DDA be re-written to imply the words "all persons associated with a disabled person" at the relevant points in the disability statute in recognition that Ms. Coleman had a cognizable claim against her former employer. Alternatively, if Judge Stacey "considered that to be too bold a step to take unaided", the team requested that the Tribunal refer the question to the CJEU for a preliminary ruling.³⁸

Counsel for Attridge Law countered that the DDA was perfectly clear on this point of law. It did not recognize disability-based associative discrimination as a cause of action. Furthermore, even if the Tribunal assumed that the EU Directive 2000/78 covered associative discrimination, it was "simply not possible to interpret the DDA consistently with the Directive", in which case, the appropriate remedy would be a lawsuit against the UK Government for improperly transposing Directive 2000/78 – what is known as a *Franovich* claim – rather than a request for a preliminary ruling from the CJEU.³⁹

Judge Stacey reframed the question as:

"whether the relevant provisions of the DDA are *acte claire* and their meaning beyond any doubt, and capable of no other reading but that protection from the forms of disability

³⁵ Case C-388/07 *Age Concern England* ECLI:EU:C:2009:128.

³⁶ UK Supreme Court judgment of 12 December 2012 *X v Mid Sussex Citizens Advice Bureau and another* [UKSC] 59.

³⁷ UK Employment Tribunal judgment of 17 February 2006 2303745/05 *Coleman v Attridge Law* para. 4.

³⁸ *Ibid.* para. 18.

³⁹ *Ibid.* para. 19.

discrimination relied on extend only to disabled persons, and not to the wider category of carers of disabled people to cover discrimination by association, or if there is doubt and ambiguity in the matter such as to require a reference to the European Court of Justice for guidance as to how to interpret the statute by reference to the parent directive the DDA purportedly implements".⁴⁰

Citing EU case law, Judge Stacey affirmed that when national courts apply the provisions of a national law that are intended to implement an EU directive, they are required to interpret the national provisions, as far as possible, in a manner that achieves an outcome consistent with the directive's purpose. In order to achieve this objective, "words cannot be deleted [from a national statute], but words can be implied to ensure compliance".⁴¹

Ultimately, Chairman Stacey concluded that a reference to the CJEU was the appropriate course of action.

"It is quite clear to me that on a literal interpretation, associative discrimination is not covered by the DDA. However, nor do I consider it to be totally *acte claire* that on a purposive construction with appropriate interpolations, sections 3A, 3B and 4 of the DDA are incapable of sustaining such an interpretation. It would be possible to imply words to achieve the purpose of the Directive contended by [counsel for Ms. Coleman] as they have indeed shown in their suggested interpolations. It would be too bold a move for me to do so, without the guidance of the Court of Justice of the European Union, but it is just such a matter that is apt for a reference. This is so most especially given the importance of the issue and the extent of the legal and academic debate on the subject".⁴²

Judge Stacey's decision to refer the case for a preliminary ruling has been described in the academic literature as "a bold act for an employment tribunal".⁴³ While there is no question that UK Employment Tribunals have the power to make a reference to the CJEU, the power is discretionary, and at least one UK Employment Appeal Tribunal judge has gone on record as observing that the power is "sparingly used at that level; normally it is left to the higher Courts for a reference to be made".⁴⁴ In an interview with the author, McLynn confessed that she too was surprised at the outcome: "I didn't think they were going to secure a reference at that point".

Judge Stacey's uncommon ruling resulted in some unusual responses. The defendant, Attridge Law, appealed Judge Stacey's decision to refer the case to the CJEU for a preliminary ruling to the UK Employment Appeal Tribunal (EAT). For the first time in the

⁴⁰ *Ibid.* para. 6.

⁴¹ *Ibid.* para. 18.

⁴² *Ibid.* para. 29.

⁴³ A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association' cit. 173 and 178.

⁴⁴ UK Employment Appeal Tribunal judgment of 29 December 2006 UKEAT/0417/06/DM *Attridge Law v Coleman*.

history of UK employment law, a party appealed a decision of a chairman of an employment tribunal to refer a question to the CJEU.⁴⁵ It is also noteworthy that the UK government department responsible for implementing the DDA, the Department for Work and Pensions, made a last-minute – and ultimately unsuccessful – effort to intervene in the case. EAT Judge Peter Clark, who presided over the appeal, reported in his judgment that counsel for Attridge Law broadly agreed with the UK Department's position, but counsel for Ms. Coleman objected to the UK Department's submission on procedural grounds because the Department had failed to make an application to be joined as a party to the case. Judge Clark found in favour of Ms. Coleman on this point and did not consider the UK Department's submission.⁴⁶

In his decision, EAT Judge Peter Clark framed the question that he was bound to answer as: "whether in referring the question identified in this case [Judge Stacey] has failed to exercise her discretion judicially or has erred in principle".⁴⁷ Covering much of the same ground that Judge Stacey had already traversed, Judge Clark decided that there were two separate questions at issue: *i*) whether Directive 2000/78 was *acte claire*, such that no referral to the CJEU was necessary and *ii*) assuming that it was not *acte claire*, whether the DDA could be read purposively in a way that accorded with EU law.⁴⁸ He concluded that Judge Stacey had not erred in finding that the Directive was not *acte claire* and that words could be interpolated into the DDA to cover associative discrimination. Rejecting Attridge Law's argument that there was simply no way to interpolate words into the DDA without violating basic principles of legal construction, Judge Clark found that "ultimately the precise form of words [that could be interpolated] will depend upon the proper interpretation of the Directive. That is the very question which the Chairman has referred to Europe".⁴⁹

In the concluding paragraphs of his judgment, Judge Clark addressed a procedural issue that, while seemingly technical, had great strategic significance in the eyes of the parties. Judge Stacey had not only made the unusual step of referring the case to the CJEU for a preliminary ruling, she had also asked the CJEU to assume that all of the facts that Ms. Coleman alleged in her complaint were true. This turned the preliminary reference into something akin to a "strike-out case",⁵⁰ a procedure whereby the defence argues that the even if all of the facts alleged in the complaint are coherent and true, the case fails because the facts "do not disclose any legally recognisable claim against the defendant".⁵¹ Counsel

⁴⁵ *Ibid.* para. 1.

⁴⁶ *Ibid.* para. 10.

⁴⁷ *Ibid.* para. 11.

⁴⁸ *Ibid.* para. 16.

⁴⁹ *Ibid.* para. 19.

⁵⁰ *Ibid.* para. 24.

⁵¹ UK Ministry of Justice practice direction 3A of 30 January 2017, *Striking Out a Statement of Case* available at www.justice.gov.uk.

for Attridge Law requested that the Tribunal defer the decision whether to make a reference to the CJEU until the domestic court had made its own determination regarding the true facts of the case. Judge Clark concluded “whilst normally it is preferable that a case is referred after all of the facts have been found by the domestic Court, I see no bar [...] for the matter to be referred on assumed facts”.⁵² It was within Chairman Stacey’s sound discretion to conclude that in this matter, it was necessary first to obtain the opinion of the CJEU on the issue of associative discrimination before she could proceed further.⁵³

How did Ms. Coleman’s legal team succeed in obtaining a preliminary reference? Several factors that are rarely discussed in standard texts on preliminary rulings appear to have been relevant. Counsel for Ms. Coleman were intimately familiar with the relevant national law (DDA), EU law (Directive 2000/78), and the ambiguous state of UK law on associational discrimination. Ms. Coleman’s legal team was able to spot the unresolved legal question at the crux of Ms. Coleman’s case early on, and quickly developed a strategy to use the Employment Tribunal pre-hearing review procedure to press for a preliminary ruling as early as possible. The team’s early assessment of the strengths and weaknesses of Ms. Coleman’s case led to careful planning and a legal strategy that resulted in several tactical advantages.

In its first tactical move, the legal team accurately anticipated that Ms. Coleman’s case against Attridge Law would be in serious jeopardy if Chairman Stacey determined that it was impossible to interpret the DDA in a manner that achieved Directive 2000/78’s purpose. Although the legal team conceded that a literal interpretation of the DDA did not cover associative discrimination, it also provided Chairman Stacey with concrete, specific suggestions about how the national court could purposively construct the statute to comply with the directive – suggestions that Chairman Stacey evidently found convincing. Had Chairman Stacey found otherwise, Ms. Coleman’s only form of recourse would have been a *Francovich* claim – a slower and more expensive judicial process that the legal team wanted to avoid at all costs.⁵⁴

Second, the legal team deliberately and explicitly narrowed the scope of the legal question it sought to resolve. It did not make the argument that the duty of reasonable adjustments should be extended to individuals who are not disabled. It did not, for example, allege that Ms. Coleman has been unlawfully discriminated against because it failed to provide her with more flexible working hours to care for her son. Instead, the legal team limited its argument to direct discrimination in the form of harassment. Art. 5 of Directive 2000/78, which covers the concept of reasonable accommodation, was drafted in such a way that it would be more difficult to argue that it applied to individuals other than the disabled person. Art. 1 prohibits discrimination “on the grounds of” disability, but art. 5 explicitly refers to reasonable accommodation as an obligation to “enable

⁵² *Attridge Law v Coleman* cit. para. 24.

⁵³ *Ibid.*

⁵⁴ Telephone interview with Paul Michell, Counsel for Coleman, in *Coleman* cit. on 30 November 2016.

a person with a disability to have access to, participate in, or advance in employment”. (emphasis added). Furthermore, the legal team anticipated that opponents to their argument would complain that associative discrimination would be too expensive to implement. By deliberately excluding the argument that associative discrimination included a duty to make a reasonable accommodation, Ms. Coleman’s legal team took the wind out of their opponents’ sails. Indeed, this tactic proved highly relevant. Much of Attridge Law’s attempt to convince the Tribunal that Directive 2000/78 did not include an associative discrimination mandate relied mainly on the reasonable adjustment duties described in arts 5 and (2)(2)(b) and preamble recitals 8, 16, and 20 of the Directive. Since Ms. Coleman’s legal team made no claim about reasonable adjustments, the Tribunal dismissed Attridge Law’s argument as completely irrelevant.⁵⁵

Third, the legal team planned for – and succeeded in – its efforts to convince the Tribunal to make a preliminary reference before Ms. Coleman’s case had been heard on the merits. This resulted in several advantages for Ms. Coleman. The facts alleged by Ms. Coleman, if true, pointed to genuinely outrageous conduct by Attridge Law. It certainly did no harm to Ms. Coleman’s chances of success that the preliminary reference explicitly asked that the CJEU reach a decision based on the assumption that all of Ms. Coleman’s allegations were true. Had the case gone forward on the merits, there was always the risk that the finder of fact would determine that Ms. Coleman had failed to meet her burden of proof. For instance, if Ms. Coleman failed to show that she had been harassed by her former employer, her case could have been dismissed on those grounds alone, rendering a preliminary reference to the CJEU unnecessary.

Finally, it appears that the UK Government had difficulties keeping up with the pace of litigation and lost control of the process. It tried – and failed – to intervene in the appeal before Judge Clark and had to resort to opposing Ms. Coleman before the CJEU.

In sum, as Passalacqua’s theory would anticipate, the Coleman litigation featured not only altruistic behaviour, but also actors with a strong command of the relevant laws. The Coleman legal team was not only motivated to right an injustice; it had the legal skills required to steer the litigation around the myriad pitfalls that this approach entailed. Also as Passalacqua’s theory would anticipate, the legal team offered its services free of charge to an individual who otherwise would not have been able to pursue her claim.

III.3. AN OPEN EU LEGAL OPPORTUNITY STRUCTURE

According to Passalacqua’s theory, the final factor that supports EU legal mobilization is the existence of an open EU legal opportunity structure. An open EU legal opportunity structure has two main attributes. First, legal actors recognize that EU law has a comparative advantage over national law. For example, the EU Treaties or secondary legislation

⁵⁵ *Attridge Law v Coleman* cit. para. 24.

may be expressed in terms that are more favourable to their client's position than national law. Second, national judges are willing to engage with the EU legal system. For better or worse, national judges are the gatekeepers of the preliminary reference procedure. Its functioning depends on Member State cooperation. As Passalacqua notes, "access to court crucially depends on judicial receptivity".⁵⁶

With regard to the comparative advantage of EU law over national law, multiple actors recognized that Ms. Coleman's case might get a more favourable hearing before the Court of Justice than in the national court system. McLynn assembled a legal team that was acutely aware that Ms. Coleman would need a ruling from the CJEU to encourage a new interpretation of UK law.

On the second point, domestic judicial receptiveness, although it has been argued that UK judges are not – on the whole – eager to make preliminary references,⁵⁷ in the case of *Coleman*, the legal team was pitching its argument to a bone fide disability law expert. Prior to being called to the bench, Chairman Stacey was a senior employment law partner at Thompsons, where she co-authored a nuts and bolts primer on disability discrimination law titled *Challenging Disability Discrimination at Work*. In the words of the authors: "The aim of this publication is to explain the scope of the employment provisions of the DDA in light of the developing case law". The purpose of the book, the authors explained, was to "analyse how the law can be used by union officials and activists in the workplace to protect their disabled members and, if necessary, through Tribunal proceedings" because "the Act is under-utilised by applicants and their representatives and only partially understood and adhered to by employers".⁵⁸ The book was published by the Institute for Employment Rights – an organization that self-identifies on its website as "A think tank for the labour movement". *Challenging Disability Discrimination at Work* does not directly address the issue of associational discrimination, but it consistently argues that the DDA's definition of disability should be expanded to cover more employment situations, that the burden of proof for plaintiffs should be relaxed, and that the UK Government should introduce "a positive duty to promote equalization of opportunities for disabled people in employment, at least in the public sector, both as employer and by using its purchasing power to promote compliance with equality legislation among contractors and supplies to the public sector".⁵⁹

One should not read too much between the lines. As Paul Michell, one of the barristers on the Coleman legal team was quick to point out, Judge Stacey ruled *against* expanding the scope of Directive 2000/78 and *against* a referral to the CJEU on a different occasion, namely, *X v Mid Sussex CAB*.⁶⁰ What seems fair to conclude based on her background is that

⁵⁶ V Passalacqua, 'Legal Mobilization via Preliminary Reference' cit. 770.

⁵⁷ J Golub, 'The Politics of Judicial Discretion' cit. 360.

⁵⁸ M Stacey and A Short, *Challenging Disability Discrimination at Work* (Institute of Employment Rights 2000) 3-4.

⁵⁹ *Ibid.* 67-69.

⁶⁰ Telephone interview with Paul Michell cited above.

Judge Stacey was unusually well qualified to evaluate *Coleman's* claim and that, despite her relatively junior position within the UK court hierarchy at that time, she was willing to entertain an early referral to the CJEU. And as we have seen *supra*, EAT Judge Peter Clark was willing to back Judge Stacey when her decision to refer was appealed.

When the preliminary reference finally reached Luxembourg, AG Maduro framed the London Employment Tribunal's preliminary reference as a request to clarify whether an employee who is treated less favourably, not because she is disabled, but because she has an association with an individual with a disability, is covered under the Directive.⁶¹ AG Maduro advised the Court that, in his opinion, it did. He stressed that the stated purpose of art. 1 of Directive 2000/78 was to lay down a general framework to combat discrimination *on the grounds of* religion or belief, age, disability, or sexual orientation,⁶² which effectively perform an exclusionary function. It prohibits employers from relying on enumerated "suspect classifications" to treat one employee less favourably than another.⁶³ For AG Maduro, it was not necessary for Ms. Coleman to show that she had been treated less favourably because of her disability. It was sufficient to show that she had been mistreated *because of* "disability".⁶⁴ "what is important is that that [sic] disability – in this case the disability of Ms. Coleman's son – was used as a reason to treat her less well".⁶⁵

The CJEU adopted a similar logic and reached a similar conclusion. Referring, as AG Maduro did, to the fact that art. 1 of Directive 2000/78 uses the language *on the grounds of*, the Court concluded that the principle of equal treatment applied not to particular category of person, but to the specifically enumerated 'grounds' provided in art. 1.⁶⁶ The Court therefore held that: "Where it is established that an employee in a situation such as that in the present case suffers direct discrimination on grounds of disability, an interpretation of Directive 2000/78 limiting its application only to people who are themselves disabled is liable to deprive that directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee."⁶⁷

IV. *COLEMAN* CONTRIBUTES TO A NEW INTERPRETATION OF NATIONAL LAW

On 30 September 2008, the case returned to Judge Stacey for a crucial aspect of Ms. Coleman's case. In a judgement issued on 26 November 2008, Judge Stacey concluded that her task was to interpret the DDA in a way that conformed with the effect of Directive

⁶¹ Case C-303/06 *Coleman* ECLI:EU:C:2008:61, opinion of AG Maduro, para. 1.

⁶² *Ibid.* para. 15 (emphasis in original).

⁶³ *Ibid.* paras 7 and 18.

⁶⁴ *Ibid.* para. 23.

⁶⁵ *Ibid.* para. 23.

⁶⁶ *Coleman* cit. paras 38 and 51.

⁶⁷ *Ibid.* para. 51.

2000/78, as elaborated upon by the CJEU, by inserting words if necessary, unless the domestic statute contained “an express and unambiguous indication to the contrary.”⁶⁸ Judge Stacey held that the DDA *could* be interpreted in such a way as to include associative discrimination as a matter of domestic law, and therefore, concluded that the Employment Tribunal had jurisdiction to hear Ms. Coleman’s case.⁶⁹ This decision was appealed to the UK Employment Appeal Tribunal, overseen by Justice Underhill, who handed down his judgment on 30 October 2009.

This is a rather complex question of law, which may be more accessible if we begin with an analysis of the objections that the defendant raised in its appeal to Judge Stacey’s ruling. First, the defendant argued that it was not possible to extend the DDA to achieve conformity with EU law because it “would involve a departure from a fundamental feature of the legislation”. The obvious conclusion from a plain reading of the DDA was that it covered only individuals with disabilities, and not individuals associated with them. Not only is the language “unlawful for an employer to discriminate against *a disabled person*” clearly intended to limit the scope of the Act only to individuals with disabilities, the “whole Act is [...] drafted on that basis”.⁷⁰ Second, the defendant referred the court to the Report of the Joint Committee, which was essentially the legislative history of the bill that would become the Disability Discrimination Act of 2005. The Committee had explicitly considered whether associative discrimination was covered under EU law, and the Minister for Disabled People had informed the Disability Rights Commission that he did not believe that associative discrimination came within the ambit of Directive 2000/78. The defendant argued that this supported the view that the legislator did not intend the DDA to be extended to include associative discrimination.⁷¹ Third, the defendant submitted that Judge Stacey’s decision was inconsistent with decisions of the Court of Appeal in *English v Thomas Sanderson Blinds Ltd*.⁷² In both cases, the court decided that it was impossible to read the UK legislation that it was interpreting – respectively, the Sex Discrimination Act 1975 and Employment Equality (Sexual Orientation) Regulation 2003 – in such a way that they would conform with EU law.⁷³ In short, the defendant argued that the

⁶⁸ UK Employment Appeal Tribunal judgment of 30 October 2009 UKEAT/0071/09/JOJ *Attridge Law v Coleman* para. 8 (quotation marks in original).

⁶⁹ *Ibid.* paras 1-2.

⁷⁰ *Ibid.* para. 18.

⁷¹ *Ibid.* para. 19.

⁷² *English v Thomas Sanderson Blinds Ltd* [2009] IRIL 206 and *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] IRIL 327.

⁷³ *Ibid.* para. 11 (internal quotation marks in original). The defendant raised a fourth point questioning whether Directive 2000/78 had direct effect at the time that Ms. Coleman brought her lawsuit. For reasons that need not concern us here, the Employment Appeal Tribunal rejected this contention outright. See *Ibid.* para. 20.

Tribunal had “distorted and rewritten” the DDA to expand its coverage to include associative discrimination.⁷⁴ These were formidable hurdles to overcome.

Justice Underhill began his analysis by stating that it was a principle of EU law that “courts and tribunals of member states should ‘so far as possible’ interpret domestic legislation in order to give effect to the state’s obligations under EU law”.⁷⁵ Furthermore, citing to *House of Lords in Pickerstone v Forth Dry Dock & Engineering Co.*,⁷⁶ he concluded that it was now settled law in the UK that a court or tribunal may “go beyond the strict limitations of statutory construction and can read words into a statute in order to give effect to EU legislation which the statute is intended to implement”.⁷⁷ But UK law also made clear that the phrase “so far as possible” meant that “it is not legitimate in every case” to employ this technique.⁷⁸ In sum: “The difficulty is to define the touchstone for distinguishing between the two types of cases, or – to put it another way – the limits of what is ‘possible’”.⁷⁹

For guidance, Justice Underhill looked primarily to the decision of the *House of Lords in Ghaidan v Godin-Mendoza*,⁸⁰ which concerned the UK’s obligations with respect to section 3(1) of the Human Rights Act 1998 and the implementation of the European Convention on Human Rights. After engaging in a detailed analysis of the reasoning presented in *Ghaidan*, Justice Underhill reached the following conclusion, which is quoted at length because it provides a relatively succinct summary of *Ghaidan*’s intricate holding:⁸¹

“I agree with the Judge [Stacey], and with Judge Clark when the matter was first before this Tribunal, that there is nothing ‘impossible’ about adding words to the provisions of the 1995 Act so as to cover associative discrimination. No doubt such an addition would change the meaning of the 1995 Act, but, as the speeches in *Ghaidan* make clear, that is not in itself impermissible. The real question is whether it would do so in a manner which is not ‘compatible with the underlying thrust of the legislation’ or which is ‘inconsistent with the scheme of the legislation or its general principles’. In *Ghaidan* the majority were prepared to interpret the words ‘wife or husband’ in Schedule 1 of the Rent Act 1977 as extending to same-sex partners. That was plainly not the intention of Parliament when the act was enacted, nor does it correspond to the actual meaning of the words, however liberally construed; but the implication was necessary in order to give effect to Convention rights and it went ‘with the grain of the legislation’. In my view the situation with which I am concerned is closely analogous. The proscription of associative discrimination is an

⁷⁴ *Ibid.* para. 10(A) (quotation marks in the original).

⁷⁵ The leading case on the subject is case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* ECLI:EU:C:1990:395.

⁷⁶ *House of Lords in Pickerstone v Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 AC 546.

⁷⁷ *Attridge Law v Coleman* cit. para. 11.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* (internal quotation marks in original).

⁸⁰ UK House of Lords judgment of 21 June 2004 *Ghaidan v. Godin-Mendoza* (FC) 2004 [UKHL] 30.

⁸¹ A Westlaw search of citations to *Coleman v Attridge* in the UK revealed that, by far, the case was most frequent cited for its analysis of *Ghaidan*. The subject matter, associative discrimination, was only relevant to the authors in a small minority of cases.

extension of the scope of the legislation as enacted, but it is in no sense repugnant to it. On the contrary, it is an extension fully in conformity with the aims of the legislation as drafted. The concept of discrimination 'on the ground of disability' still remains central".⁸²

Once it had been firmly established that Ms. Coleman had the right to bring her suit against Attridge Law, the case was listed on the docket for an employment tribunal hearing. Shortly thereafter, Ms. Coleman and Attridge Law settled the case out of court, reportedly for 12000 pounds.⁸³

The *Coleman* court saga was unfolding at the same time when the UK legislature was contemplating a complete structural revision of its anti-discrimination statutes – a process that resulted in the Equality Act 2010. The Act replaced nine anti-discrimination laws and was intended to implement fully four EU directives, including Directive 2000/78.⁸⁴ The Act has 218 sections and runs 239 pages.⁸⁵ Section 13 of the UK Equality Act prohibits less favourable treatment "because of a protected characteristic." According to at least one author, "this provides a clear basis for direct discrimination claims brought by people (such as carers or relatives) who are not themselves disabled but are treated less favourably because of their association with somebody who is".⁸⁶

An explanatory note (note 63) on the definition of direct discrimination explains that it was drafted to eliminate the dissimilarities that were a feature of previous UK anti-discrimination legislation. To quote the note, it provides "a more uniform approach by removing the former specific requirement for the victim of the discrimination to have one of the protected characteristics of age, disability, gender reassignment and sex. Accordingly, it brings the position in relation to these protected characteristics into line with that for race, sexual orientation and religion or belief in the previous legislation". Another explanatory note (note 59) on the definition of direct discrimination explains that it "occurs where the reason for a person being treated less favourably than another is a protected characteristic listed in section 4. This definition is broad enough to cover cases where the less favourable treatment is because of the victim's association with someone who has that characteristic (for example, is disabled), or because the victim is wrongly thought to have it (for example, a particular religious belief)".

One should resist the temptation to paint the holding in *Coleman* with an excessively broad brush. For sound reasons related to legal strategy, from beginning to end, *Coleman* was very consciously a case exclusively about associational discrimination in the field of

⁸² *Attridge Law v Coleman* cit. 14 (internal citations omitted).

⁸³ A Stewart, S Niccolai and C Hoskyns, 'Disability Discrimination by Association' cit. 173 and 184.

⁸⁴ B Hepple, 'The New Single Equality Act in Britain' (2010) The Equal Rights Review www.equal-rightstrust.org 11 and 15.

⁸⁵ *Ibid.*

⁸⁶ A Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) *ILJ* 359 and 373.

direct discrimination. It says nothing, for instance, about whether associational discrimination on the basis of disability should be extended to include indirect discrimination or reasonable accommodation. In fact, the latter is the subject of a 2014 published opinion,⁸⁷ in which the Court of Appeal (Civil Division) rejected the invitation to extend *Coleman* to include a duty to reasonably accommodate the needs of a child of an employee.

Nevertheless, it is clear that *Coleman* has been an important catalyst for the expansion of rights under UK law. It was instrumental in the re-formulation of the definition of direct discrimination to include associational discrimination, not only in the UK, but across the European Union. By all accounts, it was an extremely successful and well-executed legal campaign. In light of the UK's recent departure from the European Union, which will invariably raise questions about the legitimacy and precedential value of CJEU judgements in the UK legal order, the fact *Coleman* has already been integrated into domestic statutory law is particularly significant.

V. EU LEGAL MOBILIZATION IN THEORY AND PRACTICE

Passalacqua argues that preliminary reference legal mobilization is most likely to occur when three conditions exist: altruism, Euro-expertise, and a favourable EU legal opportunity structure. There is overwhelming evidence of all of them in this story. McLynn and her co-counsel, who accepted the case on a pro bono basis, were highly motivated by a desire to correct an injustice, even if they did not personally identify with Ms. Coleman's struggle. Ms. Coleman's legal team had an abundance of expertise in European law. They were clearly at ease moving between the UK national courts, the CJEU, and then back to the UK national courts again. And finally, they operated in an environment that was conducive to EU legal mobilization. The legal team not only had the financial resources and legal expertise required to pursue the litigation, but also encountered a judiciary that was open to making a preliminary reference at the first possible moment and willing to defend its position, even when the UK government urged it to reconsider. Ms. Coleman's lawyers were arguably fortunate that their case was initially presented to a judge with a particularly strong background in disability rights law, but Judge Stacey's rulings were consistently upheld by other members of the UK judiciary. When her decision was appealed, EAT Judge Peter Clark affirmed Judge Stacey's decision to refer the *Coleman* case to the CJEU. After the CJEU handed down its judgment, Justice Underhill affirmed Judge Stacey's conclusion that it was possible to interpret the DDA in a way that conformed with Directive 2000/78. To put it briefly, the *Coleman* litigation did not hinge on the inclinations of a solitary judge. The UK legal system, as a collective unit, was receptive to engagement with the CJEU and willing to adjust its interpretation of domestic laws to accommodate the CJEU's new judgement.

⁸⁷ England and Wales Court of Appeal (Civil Division) judgment of 13 May 2014 *Hainsworth v Ministry of Defence* EWCA Civ 763.

Passalacqua's theory provides a solid foundation for further investigation. Three key unanswered questions stand out. First, this *Article* has extended Passalacqua's theory to a new legal domain, but one that shares many important characteristics. Migration law and disability rights law are both fields in which NGOs and cause lawyers are well established in the EU legal ecosystem. Is Passalacqua's theory of EU legal mobilization really a theory of EU anti-discrimination and social justice legal mobilization, or does it have more generalizable explanatory power? Second, research conducted thus far has only considered cases in which preliminary references to the CJEU were successful. A close examination of *failed* attempts to secure preliminary references may help to untangle whether the factors that Passalacqua identifies in her theory are sufficient for, necessary for, or merely conducive to EU legal mobilization.⁸⁸ Third, the *Coleman* litigation does not match the widely-held view that the UK judiciary is hostile to the use of the preliminary reference procedure. To the contrary, at several stages in the litigation, UK judges made rather bold pronouncements that kept Ms. Coleman's case alive. Perhaps Passalacqua's third factor, which focuses on "judicial receptivity", cannot be properly assessed at the national level. The national judge is the crucial gatekeeper, and future research may show that the attitudes of individual judges towards engagement with the CJEU matters more than the country where their courts are located.

⁸⁸ I thank an anonymous reviewer for bringing these two points to my attention.



ARTICLES

EXPORTING ARMS OVER VALUES: THE HUMANITARIAN COST OF THE EUROPEAN DEFENCE FUND

BRAM VROEGE*

TABLE OF CONTENTS: I. Introduction. – II. Methodology. – III. If you want peace, sell more guns? – IV. From theory to practice: the ineffectiveness of arms export controls in the EU. – V. Don't fuel the fire: the EU's duty to act as a responsible arms financier. – V.1. The EU as a guardian of the international legal order. – V.2. The EU as a consistent legislator. – V.3. The nature of the EU's duty to act as a responsible arms financier. – VI. Designing a more responsible European Defence Fund. – VI.1. Operationalising the EU's duty to act as a responsible arms financier. – VI.2. Analysing the EU's policy toolbox. – VII. Conclusion.

ABSTRACT: Through the European Defence Fund (EDF) the EU will become involved for the first time in arms development. EDF funding is intended to contribute to the EU's strategic autonomy in defence. But arms developed with EDF funding may also be exported to non-EU States. International and EU norms meant to ensure a humane and responsible arms trade are insufficiently effective, leaving room for Member States to export arms even when there is a serious risk of their use in violations of international humanitarian law (IHL). On the basis of both legal and policy-based arguments, this *Article* argues that the EU has failed to properly take these IHL concerns into account in the EDF Regulation. The EU's commitments to international law and to consistency require it to refrain from contributing to activities prohibited under international and EU law. These commitments oblige the EU to act as a responsible arms financier. This would also be in line with EU soft power efforts to promote export norm adoption and compliance internationally. For such soft power efforts to be effective, the EU must visibly uphold those norms it is trying to promote. By failing to enact measures that could mitigate the risk of illegal exports of EDF-funded arms – such as a ban on financing certain high-risk activities or a financial clawback mechanism in case funding recipients export arms illegally – the EU is violating its commitments to international law and to consistency and jeopardising its reputation as an international norm entrepreneur.

KEYWORDS: Common Foreign and Security Policy – European Defence Fund – arms exports – EU values – international humanitarian law – consistency.

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I. INTRODUCTION

The EU sees defence-industrial integration as essential for developing the military capabilities required for its nascent defence policy.¹ But defence companies do not operate on a normal market. Their activities are closely intertwined with national security, which – despite the existence of an EU Common Foreign and Security Policy (CFSP) – remains a Member State competence.² Since purchasing defence products abroad may result in the loss of industrial capabilities considered essential for national security, there remains a strong tendency in the EU to purchase equipment domestically. This status quo has proven difficult to break, with both CFSP-based interventions³ and market-based interventions⁴ by the EU seeing limited success.⁵

In a new attempt to overcome Member States' reticence to cooperate, the EU has recently introduced another policy tool into the mix: The European Defence Fund (EDF).⁶ The EDF is a research and development (R&D) fund, based on the EU's industrial and research support competences.⁷ It is meant to stimulate industrial cooperation by providing funding for cross-border defence R&D projects. This, in turn, should promote cooperative procurement of military equipment, thereby tackling the issues of industrial duplication and under-investment that are currently plaguing the EU defence industry.⁸ R&D costs represent a significant proportion of defence equipment expenditures, and the EDF's eight billion euro budget for the years 2021-2027 will bring the EU into the top three of defence R&D investors in Europe.⁹

Though EU defence companies are essential for equipping Member States' armies, their activities extend beyond the EU's own borders as well. The EU defence industry is a significant arms exporter, selling products to governments across the globe. The EDF

¹ European Union Global Strategy, 'Shared Vision, Common Action: A Stronger Europe' (June 2016) [eeas.europa.eu](https://eeas.europa.eu/eeas/euas/europa.eu) 9.

² Art. 4(2) TEU.

³ Including the activation of the Permanent Structured Cooperation Mechanism foreseen in art. 20 TEU.

⁴ Mainly the introduction of the Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending the Directives 2004/17/EC and 2004/18/EC.

⁵ See D Zandee, 'No More Shortfalls? European Military Capabilities 20 Years On' and L Béraud-Sudreau, 'Integrated Markets? Europe's Defence Industry after 20 Years' both in D Fiott (ed.), *The CSDP in 2020: The EU's Legacy and Ambition in Security and Defence* (EUISS 2020) www.eiss.europa.eu 50 and 59.

⁶ Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092.

⁷ More specifically on arts 173(3), 182(4), 183, and 188(2) of the TFEU.

⁸ E Simon and A Marrone, 'Linking PESCO and EDF: Institutional Mechanisms and Political Choices' (April 2021) ARES Report 66.

⁹ Based on current annual R&D investment levels, only France and Germany will be spending more on defence R&D. See for the relevant figures per Member State the document titled 'EDA Collective and National Defence Data 2017-2019' which is available at eda.europa.eu.

Regulation acknowledges the existence of the industry's export function, proclaiming that its funding "shall not affect the export of products [...], and shall not affect the Member States' discretion as regards their policy on the export of defence-related products".¹⁰ Yet in industrial and commercial reality, domestic arms production and international exportation are strongly intertwined. Products developed to meet domestic demands are often made available for exportation, since such exports are considered an opportunity to keep domestic production affordable. Thus, even though EDF funding is earmarked for R&D activities that are in line with EU-strategic goals,¹¹ it can be expected to contribute to EU arms exports as well.¹²

The EU defence industry's role in the international arms trade is not without controversy. Arms exports are seen by many as critical enablers of violence against innocents around the globe.¹³ International humanitarian law (IHL), which regulates combatants' behaviour during armed conflict,¹⁴ requires States to refrain from exporting arms if they know or should know that those arms will be used in atrocities such as intentional or indiscriminate attacks against civilians.¹⁵ In addition, EU Member States are bound by the Arms Trade Treaty (ATT)¹⁶ and the EU Common Position on arms exports,¹⁷ which were both championed by the EU to foster a more responsible arms trade.¹⁸ However, the division of competences makes it difficult for the EU to act decisively in this area. Practice shows that Member States regularly disregard their international and EU obligations, allowing the economic and/or geopolitical interests involved in arms exports to prevail over humanitarian ones. This is particularly visible in the recent Yemen conflict, during which EU countries such as Spain and France have continued supplying armaments despite strong evidence of atrocities perpetrated by their recipients against the Yemeni civilian population.¹⁹

In light of these existing humanitarian concerns, the EU's defence funding initiative seems at odds with various EU Treaty provisions and underlying principles intended to

¹⁰ Art. 20(9) EDF Regulation.

¹¹ Art. 3(2) EDF Regulation.

¹² E Simon and A Marrone, 'Linking PESCO and EDF' cit. 21.

¹³ See for instance the European Network Against Arms Trade enaat.org.

¹⁴ IHL is the body of customary and treaty-based international law which regulates conduct during armed conflict, encompassing important treaties such as the Geneva Conventions. See more broadly M Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing 2019).

¹⁵ *Ibid.* 528-529.

¹⁶ United Nations Arms Trade Treaty of 3 June 2013.

¹⁷ Common Position 2008/944/CFSP of the European Council of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹⁸ S Depauw, 'The European Union's Involvement in Negotiating an Arms Trade Treaty' (December 2012) Non-Proliferation Papers www.sipri.org 3-4.

¹⁹ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?' (2019) JC&SL 503.

ensure that its actions support the international legal order and are compatible with EU action in other areas. The Treaty on the European Union (TEU) requires the EU to contribute to the *strict observance and development* of international law,²⁰ and to work actively to *consolidate and support* the principles of international law.²¹ This implies that the EU should not just adhere to international law itself, but should also make an effort to actively promote compliance with international law where possible. Furthermore, the EU is bound by the principle of *consistency*, which requires it to act in accordance with its own objectives and values across its competences.²² By introducing a fund that can contribute to arms exports which go against both international law and its own export norms, the EU appears to violate both of these commitments.

Though invoking the relevant principles and provisions in a court of law may prove difficult in relation to policy measures falling under the CFSP,²³ there is more at stake for the EU than legal obligations alone. The EU is also committed politically to a more responsible and humane arms trade and has built up a reputation allowing it to drive change by convincing other actors to embrace new norms.²⁴ But if the EU wishes to remain a credible actor in this area, it must demonstrate that it too acts to uphold those norms that it seeks to advance. For this reason, this *Article* seeks to answer the following research questions: Is the EU under an obligation to address the risk of EDF-funded armaments contributing to IHL violations outside of its own borders, taking into consideration its commitments to international law and to consistency? And if so, what measures could it have included in the EDF Regulation to fulfil this obligation?

The *Article* is divided into six parts. The first part explains the methodological approach taken in the analysis and provides the broader context in which the development of the EDF is to be seen (section II). The second part provides a brief introduction to the EDF and explains how its funding can lead to an increase in EU arms exports (Section III). The third part gives an overview of existing research on arms export controls in the EU, showing how they should work to reinforce IHL compliance yet fail to do so in practice (section IV). The fourth part sets out why the EU's commitment to international law and the principle of consistency oblige it to take these regulatory deficiencies into account in the context of the EDF (section V). The fifth part examines how the EU legislature could have addressed the EDF's humanitarian effects within the bounds of the EDF Regulation (section VI). Finally, the sixth part of the *Article* concludes (section VII).

²⁰ Art. 21 TEU.

²¹ Art. 21(2)(b) TEU.

²² SEM Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' (2013) CYELS 142.

²³ See section V of this *Article*.

²⁴ B Oliveira Martins and B Backhaus, 'Why and How the EU Should Act on Armed Drones' (2015) *Global Affairs* 261.

II. METHODOLOGY

This *Article* consists of a prospective evaluation of legislative effectiveness. Legislative effectiveness is an important aspect of legislative quality, along with criteria such as efficacy and efficiency.²⁵ It is a broad concept, which covers the causal relations between the law and its effects.²⁶ Evaluations of legislative effectiveness generally focus on the capacity of a piece of legislation to achieve its stated goals by bringing about changes in social reality.²⁷ But this is only one element of legislative effectiveness. Social reality is complex, and legislative interventions that are intended to achieve a particular result may have other (adverse, unintended) effects as well.²⁸ The legislature is obliged to take such potential effects into account when designing legislation. For legislation to be considered effective, it should “[minimise] to the extent possible and foreseeable the risk of adverse effects or no effects”.²⁹

This *Article* follows a prospective approach, which involves making predictions on the basis of causal relations.³⁰ A prospective evaluation of legislative effectiveness is generally conducted in order to ensure that a new piece of legislation is in accordance with existing laws and procedural principles, and to test its effects.³¹ While the EDF Regulation has already been adopted, a prospective approach is nevertheless most appropriate. Due to the EDF's nature and setup, a retrospective analysis will only be possible in several years when financed projects have reached a sufficiently advanced stage of maturity. Though the evaluation is prospective in nature, it is grounded as much as possible in empirical reality by taking into account existing research regarding the broader societal and legislative environment within which the EDF Regulation operates.

The focus of this *Article* is on a specific adverse side-effect of the EDF Regulation, namely the risk it entails for due compliance with IHL in conflict areas outside of the EU's own territory.

One could argue that there are also other fundamental EU values and objectives which may be jeopardised by the EU engaging in arms development funding, such as its commitments to human rights and the promotion of peace.³² Nevertheless, this *Article* covers only the humanitarian implications of the EDF. That is mainly because of limita-

²⁵ L Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’ (2001) *Statute Law Review* 126.

²⁶ M Mousmouti, ‘Operationalising Quality of Legislation through the Effectiveness Test’ (2012) *Legisprudence* 202.

²⁷ *Ibid.* 198.

²⁸ L Mader, ‘Evaluating the Effects’ cit. 129.

²⁹ M Mousmouti, ‘Operationalising Quality of Legislation’ cit. 203.

³⁰ L Mader, ‘Evaluating the Effects’ cit. 128.

³¹ *Ibid.* 119; M Mousmouti, ‘Operationalising Quality of Legislation’ cit. 199.

³² Arts 2, 3(1) and (5) TEU and the Charter of Fundamental Rights of the European Union.

tions of size and scope, but also because an analysis based on other values and objectives is not expected to generate different outcomes.

The adverse side-effect of the EDF Regulation addressed in this *Article* has its origin in another policy area, namely Member States' arms export practices. It is the ineffectiveness of national export controls that generates humanitarian concerns, which the EDF Regulation may in turn exacerbate. The most obvious solution would therefore be to address the problem at its root, by strengthening export controls and their enforcement. But practice shows that an EU-level solution to that effect is currently infeasible,³³ while potential victims of humanitarian violations and their advocates simultaneously face significant hurdles in their attempts to stimulate norm compliance at either the EU or the national level.³⁴ The causes of this – which shall be discussed in more detail further on in this *Article*³⁵ – are tied strongly to the specific EU legal basis under which arms export controls are regulated.

Though armaments qualify as goods under EU law, their export to States outside the EU is not governed by the EU's Common Commercial Policy. Instead, arms exports are considered a matter of foreign and security policy, thereby falling under the CFSP.³⁶ The CFSP's procedural rules and institutional arrangements differ greatly from those that characterise EU action in most of its other policy domains. CFSP decisions are taken by the European Council acting on the basis of unanimity.³⁷ Since CFSP decisions are simultaneously excluded from judicial review by the Court of Justice of the European Union (CJEU),³⁸ this greatly increases the influence of (individual) Member States over the decision-making process and limits the influence that other EU institutions (particularly the European Commission and Parliament) can exert.

Since the EDF Regulation was adopted under the ordinary legislative procedure,³⁹ its inception afforded the Commission and Parliament a unique opportunity to exert influence on the EU defence industry. This could be done by for instance attaching conditions to EDF funding, or by blocking that funding in the first place. This is particularly relevant considering Parliament's regular criticism⁴⁰ and scrutiny⁴¹ of Member States'

³³ D Cops and N Duquet, 'Reviewing the EU Common Position on Arms Exports: Whither EU Arms Transfer Controls?' (December 2019) Flemish Peace Institute Policy Brief vlaamsvredesinstituut.eu.

³⁴ L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit.

³⁵ See Section IV.

³⁶ A decision that has been criticised in the literature, see M Trybus, *Buying Defence and Security in Europe: The EU Defence and Security Procurement Directive in Context* (Cambridge University Press 2014) 165-166.

³⁷ Art. 24(1) TEU.

³⁸ Save for a couple of narrowly defined exceptions; see art. 24(1) TEU (second part).

³⁹ See the preamble to the EDF Regulation.

⁴⁰ E.g., Resolution 2021/2539(RSP) of the European Parliament of 11 February 2021 on the humanitarian and political situation in Yemen.

⁴¹ E.g., Resolution 2018/2157(INI) of the European Parliament of 14 November 2018 on arms exports: implementation of Common Position 2008/944/CFSP.

arms export practices prior to the EDF Regulation's adoption. However, as this *Article* will show, both institutions have failed to make use of this opportunity, thereby sacrificing the interests of potential third State victims in favour of the interests of the Union.

III. IF YOU WANT PEACE, SELL MORE GUNS?

As explained in the introduction, the EU defence industry is currently faced with issues of industrial duplication and under-investment. These market characteristics, in turn, have negative effects on Member States' (joint) military capacities. They lead to *inefficiency* and cost increases, which – due to budget limitations – translate into fewer units in operation. They also cause issues of *interoperability* due to the great variety of national weapon systems that are in use.⁴²

Though the EU has an interest in addressing the aforementioned problems, prior attempts to solve them via the CFSP and market instruments such as public procurement law have had limited effects.⁴³ With the EDF Regulation, the EU is drawing upon another set of its competences – industrial and research support – in an attempt to entice Member States to cooperate through financial incentives.

The aim of the EDF is to enhance the competitiveness, innovation, efficiency and technological autonomy of the EU defence industry, and thereby contribute to the EU's *strategic autonomy*.⁴⁴ The inclusion of strategic autonomy among the EDF's aims has led to questions regarding the appropriateness of the legal basis on which the EDF Regulation was adopted.⁴⁵ Strategic autonomy is an objective of the CFSP/Common Security and Defence Policy (CSDP), while industrial and research support measures such as the EDF generally pursue aims like achieving growth of a particular industry or increasing its global competitiveness.⁴⁶ In the case of the EDF, fostering the competitiveness, efficiency and innovation capacity of the defence industry in the EU is not an end but a *means* to achieve a policy goal of the CFSP/CSDP.

The scope of the EDF is determined by art. 10 EDF Regulation, which delineates the entities and activities that can qualify for funding. Funding is made available for R&D projects⁴⁷ conducted by legal entities established in at least three different Member States,⁴⁸ which are aimed at the development of new defence products and technologies or the upgrading of existing defence products and technologies.⁴⁹ Funding is in-

⁴² M Trybus, *Buying Defence and Security in Europe* cit. ch. 1.

⁴³ L Béraud-Sudreau, 'Integrated Markets?' cit.

⁴⁴ Recital 5 and art. 3(1) of the EDF Regulation.

⁴⁵ A Fischer-Lescano, 'Legal Issues Relating to the Establishment of a European Defence Fund (EDF)' (30 November 2018) Expert Report for the GUE/NGL Parliamentary Group in the EP left.eu paras 17-21 and 25.

⁴⁶ *Ibid.* para. 17.

⁴⁷ See art. 10(3) EDF Regulation for the complete list of eligible R&D actions.

⁴⁸ Art. 10(4) EDF Regulation.

⁴⁹ Art. 10(2) EDF Regulation.

tended in particular for innovative and disruptive technologies and should be consistent with defence capability priorities agreed upon by the Member States under the CSDP.⁵⁰

By interlinking the EDF with the EU's strategic goals under the CSDP, its funding may contribute to the EU's strategic autonomy in various ways. It can firstly aid in reducing industrial duplication. Simultaneously, it can help to align Member States' defence procurement practices, which can in turn lead to increased standardisation and interoperability of Member States' armed forces.⁵¹ And finally, the EDF can be used to stimulate the development of specific equipment and technologies that are required to meet capacity shortfalls identified at EU level.⁵² Whether these strategic aims will actually be achieved, however, will depend greatly on wider political developments regarding the future of the CSDP.⁵³

Though the EDF's strategic impact remains to be seen, the disbursement of EDF funding is in any future scenario expected to boost the EU defence industry's competitiveness. This, in turn, can increase the attractiveness of EU defence products on the global arms market.⁵⁴ The EU is already a sizable arms exporter at present, with many of the products developed by the EU defence industry seeing use in armies outside of the EU as well. Examples of this include France's Leclerc main battle tank, of which almost half the number produced have been exported outside of the EU,⁵⁵ and the Eurofighter jet plane, which has several non-EU operators.⁵⁶ The revenues generated via such exports play an important role in maintaining existing industrial capabilities by spreading R&D and production costs. In the words of a European Parliament member, the importance of exports for the EU defence industry is such that "without exporting arms there will not be a European defence industry".⁵⁷

It is this interrelation between domestic capabilities and foreign sales which causes the EDF to have an external dimension as well. Since the EU defence industry's export potential is intertwined with its domestic activities, a boost to its competitiveness can be expected to enhance its global market positioning too. That is especially so since the EDF supports R&D aimed at innovative and technologically advanced military products,

⁵⁰ Arts 10(1) and 3(2) EDF Regulation.

⁵¹ D Zandee, 'European Defence Fund: The Real Test is yet to Come' (February 2021) Clingendael Alert www.clingendael.org.

⁵² E Simon and A Marrone, 'Linking PESCO and EDF' cit. 15.

⁵³ See *ibid.* and S Brichet, H Chouarbi, M Dénoue, V Frossard, A Laurent, N Libert, AF Magnuszewski, P Millard and J Rolin, 'The Governance of the European Defence Fund' (20 April 2021) European Issues www.robert-schuman.eu.

⁵⁴ E Simon and A Marrone, 'Linking PESCO and EDF' cit. 21.

⁵⁵ 406 have been ordered by France and 390 by the United Arab Emirates. See Project, 'Leclerc Main Battle Tank' (16 July 2021) www.army-technology.com.

⁵⁶ Wikipedia, *Eurofighter Typhoon Procurement* en.wikipedia.org.

⁵⁷ A Brzozowski, 'Loiseau: Without Arms Exports, There Won't be a European Defence Industry' (7 October 2019) Euractiv www.euractiv.com.

for which there is a higher demand. As a result, it is foreseeable that EDF funding could serve not just to maintain foreign demand for EU defence products, but to increase it even further.⁵⁸ Thus, even though bolstering the EU defence industry's international market position is not an explicit policy aim for the EDF, it is nevertheless a foreseeable result of its design.

As indicated in the introduction, the production and trade of armaments raises humanitarian concerns. Though the EDF Regulation does not affect arms export policy, it is clear that the EU legislature has taken certain steps to address humanitarian concerns which may arise earlier on during the production phase. This follows from art. 10(6) of the EDF Regulation. Whereas the first paragraph of art. 10(6) does little more than pay lip service to international law – declaring only that no funding shall be made available for products and technologies that are already prohibited⁵⁹ – its second paragraph goes a step further by banning EDF funding for the development of lethal autonomous weapons (“killer robots”). Though lethal autonomous weapons are not necessarily considered illegal under IHL,⁶⁰ their design and functionality does carry various practical and moral hazards associated with removing the human element from lethal engagement decisions. Thus, their exclusion from EDF funding can be seen as a normative statement on the part of the EU, making clear that it does not wish to contribute to the development of systems the mere existence of which it considers undesirable from a humanitarian perspective.

While the foregoing shows that the EU has taken IHL concerns into account to a certain extent in the design of the EDF, it is generally acknowledged that the central regulatory challenge for achieving an IHL-compliant defence industry is controlling the exportation of the overwhelming majority of weapons that are not *per se* illegal to produce.⁶¹ The next section provides an overview of the international and EU norms that are intended to tackle this issue, and will explain why those norms have proven ineffective in practice. As a result, EU-produced weapons can (and *do*) end up being exported to States which can be expected to use them in a manner which violates IHL.

⁵⁸ D Cops and A Buytaert, ‘Sustainable EU Funding of European Defence Cooperation? Accountable and Transparent Coordination of Arms Export Policies Needed’ (3 December 2019) Flemish Peace Institute Policy Brief vlaamsvredesinstituut.eu.

⁵⁹ *E.g.* through the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

⁶⁰ N Davidson, I Nakamitsu, R C Arkin, A S Gill, A Lele, P Scharre and K Zawieska, ‘A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law’ (November 2017) UNODA Occasional Papers www.un.org.

⁶¹ M Sassòli, *International Humanitarian Law* cit. 529.

IV. FROM THEORY TO PRACTICE: THE INEFFECTIVENESS OF ARMS EXPORT CONTROLS IN THE EU

This section discusses the various sources of international and EU law which require EU Member States to ensure IHL compliance in the context of arms exports, and provides an overview of existing research demonstrating their shortcomings in practice.

The root of all States' obligations in relation to arms exports is found in IHL itself. As mentioned in the introduction to this *Article*, IHL protects civilians and other non-combatants during armed conflict by prohibiting various harmful acts such as intentional or indiscriminate attacks against civilian populations.⁶² Most norms of IHL, in particular the prohibitions of war crimes, crimes against humanity, and genocide, qualify as so-called peremptory norms or *ius cogens*.⁶³ These are non-derogable norms of customary international law which are binding for all States.⁶⁴ But State responsibility under IHL extends also beyond the State's own conduct in armed conflict. That is because customary IHL requires States to both respect and to *ensure respect* for IHL. This obligation is reflected in Common Article 1 of the Geneva Conventions, which requires States to cooperate to end serious violations of the peremptory norms of IHL. This duty to ensure respect encompasses both negative obligations, prohibiting active aid or assistance to IHL violations, and positive obligations, requiring States to take collective and individual measures to prevent or end such violations.⁶⁵ Possible individual measures include the imposition of an arms embargo.⁶⁶

It is this due diligence obligation contained in IHL which requires States to block arms exports if they *know* or *should have known* that those arms will be used by the recipient to commit serious IHL violations.⁶⁷ Thus, States are not only required to ensure IHL compliance when they themselves export arms, but are required also to regulate arms exports by entities operating within their territory.

In addition to the obligations that follow from IHL, EU Member States are bound by the ATT and by the Common Position. Both instruments require Member States to create an export licensing system under which arms exports must be individually assessed *ex ante* for IHL risks.⁶⁸ Materially, the level of protection offered by these instruments

⁶² As meant in arts 51 and 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

⁶³ International Criminal Tribunal for the former Yugoslavia Judgement/Sentence by Trial Chamber II of 14 January 2000 IT-95-16 *Prosecutor v Kupreskic et al* para. 520.

⁶⁴ M Sassòli, *International Humanitarian Law* cit. 47.

⁶⁵ *Ibid.* 125-131.

⁶⁶ International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para. 181.

⁶⁷ See M Sassòli, *International Humanitarian Law* cit. 528-529, for more information on the exact obligations regarding arms exports which follow from IHL.

⁶⁸ See arts 6 and 7 ATT, and art. 2, criterion 2 of the Common Position.

largely corresponds with what is already required from all States on the basis of customary IHL.⁶⁹ Therefore, their added value lies mainly in the supporting and transparency structures which they require States to enact, such as national control systems and record-keeping and reporting obligations.⁷⁰ Since the Common Position's substantive risk assessment criteria are somewhat more stringent than the ATT's,⁷¹ and since it directly incorporates arms export norms into the EU legal order, the focus of this section will primarily be on the Common Position.

The Common Position requires Member States to *assess* the buyer's attitude towards relevant principles established by IHL instruments and to *deny* an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of IHL.⁷² Yet existing research shows that Member States interpret and apply this standard in very different ways, with several Member States greenlighting exports even when there is overwhelming evidence of recent and ongoing IHL violations by the buyer. This is particularly visible in the Yemen conflict.⁷³ This conflict began in 2014 as a civil war between the Yemeni government and the Houthis movement of Shiite rebels. In 2015, a coalition of Sunni countries led by Saudi Arabia intervened,⁷⁴ primarily to prevent Iran (which provides support to the Houthis) from extending its influence over Yemen. Saudi Arabia has received aid in its efforts against the Houthis from the United States, the United Kingdom, and France, primarily in the form of arms supplies.

The conflict, which remains unresolved at present, has had a devastating impact on the Yemeni civilian population. In 2018, United Nations (UN) Secretary-General Guterres qualified the situation in Yemen as the worst humanitarian crisis in the world.⁷⁵

⁶⁹ See M Sassòli, *International Humanitarian Law* cit. 529-532 and L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit. 518-521.

⁷⁰ L Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties' cit. 518.

⁷¹ The ATT provides more leeway to states to let other (security and commercial) interests prevail when risks of IHL violations have been identified. See also BAA Martínez, 'A Balance of Risks: The Protection of Human Rights in International Arms Trade Agreements' (2018) *Security & Human Rights* 199.

⁷² Art. 2(2)(c) of the Common Position.

⁷³ Other examples of differences in approach include: Disunity in relation to arms exports for Syrian rebels during the recent Syrian civil war (S Besch and B Oppenheim, 'Up in Arms: Warring over Europe's Arms Export Regime' (10 September 2019) Centre for European Reform www.cer.eu); differences in licensing policies in response to the 2006-2010 Arab Spring (N Duquet, 'Business as Usual? Assessing the Impact of the Arab Spring on European Arms Export Control Policies' (24 March 2014) Flemish Peace Institute vlaamsvredeinstituut.eu); differing approaches to the 1989 arms embargo against China (S Gupta, 'EU Weapons Embargo and Current Chinese Foreign Policy' (2013) *Strategic Analysis* 581-583).

⁷⁴ Saudi Arabia, the United Arab Emirates, Bahrain, Kuwait, Qatar, Egypt, Morocco, Jordan, Sudan, Malaysia, Senegal, and Pakistan. See for a more comprehensive description of the conflict and its origins A Al Dosary and M George, 'Yemen War: An Overview of the Armed Conflict and Role of Belligerents' (2020) *Journal of Politics and Law* 53.

⁷⁵ Speech by United Nations Secretary-General A Guterres, 'Opening Remarks at Press Encounter on Yemen' (2 November 2018) United Nations www.un.org.

Throughout the duration of the conflict, there has been a continuous stream of reports by UN agencies⁷⁶ and Non-Governmental Organisations (NGO's)⁷⁷ of serious IHL violations on both sides of the fighting. In relation to the Saudi coalition, those reports detail a variety of IHL violations, including widespread and systematic attacks on civilian targets and a failure to appropriately distinguish between civilian and military objects. According to the Yemen Data Project, coalition air strikes have killed and injured more than 18.000 civilians since 2015.⁷⁸

International responses to the IHL violations in Yemen have varied greatly. The UN Security Council (UNSC) imposed an arms embargo on the Houthis,⁷⁹ thereby prohibiting all weapon exports to them in general.⁸⁰ But against Saudi Arabia and its allies no such UNSC measures were taken. As such, every State must individually assess the legality of its exports. This is where stark differences emerged within the EU. Though the European Parliament adopted resolutions calling on Member States to cease arms exports to Saudi Arabia and its allies no less than six times,⁸¹ several of the EU's most important weapons manufacturing States did not heed those calls. While a number of Member States took steps relatively early on to (partially) block arms exports, export data over the years 2014-2018 show that total EU arms exports to coalition members actually *increased* during the relevant time period.⁸² Certain countries, such as Germany and Italy, have since changed their position,⁸³ but other Member States – including prominent arms producers like Spain and France – have kept up their exports during the duration of the conflict. These exports include weapons and munitions that were used in prior military operations that caused civilian casualties in Yemen, such as fighter jets and aircraft bombs.⁸⁴

⁷⁶ See the annual reports of the UN Security Council Committee established pursuant to resolution 2140 (2014), available at www.un.org; the UN Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Report of the United Nations High Commissioner for Human Rights' (13 September 2017) A/HRC/36/33; and the ongoing reports from the UN Group of Eminent International and Regional Experts on Yemen, established on 3 October 2017 pursuant to resolution A/HRC/RES/36/31.

⁷⁷ See for example Human Rights Watch annual World Reports on Yemen over the years 2014-2020 (available at www.hrw.org) and Amnesty International's annual reports on The State of the World's Human Rights over the years 2014-2020 (available at www.amnesty.org).

⁷⁸ Yemen Data Project, available at www.yemendataproject.org.

⁷⁹ Security Council, Resolution 2216 of 14 April 2015, UN Doc S/RES/2216 (2015).

⁸⁰ See also art. 2(1) of the Common Position.

⁸¹ See recently Resolution 2021/2539(RSP) of the European Parliament of 11 February 2021 on the humanitarian and political situation in Yemen, which includes references to the earlier resolutions to that effect.

⁸² PD Wezeman and A Kuimova, 'Military Spending and Arms Imports by Iran, Saudi Arabia, Qatar and the UAE' (May 2019) SIPRI www.sipri.org.

⁸³ G Chazan and L Pitel, 'Germany Halts Arms Exports to Saudi Arabia after Khashoggi's Death' (22 October 2018) Financial Times www.ft.com; The Local, 'Italy Blocks Arms Sales to Saudi Arabia Permanently' (29 January 2021) www.thelocal.it.

⁸⁴ See M Bromly and G Maletta, 'The Conflict in Yemen and EU's Arms Export Controls: Highlighting the Flaws in the Current Regime' (16 March 2018) SIPRI www.sipri.org; and G Maletta, 'Legal Challenges to

The Common Position's failure to prevent problematic exports in situations like the one in Yemen can be traced back to two (interrelated) factors, which greatly affect its enforceability and its effectiveness in preventing contributions to IHL violations.

The first factor is its *limited harmonising effect*. National licensing systems continue to differ on important aspects such as their institutional framework, material scope, application of licenses and end-use controls, and transparency.⁸⁵ Furthermore, the Common Position's assessment criteria are open-ended in nature,⁸⁶ leaving room for divergent interpretations.⁸⁷ Initiatives intended to harmonise interpretations, such as the introduction of an interpretative Users' Guide, have not solved the issue thus far.⁸⁸ And since the European Council's recent review of the Common Position has resulted in only minor changes to it,⁸⁹ a further alignment of Member States' practices is not expected in the near future.⁹⁰

The second factor is *limited access to justice* at both the EU and the national level. As the Common Position has been adopted under the CFSP, it falls outside of the jurisdiction of the CJEU. This also prevents national courts from referring questions to it in order to resolve existing interpretative differences. Furthermore, as demonstrated by Ferro's (2019) study into legal challenges brought against export licenses granted to Saudi Arabia and its allies,⁹¹ there are simultaneously significant hurdles when it comes to bringing a case at the national level. For various reasons, such cases are most often brought by NGO's acting in the collective interests of victims of armed conflict. In some countries, national procedural rules prohibit NGO's from opening a court case in the first place.⁹² In jurisdictions which do allow NGO's to bring an action against export licenses,⁹³ national courts have so far displayed a strongly deferential attitude towards the assessments carried out by government authorities.⁹⁴ As a result, it has proven very

EU Member States' Arms Exports to Saudi Arabia: Current Status and Potential Implications' (28 June 2019) SIPRI www.sipri.org.

⁸⁵ D Cops, N Duquet and G Gourdin, 'Towards Europeanised Arms Export Controls? Comparing Control Systems in EU Member States' (15 June 2017) Flemish Peace Institute vlaamsvredesinstituut.eu.

⁸⁶ See art. 2(2), second indent and under (c) of the Common Position, and in particular the "clear risk" element.

⁸⁷ BÁÁ Martínez, 'A Balance of Risks' cit. 214.

⁸⁸ European Council User's Guide to Council Common Position 2008/944/CFSP of 16 September 2019 n. 12189/19 defining common rules governing the control of exports of military technology and equipment.

⁸⁹ Conclusions 12195/19 of the European Council of 16 September 2019 on the review of the Council Common Position 2008/944/CFSP of 8 December 2008 on the control of arms exports.

⁹⁰ D Cops and N Duquet, 'Reviewing the EU Common Position on Arms Exports' cit.

⁹¹ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties' cit.

⁹² See for example, Tribunal Administratif de Paris judgment of 9 July 2019 1807203/6-2 *Exportation d'armes vers le Yemen*.

⁹³ Such as the UK, see London Court of Appeal of 20 June 2019 T3/2017/2079 *Campaign Against Arms Trade (CAAT) v The Secretary of State for International Trade*.

⁹⁴ L Ferro, 'Western Gunrunners (Middle-)Eastern Casualties' cit. 531.

difficult to substantively challenge export licenses related to the Yemen conflict, even though these decisions “so flagrantly breach international law”.⁹⁵

V. DON'T FUEL THE FIRE: THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

Having covered the Member States' obligations in arms export controls, it is now time to examine more closely the obligations of the EU in this area in light of the EDF. At the outset, the EU's role in arms export controls is a markedly different one compared to that of its Member States. After all, the EU is not an *addressee* of arms export legislation: It is neither an arms exporter nor an export licencing authority. But as this section will show, the ineffectiveness of international and EU arms export controls is nevertheless a legally relevant fact for the EU in the context of the EDF. Firstly because of the EU's commitment to the international legal order, which requires it to actively stimulate compliance with international law where possible (subsection V.1). And secondly because of the principle of consistency, which requires it to refrain from contributing through the EDF to behaviour that it is trying to prevent under the Common Position (subsection V.2). Though the EU's commitments to international law and to consistency can both support the existence of a legal duty for the EU to act as a responsible arms financier, it must be noted that the CFSP-specific context of arms export controls may make it difficult for this duty to be enforced judicially (subsection V.3).

V.1. THE EU AS A GUARDIAN OF THE INTERNATIONAL LEGAL ORDER

International law can affect the EU in different ways. Firstly, the EU itself can be liable for violating international law. For such liability to occur, the EU's actions have to qualify as an internationally wrongful act according to the customary rules on liability of international organisations. This part of customary international law is still in development. The International Law Commission (ILC) has proposed a set of Draft Articles on the Responsibility of International Organizations (DARIO),⁹⁶ but these have not yet been adopted. Nevertheless, they represent the first authoritative attempt to formulate a coherent system of responsibility for international organisations based on general principles of customary international law,⁹⁷ which can provide inspiration for examining the extent of EU liability in this area.⁹⁸

⁹⁵ *Ibid.* 533-535.

⁹⁶ UN, *Yearbook of the International Law Commission* (2011) legal.un.org.

⁹⁷ M Möldner, 'Responsibility of International Organizations – Introducing the ILC's DARIO' (2012) Max Planck Yearbook of United Nations Law Online 281, 285-288.

⁹⁸ See also D Sehnalek, 'The Responsibility of the European Union under International Law' in AJ Bělohlávek and N Rozehnalová (eds), *Czech Yearbook of International Law* (2018) 289.

Based on the DARIO, adopting the EDF Regulation without including additional safeguards surrounding arms export compliance would not appear to lead to international liability on the part of the EU. As the EU will at most contribute *indirectly* to illegal arms exports, it could only be held liable if its funding would qualify as aid or assistance to an internationally wrongful act. For this, two requirements must be met. The first requirement is that the act to which aid is given would be internationally wrongful if it were committed by the EU itself.⁹⁹ Since the EU is itself not a signatory to the ATT, this means that it cannot be held liable for aiding or assisting in violations of the ATT by others. This could be different as far as IHL is concerned, since IHL generates obligations that are customary in nature. Nevertheless, EU liability for aiding in a violation of IHL export obligations is similarly unlikely. That is because of the second requirement for liability: knowledge of the circumstances of the internationally wrongful act to which the aid is given.¹⁰⁰ Such knowledge would be very difficult to prove in relation to the EDF. Its funding is limited to the R&D phase of arms development, at which point it will often not be clear whether end products will be exported at all. Thus, when the EU grants funding for a particular project, there will usually be no concrete indications that the products to be developed will be exported unlawfully. Since knowledge that the EDF may contribute to illegal arms exports *in abstracto* is insufficient, the EDF will most likely not give rise to direct international liability for the EU.

The second way in which international law can affect the EU is through application of international norms within the EU legal order. Depending on the nature of the norm in question, international law may have effect in the EU legal order directly or through harmonious interpretation.¹⁰¹ Customary international law generally has direct effect, as was reaffirmed by the CJEU in *ATAA*: “when [the EU] adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union”.¹⁰² Treaties have direct effect only if certain requirements are met, including firstly the requirement that the EU must be bound by the treaty in question.¹⁰³ But since the EU will not actually be violating international law through its funding, this second form of legal effect would also not appear to bar the EU from introducing a measure such as the EDF.

⁹⁹ Art. 14(b) DARIO.

¹⁰⁰ Art. 14(a) DARIO. See specifically on financing as aid or assistance also A Reinisch, ‘Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts’ (2010) *IntOrgLRev* 7, 66-72.

¹⁰¹ K Ziegler, ‘The Relationship between EU Law and International Law’ in D Patterson and A Södersten (eds), *A Companion to European Law and International law* (John Wiley & Sons 2016) ch. 4.

¹⁰² Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864 para. 101.

¹⁰³ Case C-308/06 *Intertanko and Others* ECLI:EU:C:2008:312 para. 44.

However, based on the text of the TEU, I argue that there is also a third layer to the EU's commitment to international law.¹⁰⁴ This consists of an obligation for the EU to use its influence to stimulate compliance with international law by others. This obligation follows firstly from art. 3(5) TEU, which commits the EU to the *strict observance and development* of international law. It is expanded upon further in art. 21 TEU, which sets out the objectives for external EU action. Art. 21(1) TEU states that EU external action shall be guided by respect for the principles of international law, while art. 21(2)(b) TEU states that the EU shall work towards *consolidating and supporting* those principles. These commitments also affect internal EU measures such as the EDF Regulation. This follows from art. 21(3) TEU, which proclaims in its first paragraph that the EU must respect the CFSP's objectives also in relation to the external aspects of its other policies. This means that when the EU enacts internal policy measures that have external effects, it must ensure that those measures too respect the EU's aim of consolidating and supporting the principles of international law.

Interpreting arts 3(5) and 21 TEU as provisions with concrete, substantive meaning is in line with Wessel's reading of those articles. According to Wessel, arts 3(5) and 21 TEU require EU international relations to be guided by the fundamental objectives included in those provisions.¹⁰⁵ Support for this approach to art. 21(2)(b) TEU specifically can be found also in EU jurisprudence regarding restrictive measures (sanctions) against individuals. In cases such as *Al Matri and Tomana*,¹⁰⁶ the General Court has confirmed that the objectives listed in art. 21(2)(b) TEU such as advancing democracy and the rule of law grant the EU competence – when read in conjunction with art. 29 TEU – to impose restrictive measures against individuals abroad in pursuit of those objectives. Thus, the EU's objective to work towards consolidating and supporting the principles of international law can also be regarded as a justification for concrete EU action in support of that goal.

Based on the foregoing, I argue that art. 21(2)(b) TEU – read in conjunction with art. 21(3) TEU – imposes an obligation on the EU to ensure that its internal actions with an external dimension do not run contrary to its objective of consolidating and supporting the principles of international law. Since arms export controls are rooted firmly in customary IHL, and since the EDF Regulation can be expected to contribute to arms exports which may contravene customary IHL (see Section IV), art. 21 TEU would thus require the EU to take steps to ensure compliance with customary IHL by the recipients of its funding.

¹⁰⁴ See for a similar line of reasoning in relation to the EU's external human rights obligations L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2014) EJIL 1071.

¹⁰⁵ *eJournal*: RA Wessel, 'Lex Imperfecta: Law and Integration in European Foreign and Security Policy' (2016) European Papers www.europeanpapers.eu 444.

¹⁰⁶ Case T-200/11 *Al Matri v Council* ECLI:EU:T:2013:275 and Case T-190/12 *Tomana and Others v Council and Commission* ECLI:EU:T:2015:2222. See L Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: An Analysis of Article 21 of the Treaty on the European Union' (2018) EuConst 14 and 591-595 for a more in-depth discussion.

V.2. THE EU AS A CONSISTENT LEGISLATOR

Consistency is a legally binding principle of EU law, which features prominently in both the EU Treaties and the CJEU's case law. It has various implications for both the horizontal and vertical levels of EU governance.¹⁰⁷ Horizontal (that is, inter-EU) consistency is included in art. 13(1) TEU among the general aims of the EU institutions, while art. 7 TFEU makes clear that the EU must "ensure consistency between its policies and activities, taking all of its objectives into account". According to most authors, the EU is bound by a horizontal consistency obligation that extends beyond merely ensuring that one EU legal instrument does not contradict another. Herlin-Karnell and Konstadinides argue for instance that "when it comes to legal drafting, consistency can be interpreted not only as consistency of content (ie, coordination and avoidance of contradiction) but also as consistency of logic (consolidation) and goals".¹⁰⁸

The consistency principle is of such prominence that it may qualify as one of the foundational legal principles of the EU, since it is a *legally binding, overarching normative frame of reference* for all primary law.¹⁰⁹ As such, it has been given an explicit place in the CFSP as well. The second paragraph of art. 21(3) TEU requires the EU to "ensure consistency between the different areas of its external action and between these and its other policies". Thus, the EU is under an explicit obligation to ensure consistency between EU internal policies such as the EDF and EU external policies such as the Common Position.¹¹⁰

The consistency principle allows for a relatively straightforward line of argumentation connecting together the EDF Regulation and export control compliance. As the EU is fully aware of the deficiencies of Member States' arms export regimes, and there are numerous signals that Member States continue to export arms in violation of the EU's own Common Position, increasing arms industrial funding without including safeguards relating to export controls runs contrary to the consistency principle. After all, without such safeguards it is reasonably foreseeable that EDF funding will end up contributing to – or even stimulating – behaviour which the EU is actively trying to prevent in another area of action.

V.3. THE NATURE OF THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

As explained in the previous subsections, the EU's commitment to international law and the consistency principle both support the existence of a duty for the EU to act as a re-

¹⁰⁷ See SEM Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law' cit. for an in-depth analysis of those functions.

¹⁰⁸ *Ibid.* 146.

¹⁰⁹ A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) *Revus* 35 para. 25 and 35.

¹¹⁰ See also RA Wessel, 'Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?' (2015) *European Foreign Affairs Review* 129.

sponsible arms financier. However, due to the specific characteristics of the CFSP, enforcing this duty is not a straightforward matter.

The main barrier to enforcement is the CJEU's lack of jurisdiction over the CFSP. Though CFSP decisions are considered to bind the Member States, there are significant limitations when it comes to challenging their effects through the CJEU or a national court.¹¹¹ CJEU jurisdiction is limited to guarding the lines of EU competence (such as between the CFSP and other forms of EU external action¹¹²) and providing protection against restrictive measures against individuals.¹¹³ Though the EDF Regulation is itself reviewable on the basis of art. 263 TFEU, it seems unlikely that the CJEU would be able to rely on the consistency principle or the EU's commitment to international law to review that Regulation's compatibility with EU obligations falling under the CFSP. After all, these lines of argumentation do not concern the demarcation of EU competence or the application of individual measures. They would inevitably require the CJEU to substantively review art. 21 TEU and (the implementation of) the Common Position, which it may not do on the basis of art. 24(1) TEU. As the CJEU acknowledges, EU law is simply such that "certain acts adopted in the context of the CFSP fall outside of the ambit of judicial review by the Court of Justice".¹¹⁴ This jurisdictional gap is unlikely to be closed by the national courts, who are as a rule precluded from declaring EU acts invalid.¹¹⁵

On top of this, the most likely parties to bring a case before the CJEU against the EDF Regulation – NGO's and the third-state persons they represent – would face other formal obstacles as well. Art. 263(1) TFEU restricts appeals to acts that are of direct and individual concern to the applicant. This requirement is applied strictly by the CJEU and bars actions by public interest groups,¹¹⁶ meaning that NGO litigation is excluded at the EU level. Furthermore, a legal act challenged under art. 263(1) TFEU must be intended to produce legal effects *vis-à-vis* the applicant. Based on the available case law, there is a good chance that the CJEU would rule that the EDF Regulation is not intended to produce legal effects in relation to third-state applicants. This follows from the Court of First Instance's verdict in *Commune de Champagne*, in which it ruled that "[...] an act of an institution adopted pursuant to the Treaty, as a unilateral act of the Community, cannot create rights and obligations outside the territory thus defined".¹¹⁷ While this line of reasoning has been criticised

¹¹¹ *Ibid.*

¹¹² Case C-263/14 *Parliament v Council* ECLI:EU:C:2016:435.

¹¹³ Case C-134/19 *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793.

¹¹⁴ Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 252.

¹¹⁵ P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 1.

¹¹⁶ *E.g.* Case C-565/19 *Carvalho and Others v Parliament and Council* ECLI:EU:C:2021:252. See also the report by DG Internal Polices, *Standing up for your right(s) in Europe* (2012) www.europarl.europa.eu/https 39-40.

¹¹⁷ Case T-212/02 *Commune de Champagne and Others v Commission* ECLI:EU:T:2007:194 para. 90.

in the literature,¹¹⁸ if upheld it would serve to bar actions against the EDF Regulation brought by the potential victims of illicit arms exports.

Based on the foregoing, it appears unlikely that the EDF Regulation could be challenged judicially over failure on the part of the EU to act as a responsible arms financier. But does this mean that the EU can simply ignore its obligations? I would argue the contrary. From an EU-constitutional perspective, it merely means that the responsibility to ensure that the EDF Regulation is compatible with the EU's obligations in relation to international and EU arms export controls falls on the shoulders of the EU legislator. After all, it is firstly the legislator that must transpose the EU's objectives and values "into justiciable norms or principles as part of a legal discourse and political-societal choice".¹¹⁹

Furthermore, it is clear from the EU's efforts on the international scene that it has also committed itself *politically* to fostering a more responsible arms trade. EU soft power has been a strong driving force behind the adoption of the ATT¹²⁰ and of more stringent standards in relation to the proliferation of small arms and light weapons¹²¹ and Weapons of Mass Destruction (WMD's).¹²² Because of these efforts the EU has been referred to as a *norm entrepreneur* in arms controls, as the EU is able to put issues on the agenda and to convince others to embrace new norms by advancing normative interpretations of fundamental values.¹²³ But successful norm advocacy requires the norm entrepreneur to demonstrate strong notions regarding appropriate or desirable behaviour.¹²⁴ For the EU to remain a credible actor, it must – in other words – act in line with those fundamental convictions it seeks to advance in the wider world. A failure by the EU to grasp opportunities to enhance norm compliance in the area of export controls may thus jeopardise its position as norm entrepreneur, since this could be perceived by other actors as the EU failing to uphold those norms that it is promoting others to follow. This, too, forms a reason for the EU to ensure that it does not contribute to arms exports that run contrary to its own export control norms.

It follows then that the EU is both legally obliged and politically committed to stimulating a more responsible arms trade. Though judicial enforcement of the relevant legal

¹¹⁸ L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' cit. 1087-1088.

¹¹⁹ O Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) *Hague Journal on the Rule of Law* 133.

¹²⁰ See for instance Conclusions 12514/1/05 of the European Council of 3 October 2005 on an International Treaty on the Arms Trade.

¹²¹ Conclusions 13581/18 of the European Council of 19 November 2018 on the Adoption of an EU Strategy Against Illicit Firearms, Small Arms & Light Weapons & Their Ammunition.

¹²² Conclusions 15708/03 of European Council of 9 December 2003 on an EU strategy against proliferation of Weapons of Mass Destruction.

¹²³ B Oliveira Martins and B Backhaus, 'Why and How the EU Should Act on Armed Drones' cit. 261.

¹²⁴ M Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) *International Organization* 896 and 904.

obligations seems unlikely, this does not release the EU from its responsibilities. The next section examines how this legal-political commitment to a responsible arms trade could be put into practice in the context of the EDF.

VI. DESIGNING A MORE RESPONSIBLE EUROPEAN DEFENCE FUND

It is clear from the final text of the EDF Regulation that potential non-compliance with EU export norms by funding recipients will not affect the disbursement of EDF funding. Yet as this section will demonstrate, it would certainly have been possible for the EU to draft the EDF Regulation in such a way so as to reduce the chance of export control violations involving EDF-funded products. Several measures to that effect were proposed by the European Parliament during the EDF's legislative process.¹²⁵ However, during the (non-public) inter-institutional negotiations for the EDF, Parliament ultimately acquiesced to the wishes of the Council and Commission not to include them in the final Regulation.¹²⁶ The measures originally proposed by Parliament, as well as other potential solutions to the challenge of designing a more humane defence-industrial financing instrument, will be examined in this section. But before doing so, it is necessary to determine the relevant *benchmark* against which such measures should be assessed. In other words, what are the critical parameters for determining whether the EU has met its obligations as identified in the previous subsection?

VI.1. OPERATIONALISING THE EU'S DUTY TO ACT AS A RESPONSIBLE ARMS FINANCIER

It is important to note as a point of departure that the relevant obligations identified in section V are rather open ended. This implies the existence of a relatively wide margin of appreciation for the EU legislator. From this perspective, consistency and consolidating and supporting international law can be seen as public policy objectives that are to be taken into account while drafting legislation and which must be balanced against other relevant interests that are at stake. The relative "weight" of these obligations ought to reflect the EU's appreciation of the acceptable level of risk of its actions in one area contributing to activities which it considers undesirable in another. This can be regarded as a sliding scale. At one extreme of the scale would be an EU which considers export norm compliance of absolute importance. This EU would consider *any* risk of its funding contributing to illegal arms exports unacceptable, and would thus only engage in defence-industrial funding if it would have certainty that its funding would not contribute to such activities.

¹²⁵ Resolution 2018/2157(INI) cit. paras 21 and 41.

¹²⁶ Proposal for a Regulation COM(2018)476 of the European Parliament and of the Council of 13 June 2018 establishing the European Defence Fund. For details of the legislative process see eur-lex.europa.eu for an overview of the EDF Regulation's development from proposal to final text.

At the other extreme of the scale would be an EU that would allow all other (geopolitical, economic) interests to prevail in case of conflict with its humanitarian export obligations. An EU positioned in the middle ground between these two extremes would make an effort to reduce risks to a reasonable level. In effect, this corresponds with a proportionality test *stricto sensu*: Is there an adequate balance between the benefits of a measure in relation to one public interest, compared to the harm inflicted on another?¹²⁷ Based on the nature of the relevant EU legal obligations and the EU's constitutional commitment to proportionality,¹²⁸ such an approach would seem most appropriate.

Next, the limitations to the EU's legislative toolbox must be kept in mind. Any protective measures that the EU may wish to implement would have to be in line with the *division of competences*. As is clear from this *Article*, defence-industrial policy is a complex terrain which requires addressing various geopolitical, economic and humanitarian issues. But the EU is currently not able to adopt such an integrated approach. It is a limited foreign and security actor, and it does not possess the competences to strengthen arms export controls and their enforcement. The most direct and effective solution to the problem identified in this article would therefore be to enhance the EU's competences in this area. Yet political realities are such that this is not likely to occur any time soon. That being the case, it must be recognised that any attempt to address the issue of arms export non-compliance as an ancillary effect under the EDF Regulation will always be indirect, and therefore imperfect.

The ancillary nature of the issue also implies that any instrument intended to address export control compliance within the context of the EDF Regulation ought to respect the *primary* policy goal of the EDF of contributing to strategic autonomy by stimulating industrial cooperation. Otherwise, such an instrument would defeat the purpose of instituting the EDF in the first place.

Taking the foregoing considerations into account, the EU's duty to act as a responsible arms financier within the context of the EDF could be operationalised as an obligation to include in the EDF Regulation any measures that *i)* are suitable to prevent EU funding from contributing to illegal arms exports, *ii)* fall within the scope of the EU's competences regarding industrial and research support, and *iii)* do not jeopardise the EDF's primary policy objectives.

VI.2. ANALYSING THE EU'S POLICY TOOLBOX

In order to determine in what manner the EU could have acted against illegal arms exports in the EDF Regulation, this subsection will examine a number of different policy options. These are *i)* introducing a dedicated export control regime for EDF-funded products,

¹²⁷ Compare A Barak, 'Proportionality *Stricto Sensu* (Balancing)' in H Spector and B Bix (eds), *Rights: Concepts and Contexts* (Routledge 2017) 507.

¹²⁸ Art. 5(4) TEU.

ii) restricting EDF financing for certain products that carry increased IHL risks, *iii)* increasing transparency regarding exports of arms developed with EDF funding, and *iv)* creating a “clawback mechanism” through which funding recipients can be ordered to reimburse funding under certain conditions. The first three instruments were tabled by the European Parliament during the legislative process. Inspiration for the fourth instrument was found in the EDF Regulation itself, as such a mechanism is already included in it in order to address a different type of undesirable behaviour by funding recipients.

a) Introducing a dedicated control regime for EDF-funded products.

The first policy option to be discussed was tabled by the European Parliament in a resolution which it adopted following a parliamentary evaluation of the Common Position. In this resolution, Parliament “calls on the Council and Parliament to agree on a detailed interpretation and implementation regime including a supervisory body, a sanctioning body and an ethical committee, to ensure that the criteria of the Common Position are applied at least to the products financed under [...] the EDF”.¹²⁹

The measures proposed by Parliament are quite far-reaching and would go a long way in addressing the main issues plaguing EU arms export policy identified in section IV of this *Article*. Thus, these measures would certainly seem suitable to prevent EU funding from contributing to illegal arms exports. However, they are simultaneously problematic from the perspective of both the division of competences and the EDF's primary policy effectiveness.

As regards competence, Parliament's proposal would effectively amount to partial harmonisation of Member States' export control policies. It would thus have to be adopted on the basis of the CFSP rather than the industrial support competence on which the EDF Regulation is based. Furthermore, the proposal would essentially entail the creation of an additional, separate and parallel EU export regime that only applies to EDF-funded products. The resultant (financial and procedural) burdens for arms producers could disincentivise them from participating in EDF programmes, thereby jeopardising its primary policy objectives. This proposal is therefore ill suited for addressing export issues in the specific context of the EDF.

b) Restricting financing up front.

Since the EDF is a funding instrument, the principal way in which its influence is determined is the scope of its financing: which activities qualify for funding, and which do not? Therefore, one way to address humanitarian concerns could be to restrict funding for particular activities. As explained in section III of this *Article*, it is clear from the final text of the EDF Regulation that the legislature implemented certain such restrictions by prohibiting in art. 10(6) EDF Regulation funding for products and technologies that are banned by international law and for lethal autonomous weapons. But the EU could have chosen to expand this provision also to other types of weaponry of which the ex-

¹²⁹ Resolution 2018/2157(INI) cit. para. 41.

portation generates particularly serious humanitarian risks. Parliament proposed for example excluding from financing small arms and light weapons that are “mainly developed for export purposes, i.e. where no Member State has expressed a requirement for the action to be carried out”.¹³⁰

Since small arms and light weapons are particularly associated with IHL violations,¹³¹ excluding those weapons from funding could in theory serve to reduce the IHL concerns surrounding the EDF. Yet such measures can only go so far without simultaneously jeopardising the EDF’s primary policy goals. In this context, it must be recalled that the problems in relation to Yemen are not caused by weaponry mainly developed for export purposes, but by high-tech major weapon systems such as (munitions for) jet planes. As long as EDF financing is available for any such “hard” defence products, there will always be a risk of those products being used to conduct IHL violations by their recipients. And since excluding all hard defence products from funding would severely hamper the EDF’s scope and functionality, funding restrictions can only be regarded as partially suitable for addressing export issues in the specific context of the EDF.

c) Increasing transparency.

The third and final proposal tabled by Parliament concerns the introduction of a mechanism increasing the transparency of EDF funding in relation to arms exports. In this context, Parliament suggested listing exports of EDF-funded products separately in the export data submitted to COARM, in order to ensure a close monitoring of those products.¹³² COARM – the Council Working Party on Conventional Arms Export – gathers, registers, and publishes EU Member States’ arms exports data in fulfilment of art. 8 of the Common Position.

While Parliament’s chosen solution would necessitate adapting the Common Position, it would also appear possible to include a similar mechanism in the EDF Regulation itself. Such a mechanism could be seen as a financial accountability tool in support of the EDF Regulation’s primary functions, comparable to the monitoring and reporting obligations currently laid down in art. 28 EDF Regulation. Additionally, the EDF Regulation already foresees in a number of arrangements regarding information, communication and publicity surrounding EDF funding, including a duty for recipients to “*acknowledge the origin of those funds and ensure the visibility of the Union funding*” (art. 32(1) EDF Regulation). However, whether such a transparency mechanism would be suitable to promote export control compliance is another matter. In theory, enhanced transparency could enable both the EU and NGO’s to make better use of their soft power in relation to arms exports. Yet COARM already reports on arms exports, and

¹³⁰ Document A8-0412/2018, proposed art. 11(6).

¹³¹ See A Boivin, ‘Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons’ (2005) IRRC international-review.icrc.org 467.

¹³² European Parliament Resolution of 14 November 2018 cit. para. 41.

there are various actors who regularly sound the alarm over exports to recipients with a poor humanitarian record. While making EDF funding specifically visible in this context could serve to put the spotlight on the issue, without an actual “stick” to properly act against problematic exports the added value may be limited indeed.

d) Introducing a clawback provision.

As mentioned earlier in this subsection, the EDF's main impact comes from its financial influence. It is the “pull” of its financing which is supposed to nudge the defence industry into a particular direction. But the EDF's influence may also extend beyond the moment when its funding has been disbursed. As arts 20(4) and 23(4) of the EDF Regulation show, it is possible to design an *ex post* enforcement mechanism which allows funding to be clawed back in case the recipient of that funding acts contrary to the EU's interests. These provisions are intended to ensure that EDF funding is used in a manner that is consistent with the security and defence interests of the EU and its Member States. They impose a duty on recipients of funding to notify the Commission prior to transferring intellectual property and/or ownership of the results of EDF-funded actions to a third State or a third State entity. If this transfer is found to contravene the security and defence interests of the Union and its Member States or the objectives of the EDF, the financial support provided from the EDF must be reimbursed. Thus, while the EDF does not affect arms exports *officially*, it does impose financial consequences on funding recipients if their exports run contrary to security interests.

A comparable clawback mechanism could be designed to ensure that EDF-funded products are exported in a manner compliant with the Common Position. Taking arts 20(4) and 23(4) as templates, a provision could be designed requiring funding recipients to notify the Commission prior to exporting products resulting from EDF-funded R&D actions. If the Commission were to conclude that an export is not compliant with the Common Position, the recipient could then be required to reimburse (part of) the funding it received. Such a mechanism could prove effective in preventing EU funding from contributing to illegal arms exports, since it would make it possible for an EU body to carry out an independent review of the compatibility of EDF-funded exports with humanitarian standards. And since such a mechanism would tie export control compliance directly to the EDF's main purpose and function (industrial funding), its effectivity would be intertwined with the EDF's general effectivity as well. Thus, if EDF funding were to book significant results, the threat of reimbursement may also prove an effective incentive pushing both companies and Member States to be more critical in their export practices. And since such a mechanism imposes no additional obligations on companies – after all, they are required only to adhere to the already-existing rules of the Common Position – the EDF's primary policy objectives would not appear to be jeopardised.

Finally, it would seem possible to argue that such a mechanism would fall within the legal basis of the EDF Regulation. In this context it is useful again to draw a comparison with arts 20(4) and 23(4) EDF Regulation. Under those articles, the Commission will be-

come responsible for assessing military security interests, even though it is neither competent to develop European military security policy¹³³ nor to develop national military security policy.¹³⁴ In both cases, the mechanism can be considered necessary to ensure the proper disbursement of funding in relation to the EU's public interests.

VII. CONCLUSION

This *Article* sought to discover whether the EU is under an obligation to address the risk of EDF-funded armaments contributing to IHL violations outside of its own borders, taking into consideration its commitments to international law and consistency, and if so, what measures it could have included in the EDF Regulation to fulfil this obligation.

On the basis of an EU legal-constitutional analysis, this *Article* concludes that the EU was indeed required to address the risk of EDF-funded armaments contributing to IHL violations. This obligation has two separate sources, namely the EU's duty to consolidate and support the principles of international law – including customary IHL – and its duty to act in a manner that is consistent with its own Common Position on arms exports. Though the specific procedural and institutional arrangements governing the CFSP likely prevent this obligation from being enforced in a court of law, the EU legislature cannot simply ignore it either. Firstly, because it is an obligation rooted in EU primary law which the EU legislature is required to observe. And secondly, because it reflects certain core values the promotion of which the EU has committed itself to at a political level as well. Since such value-promoting activities rely on soft power, the EU must be seen to uphold its values itself as well if it wishes to remain a credible actor.

As demonstrated through an analysis of the legislative toolbox available to the EU when drafting the EDF Regulation, the EU could have used a number of instruments to address the risk of EU funds contributing to illegal arms exports without violating the division of competences or jeopardising the EDF's primary policy objectives. One option would be to exclude more product types from funding that pose a high risk for humanitarian violations, while at the same time having little to no EU-strategic value. Another would be to introduce an *ex post* enforcement mechanism allowing the European Commission to claw back funding in case EDF-funded weapons are exported in violation of the Common Position. Though such measures are by no means a perfect solution to the issue of illegal arms exports, they can be seen as a next-best option in lieu of enhancing the EU's competences regarding arms exports.

By failing to enact any measures to address the problem of illegal arms exports in the context of the EDF, the EU has neglected its obligations in relation to the international legal order and its duty to ensure consistency. Furthermore, the EU's inaction

¹³³ Which falls, as part of the CSDP, under the purview of the Council.

¹³⁴ Which remains a Member State prerogative, under art. 4(2) TEU.

risks jeopardising its soft power role in the realm of arms controls, which it has actively developed and made use of over the years to reduce the suffering brought about by the proliferation of arms across the globe.

As evidenced by the European Parliament's input during the legislative process, the EU legislature was clearly aware of the humanitarian concerns accompanying the EDF. The absence of export-related measures in the EDF Regulation thus reflects a conscious choice to sacrifice the interests of victims of armed conflict abroad in favour of other foreign policy priorities. This is starkly at odds with the EU's foreign policy rhetoric, in which it stylises itself as an ethical actor and as a 'force for good' on the international scene.¹³⁵

While the EDF is certainly not the first example of disparity between the EU's rhetoric and its external action,¹³⁶ such issues have often been attributed in the past to the EU's dependence on soft power to propagate its values internationally.¹³⁷ Since EU foreign policy relies on Member State action for its implementation, and largely excludes EU institutions such as the European Parliament from the process, refusal by Member States to prioritise EU norms and values over national policy interests certainly limits the EU in its ability to actually influence the behaviour of other States.¹³⁸ Yet the example of the EDF raises questions regarding the EU's own commitment to its values as well. By signing the EDF Regulation into law in its current form, the EU institutions – including the European Parliament – have made a conscious choice to accept the risk of EU funds fuelling illicit arms exports. Thus, when presented with an opportunity to actually *enforce* its own values, the EU too failed the litmus test.

The EDF is not the only new CFSP instrument which raises questions regarding the EU's commitment to upholding its values abroad. The newly-minted European Peace Facility (EPF),¹³⁹ which will allow the EU for the first time to supply weapons to non-EU military forces, has attracted similar criticisms. Like the EDF, the EPF has been prompted by geopolitical concerns – mainly a desire to increase stability in the Sahel and other (North-)African regions. Yet shipping weapons to governments in those regions is not without risks, especially considering their poor human rights records. For this reason, the EPF has received widespread criticism from various actors who claim that it will increase harm to civilians rather than bring peace to the region.¹⁴⁰

¹³⁵ L Aggestam, 'Introduction: Ethical Power Europe?' (2008) *International Affairs* 1.

¹³⁶ A Skolimowska, 'The European Union as a "Normative Power" in International Relations. Theoretical and Empirical Challenges' (2015) *Yearbook of Polish European Studies* 111.

¹³⁷ See, for instance, I Manners, 'Normative power Europe: A Contradiction in Terms?' (2002) *JCom-MarSt* 235.

¹³⁸ R Nouredine, 'Normative Power Europe in Field of Human Rights: Is the EU a Force for Good in the World?' (2016) *Australia and New Zealand Journal of European Studies* 111.

¹³⁹ Decision (CFSP) 2021/509 of the European Council of 22 March 2021 on establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528.

¹⁴⁰ Z Campbell, C Chandler and C Jones, 'Hard power: Europe's Military Drift Causes Alarm' (19 May 2021) *The Guardian* www.theguardian.com.

Developments such as these indicate that the EU's gradual transition to hard power in the realm of security and defence creates a real risk of sacrificing the core values that it was originally founded on. If the EU wants those values to represent more than just empty words, it will have to make serious efforts to put them into action as well.



ARTICLES

THE ENTITLEMENT OF THE EUROPEAN UNION TO EXERCISE DIPLOMATIC PROTECTION: AN INTERNATIONAL CUSTOMARY LAW PERSPECTIVE

AURORA RASI*

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ABSTRACT: Recent international practice of the European Union features a certain attention to the need to protect European citizens whose interests have been affected by a breach of international law by a third State. Strikingly, this practice seems to find a more solid basis in international law than in EU law. This *Article* explores the actions performed by the European Union through the lens of customary international law on diplomatic protection. It aims at ascertaining whether these actions prompted a development of international law which entails that, in force of the European citizenship, the Union is entitled to protect its citizens.

KEYWORDS: diplomatic protection – international customary law – EU citizenship – international practice of the EU – external action – international organisations.

I. INTRODUCTION: RECENT TRENDS IN THE PRACTICE OF THE EUROPEAN UNION CONCERNING THE PROTECTION OF EUROPEAN CITIZENS *VIS-À-VIS* A THIRD STATE

Not more than a few weeks after the withdrawal of the United Kingdom from the European Union, a number of EU citizens attempting to enter the UK territory without a visa

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discovered to be irregular migrants and, to their dismay, were treated as such. Some of them, indeed, had been picked up at the airport, deprived of their mobile phones, brought in centres for irregular migrants and detained for a number of days.¹

The reaction of the Union was prompt and firm. The European Council “call[ed] on the UK to respect the principle of non-discrimination among Member States” and “invite[d] the Commission to continue its efforts to ensure full implementation of the Agreements [between the EU and the UK], including in the areas of EU citizens’ rights, [...] making full use of the instruments under the Agreements”.² The Commission highlighted that “[m]edia reports of European citizens being put in detention cells or being fingerprinted just because they wanted to visit the United Kingdom” could damage the relationship between the Union and the United Kingdom and, consequently, invited the UK to “calm down [...] and focus on the future”.³ Moreover, once pointed out that “the treatment of EU citizens at the UK border has [its] full attention”, and while admitting that “[t]he UK authorities announced several measures to address EU concerns, including clarification of guidance for border guards to prefer immigration bail”, the Commission made clear that it “will not hesitate to take action to address problems”.⁴

Interestingly, the EU reaction, far from being unrehearsed, was solicited and supported by a number of members of the European Parliament, who asked the Commission to determine “[w]hat action it will take to ensure that the rights of EU citizens are protected by the United Kingdom should such situations ever arise again”, to clarify “[h]ow does [it] intend to respond in order to defend EU citizens in the UK [...]?” and “[h]ow does [it] intend to prevent similar cases from happening again in the future and to ensure that there are no restrictions on individual freedoms for EU citizens traveling

¹ See C Gallardo, ‘EU Citizens Detained by UK after Landing Without Work Visas’ (6 May 2021) Politico www.politico.eu; C Gallardo, ‘More than 600 EU Nationals Held Under UK Immigration Powers in Three Months’ (27 May 2021) Politico www.politico.eu. See also G Tremlett and L O’Carroll, ‘EU Citizens Arriving in UK Being Locked up and Expelled’ (13 May 2021) The Guardian www.theguardian.com; G Tremlett and L O’Carroll, ‘Hostile UK Border Regime Traumatizes Visitors from EU’ (14 May 2021) The Guardian www.theguardian.com; G Tremlett and L O’Carroll, ‘Number of EU Citizens Refused Entry to UK Soars Despite Covid Crisis’ (28 May 2021) The Guardian www.theguardian.com. Moreover, see C Da Silva, ‘Thousands of EU Citizens Refused UK Entry in Three Months Since Brexit Took Effect’ (28 May 2021) EuroNews www.euronews.com; R De Miguel, ‘The Dark Side of Brexit: European Citizens Being Detained in Migrant Holding Centers in UK’ (17 May 2021) El País english.elpais.com; Al Jazeera and News Agencies, ‘UK Refusing EU Citizens Entry at Much Higher Rate Despite COVID’ (28 May 2021) Al Jazeera www.aljazeera.com.

² European Council Conclusions of 24-25 May 2021 paras 17-18. See C Gallardo and K Oroschakoff, ‘EU Leaders Set to Urge UK to Respect Citizens’ Rights After Detentions Row: European Council Weighs in after EU Nationals Without Visas Were Detained’ (18 May 2021) Politico www.politico.eu; Reuters, ‘Brussels to Chide UK over Handling of EU Citizens at Borders’ (19 May 2021) Reuters www.reuters.com.

³ See M De La Baume, ‘Šefčovič Warns UK over “Unilateral Actions” Like Detention of EU Citizens’ (30 May 2021) Politico www.politico.eu and BBC, ‘Edwin Poots and Maroš Šefčovič on NI Protocol’ (30 May 2021) BBC www.bbc.co.uk.

⁴ Answer P-002650/2021 given by Vice-President Šefčovič on behalf of the European Commission of 16 July 2021 www.europarl.europa.eu.

to the UK?”.⁵ The Commission was even asked to intervene against the UK to protect EU citizens having the nationality of a particular Member State. Noting that in the first three months of 2021 more than two thousand Romanian nationals “were stopped at the British border”, it was requested to clarify what they were “planning to do to make sure the British authorities provide additional information on the situation of Romanians refused entry to the United Kingdom and justify the repeated refusals to allow them to enter the United Kingdom?”.⁶

II. THE QUEST FOR COMPETENCE: ARTS 20 AND 23 TFEU

This EU action against the UK does not have an explicit legal basis in EU law.

Although arts 20(2)(c) and 23 TFEU provide EU citizens with the right to be protected within the territory of third States, they do not assign that competence to the European Union: quite the contrary, arts 20(2)(c) and 23 assign it to the exclusive competence of the Member States. Art. 23 TFEU expressly states that EU citizens who are “in the territory of a third country in which the Member State of which they are nationals is not represented” are entitled to enjoy “the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State”. Nor is this exclusive competence inlaid by art. 35 TEU, which only confers to the “Union delegation” the task to “contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in [arts 20(2)(c) and 23 TFEU]”.⁷ In other words, art. 35 only confers to the Union the power to facilitate the in-

⁵ European Parliament, Priority question for written answer P-002650/2021 to the Commission of 17 May 2021 www.europarl.europa.eu; European Parliament, Question for written answer E-002787/2021 to the Commission of 26 May 2021 www.europarl.europa.eu.

⁶ European Parliament, Question for written answer E-002966/2021 to the Commission of 3 June 2021 www.europarl.europa.eu. The Council was instead asked whether it was “aware” of the reports “in the European press of European citizens of various nationalities being detained upon arrival in the United Kingdom” and whether it was “[willing] to demand that the UK comply with the principle of non-discrimination between Member States and the rights of European citizens?” (European Parliament, Question for written answer E-002812/2021 to the Council of 27 May 2021 www.europarl.europa.eu). On the external powers of the Parliament, see R Passos, ‘The External Powers of the European Parliament’ in P Eeckhout and M López-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 85.

⁷ For an analysis of arts 20(2)(c) and 23 TFEU and, more generally, of the role of the Union in the protection of EU citizens abroad see M Moraru, ‘An Analysis of the Consular Protection Directive: Are EU Citizens Now Better Protected in the World?’ (2019) CMLRev 417; P Vigni, ‘The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries?’ in D Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge University Press 2017) 584; R La Rosa, ‘La protezione diplomatica nell'Unione europea: un esempio di evoluzione delle norme internazionali in materia’ (2009) Studi sull'integrazione europea 133.

ter-State mechanism of delegation of representation that is widely known in international law and used by arts 20(2)(c) and 23(3) TFEU.⁸

But even if arts 20(2)(c) and 23 TFEU were interpreted as attributing the power to the Union to intervene on an equal footing with the Member States, in the case of the EU citizens detained in the UK irregular migrants centres these provisions would not apply. As noted, the mechanism set up in the Treaties is conditional upon the fact that in the territory of third States, which have allegedly committed a wrongful act against an EU citizen, his home State is not represented: notoriously, all the Member States of the European Union are represented in the United Kingdom.⁹

⁸ On the inter-State mechanism of delegation of the power to represent the citizens of a State, see: art. 46 of the 1961 Vienna Convention on Diplomatic Relations (“A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals”); art. 8 of the 1963 Vienna Convention on Consular Relations (“Exercise of consular functions on behalf of a third State. Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State”). Furthermore, see International Law Commission, Fifth Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur of 4 March 2004, UN Doc. A/CN.4/538 www.legal.un.org, para. 8: “A State may delegate by means of an international agreement the right to protect its nationals abroad to another State. Such an agreement may be entered into when a State has no diplomatic representation in a foreign country where many of its nationals reside[.] The best known example of such a delegation of the right of diplomatic protection today is to be found in article 8c of the Treaty on European Union (Treaty of Maasticht)”. However, the Special Rapporteur noted that “[i]t is not clear whether this provision, or indeed other arrangements of this kind, contemplates diplomatic protection as this term is understood in the present draft articles, that is, action taken by a State in its own right arising from an injury to a national caused by the internationally wrongful act of another State – or only consular action, that is, immediate assistance to a national in distress” (*ibid.*). An example of implementation of arts 20 and 23 TFEU and 35 TEU is the case of the Polish journalist arrested in Myanmar while documenting the *coup d’État* that took place there. The EU followed the affair, but it was managed by the diplomatic and consular authorities of the Member State which, in the absence of a Polish representation in Myanmar, assists Polish citizens. In particular, the Commission explained that “[t]he EU followed [...] the case of Robert Bociaga, who was detained by security forces on 12 March 2021, in close cooperation with the German Embassy who provides consular assistance to Polish citizens” (Answer P-001487/2021 given by High Representative/Vice-President Borrell on behalf of the European Commission of 1 June 2021 www.europarl.europa.eu). For other examples of application of arts 20 and 23 TFEU and 35 TEU see European Union External Action, *Good Stories on Consular Support for EU Citizens Stranded Abroad* (7 June 2020) eeas.europa.eu; European Union External Action, *EU-coordinated Repatriation of EU Citizens from Vietnam* (6 April 2020) eeas.europa.eu; European Union External Action, *Information Note to EU Member States Citizens (and from Iceland and Norway) in Liberia* (8 November 2018) eeas.europa.eu.

⁹ See the list of foreign countries represented in the United Kingdom at UK Government, *Foreign Embassies in the UK* www.gov.uk.

III. THE QUEST FOR COMPETENCE: THE EU-UK AGREEMENTS

Before concluding that the reaction of the European Union was deprived of a legal basis, it is necessary to verify whether it can be grounded in international law and, notably, on the agreements concluded by the EU with the United Kingdom.¹⁰

If the UK had contracted in an agreement with the EU the obligation to grant European citizens the right to freely access its territory, namely to enter without a visa, the EU action could be qualified as a request to a non-compliant party to abide by the obligations flowing from the treaty. Under the doctrine of implied powers, an international organisation “must be deemed to have those powers which, though not expressly provided in the [founding treaties], are conferred upon it by necessary implication as being essential to the performance of its duties”.¹¹ Consequently, if the Union had concluded an agreement with the UK establishing the treatment of the EU citizens, and, more specifically, if the agreement determined that EU citizens had the right to enter the UK territory without a visa, the Union could claim to possess the international powers and prerogatives necessary to implement it.¹²

This, however, was not the case. While replying to the questions of the Members of the European Parliament, the Commission excluded the possibility to ground its intervention against the United Kingdom on an agreement in force among them. It expressly recognised that “[t]he majority of reported cases of detention [falls] outside the scope of the [...] EU-UK agreements”: neither the Withdrawal Agreement nor the Trade and Cooperation Agreement actually provide for a general right of the European citizens to enter the UK territory.¹³ On the contrary, as the United Kingdom is a “third country”, the Commission admitted that “its national immigration law applies to all travellers, including EU citizens”.¹⁴

¹⁰ For an updated list of the international agreements between the European Union and the United Kingdom see European Commission, *Relations with the United Kingdom* ec.europa.eu.

¹¹ ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [11 April 1949] para. 12.

¹² In this sense, *ex multis*, E Cannizzaro, ‘The Scope of EU Foreign Power: Is the EC Competent to Include Human Rights Clauses in Agreements Concluded with Third States?’ in E Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) 297, 311 ff.

¹³ Answer given by Vice-President Šefčovič on behalf of the European Commission cit.

¹⁴ *Ibid.* In the same sense, the Commission’s website specifies that “[e]ntry rules to the UK for [...] EU citizens [...] who have not resided in the UK at the end of the transition period [...] fall outside the scope of the Withdrawal Agreement”, then “[w]hether or not will [EU citizen] need an entry visa after the end of the transition period will depend on the future rules that will be put in place in the UK” (European Commission, *Questions and Answers – the Rights of EU and UK Citizens, as Outlined in the Withdrawal Agreement* (26 November 2018) ec.europa.eu); that the Trade and Cooperation Agreement “does not cover the right to enter (with or without visa), work, reside or stay of EU citizens in the UK or of UK nationals in the EU” (European Commission, *Questions and Answers – EU-UK Trade and Cooperation Agreement* (24 December 2020) ec.europa.eu).

IV. THE QUEST FOR COMPETENCE: CUSTOMARY LAW ON DIPLOMATIC PROTECTION

This latter statement, together with the emphasis constantly placed by the EU on the status of “EU citizens” possessed by the individuals damaged by the UK conduct, definitively clarifies that the European Union intended to act precisely in diplomatic protection. Under this customary rule the State of nationality of individuals injured by a breach of international law by another State is empowered to intervene using its prerogatives under international law to secure protection to those individuals and to obtain reparation from the wrongdoer. More precisely, this power materialised in bringing a claim *vis-à-vis* the UK to comply with its obligations under the customary international rules on the treatment of aliens: obligations traditionally owed to any foreign State by virtue of the link of nationality with its citizens. Then, the issue to be determined is whether the European Union is entitled, under international law, to exercise diplomatic protection in favour of European citizens.¹⁵

V. LEGAL ENTITLEMENT TO EXERCISE DIPLOMATIC PROTECTION UNDER INTERNATIONAL LAW

V.1. A FUNCTIONAL INTERPRETATION OF INTERNATIONAL LAW ON DIPLOMATIC PROTECTION

Art. 1 of the Draft Articles on Diplomatic Protection defines diplomatic protection as “the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such a responsibility”.¹⁶ In *Diallo*, the International Court of Justice (ICJ) qualified this provision as corresponding to customary international law.¹⁷

At first sight, the wording of this definition excludes the EU from the set of entities entitled to exercise diplomatic protection: art. 1 only mentions States, and the EU is not

¹⁵ In this *Article*, the terms “citizenship” and “nationality” will be used interchangeably: for the purposes of the present analysis, both indicate the existence of a link between an individual and an international entity. However, under international law, a slight difference between these two terms seemingly exists: “nationality” denotes “the legal status of the individual”, while “citizenship” indicates “the consequences of that status, ie the rights and duties under national law” (O Dörr, ‘Nationality’ (August 2019) Max Planck Encyclopedia of Public International Law opil-ouplaw.com).

¹⁶ International Law Commission, Draft Articles on Diplomatic Protection with Commentaries in Report of the International Law Commission on the Work of Its Fifty-eighth Session, UN Doc. A/61/10 (2006) Yearbook of the International Law Commission 26.

¹⁷ ICJ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [24 May 2007] para. 39.

a State. Coherently with such an assumption, art. 3 of the Draft Articles on Diplomatic Protection, dealing with the identification of the entities entitled to exercise diplomatic protection, states that “[t]he State entitled to exercise diplomatic protection is the State of nationality [of the individual concerned]”.

However, the textual reading of these provisions is not conclusive. Several elements indicate the necessity to use other means of interpretation and, in particular, the necessity to adopt a functional approach. Both the case law of the ICJ and the Draft Articles on Diplomatic Protection point in this direction.

In *Nottebohm* the ICJ set out that the formal link of nationality is not sufficient, for a State, to exercise diplomatic protection. In particular, in *Nottebohm* the Court declined to apply a formal notion of citizenship and instead decided for a substantial notion: on the basis of this approach, the Court found that a State lacking substantial connection with an individual is not entitled to act in diplomatic protection.¹⁸ A careful analysis of the practice led the ICJ to argue that, in the context of diplomatic protection, the term “nationality” should not be interpreted in a formal sense but on the basis of its function, namely to protect individuals having a genuine connection with their home State.¹⁹ Consistently, the Court made it clear that a mere formal relationship between an individual and a State could not bestow upon the State the right to exercise diplomatic protection in his favour. The right to exercise diplomatic protection was only entailed by the “translation into juridical terms of the [substantial] individual’s connection with the State which has made him its national”.²⁰

In *Reparation for Injuries* the ICJ seems to have accepted the idea that the formal link of nationality is not even necessary to legitimately act in diplomatic protection. In that case, notoriously, the ICJ adopted a functional approach with regard to the legal status of the entity allegedly entitled to bring a claim to protect an individual injured by a State and, on that basis, found that the United Nations have the power “to protect” their agents when acting on their behalf. As specified in the advisory opinion, diplomatic protection actually “rests on two bases: [t]he first is that the defendant State has broken an

¹⁸ ICJ *Nottebohm (Liechtenstein v Guatemala)* (Merits) [6 April 1955] 21 ff.

¹⁹ *Ibid.* 23.

²⁰ *Ibid.* Interestingly, the genuine link doctrine has been upheld by the Commission in October 2020, when it started an infringement procedure against Cyprus and Malta. More precisely, “[t]he Commission considers that the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship” (European Commission, *Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for “Selling” EU Citizenship* (press release of 20 October 2020 ec.europa.eu). Furthermore, the findings of *Nottebohm* have been referred to as an element capable to untie some controversial knots in the mysterious notion of European citizenship. See, *inter alia*, case C-482/18 *Google Ireland* ECLI:EU:C:2019:728, opinion of AG Kokott, para. 44; case C-298/14 *Brouillard* ECLI:EU:C:2015:408, opinion of AG Sharpston, para. 35 and case-law cited therein; case C-507/13 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:2394, opinion of AG Jääskinen, para. 40.

obligation towards the national State in respect of its nationals[; t]he second is that only the party to whom an international obligation is due can bring a claim in respect of its breach".²¹ Well, "[t]his is precisely what happens when [an international o]rganization, in bringing a claim for [a] damage suffered by [one of] its agent [because of the unlawful conduct of a State], does so by invoking the breach of an obligation towards itself".²² In other words, "the principle underlying [the rule on diplomatic protection] leads to the recognition of this capacity as belonging to the [o]rganization, when [it] invokes, as the ground of its claim, a breach of an obligation towards itself".²³ The connection between the individual-agent and the organization may even take precedence over the link with his home State: in order to guarantee the independent action of the organization, indeed, "it is essential that in performing his duties [the agent] need not have to rely on any other protection than that of the [o]rganization [...]. In particular, he should not have to rely on the protection of his own State".²⁴

Years later, the International Law Commission (ILC) endorsed the functional approach advocated by the ICJ. Commenting on art. 1 of the Draft Articles on Diplomatic Protection the ILC clarified that, during its entire process, it has considered diplomatic protection exclusively from the point of view of its ultimate purpose: "it views diplomatic protection through the prism of international responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an international wrongful act".²⁵

²¹ *Reparation for Injuries Suffered in the Service of the United Nations* cit. paras 11-12.

²² *Ibid.* 12.

²³ *Ibid.*

²⁴ *Ibid.* 13.

²⁵ Draft Articles on Diplomatic Protection with Commentaries cit. 27. Ironically, the functional approach to diplomatic protection has been adopted by the ILC also to explain the reasons why it departed from the test of "genuine nationality" established in *Nottebohm*: in the modern international scenario, characterized by an ever greater mobility of individuals between States, "genuine nationality" would limit the effectiveness of the discipline of diplomatic protection. Therefore, it would hamper its capacity to achieve the goal of securing the responsibility of States. For these reasons, it proved necessary to prefer a different reading, capable of offering guarantees to many individuals as possible. In the First Report on Diplomatic Protection, by Mr. John R Dugard, Special Rapporteur, it is specified that "[t]he genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. In today's world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection. Even supporters of *Nottebohm*, like Brownlie and van Panhuys, accept the need for a liberal application of *Nottebohm*" (UN Doc. A/CN.4/506 and Add. 1, 2000, para. 117 legal.un.org). Cf. the same point in Draft Articles on Diplomatic Protection with Commentaries cit. 30. Dugard came back to this issue in J Dugard, 'Diplomatic Protection' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2018) 1051, 1053 ff.

This approach has two consequences. First, from a methodological perspective, it directs to interpret arts 1 and 3 of the Draft Articles on Diplomatic Protection in the light of their purpose. Second, although the scope of the Draft Articles is limited to diplomatic protection claimed by States, by no way do they preclude the entitlement of other entities, such as international organizations, under special treaties or under general international law, to act in diplomatic protection.

V.2. A FUNCTIONAL NOTION OF “NATIONALITY”

In its commentary on art. 3 of the Draft Articles on Diplomatic Protection, the ILC specified that the “emphasis [...] on the bond of nationality between State and national” is due to the fact that it is precisely this link that “entitles the State to exercise diplomatic protection”.²⁶

There is nothing innovative in this wording. Even the Permanent Court of International Justice (PCIJ) stated, in the first decades of XX century, that “it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”.²⁷ However, from a functional point of view, the clarification of the ILC seems to imply that, as it is the status of citizen that directly entails the right to act in diplomatic protection, States have a role (simply) because they are the entities which, traditionally, confer citizenship to individuals. Consequently, it would not be illogical to assume that every entity which is able, on the basis of its domestic law, to grant individuals that status, may fall within the notion of “State of nationality”. If this assumption is correct, it is crucial to determine, once again from a functional perspective, what “nationality” really means in the discipline of diplomatic protection.

A useful indication comes from the commentary to the Draft Articles on Diplomatic Protection, where the ILC explained that “[as] the individual had no place, no rights in the international legal order [,] if a national injured abroad was to be protected, this could be done only by means of a fiction”, and the *fictio iuris* was precisely “that an injury to the national was an injury to the State itself”.²⁸ Diplomatic protection is thus grounded on a logical expedient which allows States to invoke the responsibility of other States for international wrongful acts which damaged their citizens. In this scheme, nationality is the notion which bridges the damage materially related to an individual to the State legally injured. The bond of allegiance between the individual and the State,

²⁶ Draft Articles on Diplomatic Protection with Commentaries cit. 29.

²⁷ PCIJ *The Panevezys-Saldutiskis Railway Case* (Merits) [28 February 1939] 16. In the same sense, see PCIJ *Mavrommatis Palestine Concessions* (Objection to the Jurisdiction of the Court) [30 August 1924] 12: “[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State” (emphasis added).

²⁸ Draft Articles on Diplomatic Protection with Commentaries cit. 27. For an in-depth analysis of the history of diplomatic protection see, *ex multis*, CF Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 8 ff.

proven by nationality, then produces a transfer-effect that is enforceable *erga omnes*, namely against every other State of the international community.²⁹

This approach proves to be perfectly coherent with the broader legal framework of State responsibility. Indeed, in the system of State responsibility codified by the Draft Articles on Responsibility of States for Internationally Wrongful Act, only the injured State can invoke the responsibility for a wrongful act of another State.³⁰ From this perspective, diplomatic protection would be one of the procedures the injured State may recur to bring an international claim.³¹

So far, the reasoning seems to point out that, in the field of diplomatic protection, the notion of State of nationality should be considered as embracing the entities endowed with international legal personality which unilaterally establish a bond of allegiance with individuals that is suitable to produce some particular effects. More precisely, this bond of allegiance between the entity and the individual must be enforceable against the international community and entail the transfer, from the individual to the entity, of the injuries suffered by the individual because of an international wrongful act of a State.

There is no doubt that, usually, these entities correspond to States, and the bond of allegiance they establish with the individuals is named nationality. However, from a very functional perspective, it can not be excluded that entities other than States may be entitled to exercise diplomatic protection in presence of bonds of allegiance bearing a different name. In other words, in the light of what has been seen above, international law does not prevent entities other than States to act in diplomatic protection in favour of

²⁹ As specified by the ILC, by transferring the injury suffered by an individual to his national State, nationality also prevents the impunity of the wrongdoing State. In this sense, see Draft Articles on Diplomatic Protection with Commentaries cit. 27: "diplomatic protection [...] is a procedure for securing the responsibility of the State for injury to the national flowing from an international wrongful act".

³⁰ See the Draft Articles on Diplomatic Protection with Commentaries cit. 27: "[d]iplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the responsibility of States for internationally wrongful acts, maintain the distinction between primary and secondary rules and deal only with the latter".

³¹ In this sense, see arts 30, 31 and 36 of Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 117 99. With regard to compensation, the commentary to art. 36 explicitly refers to diplomatic protection. It states that this provision "is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act. The scope of this obligation is [limited to] 'any financially assessable damage'. Financially assessable damage encompasses [...] damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection" (Draft Articles on Responsibility of States for Internationally Wrongful Acts cit. 99).

the individuals with whom they had established a bond of allegiance bearing analogies with nationality, if endowed with the necessary powers under their domestic laws.

VI. THE EU CITIZENSHIP AND THE BOND OF ALLEGIANCE

The next step in this analysis is to determine whether European citizenship possesses, under international law, all the features examined above and, therefore, can discharge the functions performed by nationality in inter-States relations.

VI.1. THE FOUNDING TREATIES

As largely known, art. 20 TFEU grants certain individuals the status of EU citizen: in particular, “[e]very person holding the nationality of a Member State shall be a citizen of the Union”. In order to determine whether the European citizenship is sufficient to bestow upon the EU the right to exercise diplomatic protection, it is necessary to ascertain, beyond the *nomen iuris*, whether the EU citizenship fulfills the conditions referred to in the preceding section: namely whether it is the expression of a bond of allegiance between the Union and the individuals; whether it can be opposed to the members of the international community; whether it transfers the injuries produced to the EU, by a wrongful conduct of a third State, on the European citizens.

If the analysis were conducted exclusively in the light of the provisions of the EU founding Treaties, the answer could only be negative. The Treaties seem to conceive of EU citizenship as a sort of a *minoris generis* citizenship. It is additional and complementary to the citizenship of a Member State.³² It consists of a *numerus clausus* of rights which is not comparable with the many entitlements traditionally connected to national citizenships. Moreover, EU citizenship, even if formally granted by the European Union, is entirely predetermined by the Member States and cannot be amended by the sole Union. Under art. 25 TFEU, the rights deriving from EU citizenship can be increased through a procedure which requires not only the unanimity of the Member States acting within the EU Institutions, but also their “approval [...] in accordance with their respective constitutional requirements”. Finally, but not less importantly, no provision of the Treaties confers to the Union the power to enforce the rights of the individuals *vis-à-vis* third States by virtue of the bond of allegiance incorporated in the EU citizenship. Consistently with its *minoris generis* character, the Treaties do not seem to conceive of EU citizenship as having “external relevance”.³³

³² Art. 20(1) TFEU: “[c]itizenship of the Union shall be additional to and not replace national citizenship”.

³³ The EU citizenship has been the subject of extensive literature. *Ex multis*, see: J Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 608; D Kochenov, *Citizenship* (MIT Press 2019); D Kochenov, ‘Pluralism Through Its Denial: the Success of EU Citizenship’ in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 179; D Kochenov, ‘On Tiles

VI.2. THE PRACTICE OF THE EUROPEAN UNION

However, the provisions of the EU founding Treaties are not the sole elements to be taken into account. In particular, ascertaining the international relevance of the European citizenship from a functional perspective requires to strictly consider the international practice related to the EU citizenship.

In this regard, the obvious precedent is *Odigitria*.

In 1979 and 1980 the European Union concluded two distinct fishing agreements with Senegal and with Guinea-Bissau whereby each of these two States granted fishing rights in its respective territorial waters to licensed vessels flying the flag of a Member State. Unfortunately, the borders of the territorial waters of the two States were not clear-cut: in particular, there was an area subject to overlapping claims. Precisely in these disputed waters, the Guinean authorities seized a fishing vessel belonging to the Greek company *Odigitria* possessing a fishing license granted by the Senegalese authorities, confiscated its cargo and ordered the captain to pay a fine for fishing in territorial waters without a Guinean license.³⁴

The Commission intervened in the dispute between *Odigitria* and Guinea-Bissau. It “had intensive consultations [with Guinea’s authorities] in order to facilitate the vessel’s release”, “was present at the trial [of the captain and] made several approaches to the Government and President of the Republic of Bissau”.³⁵ Its conduct was such that, called to review it, the General Court would have recognized that “there is no reason to doubt that the Commission Delegation in Guinea-Bissau fulfilled [...] *its duty to provide diplomatic protection* to the master and [*Odigitria*]”.³⁶ This statement was confirmed by the Court of Justice which rejected *Odigitria*’s appeal complaint according to which the Commission, despite of what previously established by the General Court, had violated its obligation to provide diplomatic protection.³⁷

It would be a mistake to argue that in *Odigitria* the European Union simply requested Guinea-Bissau to fulfill its obligations under the 1980 agreement, namely to let the EU vessels fish in its own waters. Several elements point in another direction.

First, it must be considered that Guinea-Bissau did not violate the 1980 agreement. The agreement imposed on that State the obligation to allow EU vessels licenced by the Guinean authorities to fish in its waters. The disputed waters were, for Guinea-Bissau, a

and Pillars: EU Citizenship as a Federal Denominator’ in D Kochenov (ed), *EU Citizenship and Federalism* cit. 3; D Kostakopoulou, *EU Citizenship Law and Policy* (Edward Elgar 2020); A Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart 2020); G Davies, ‘European Union Citizenship and the Sorting of Europe’ (2021) *Journal of European integration* 49; F Strumia, *La duplice metamorfosi della cittadinanza in Europa* (Jovene 2013).

³⁴ Case T-572/93 *Odigitria v Council and Commission* ECLI:EU:T:1995:131 para. 1 ff.

³⁵ *Ibid.* para. 76.

³⁶ *Ibid.* para. 77 (emphasis added).

³⁷ Case C-293/95 P *Odigitria v Council and Commission* ECLI:EU:C:1996:457 paras 10 and 43 ff.

part of its own territory. Then, as viewed by Guinea, it simply sanctioned a vessel which was fishing in its waters without the necessary license.³⁸ Moreover, the Commission did not request the Guinean authorities to compensate the damages they caused by seizing the vessel, or to pay the equivalent of the cargo they confiscated, nor did it ask them to revoke the fine imposed on the captain. As it specified, the Commission operated “in order to facilitate the vessel’s release” and supervised the trial held against the commander.³⁹ Thus the “internationally wrongful act” against which the Union reacted “with a view to the implementation of [the international] responsibility” of Guinea-Bissau, to recall the expressions used in art. 1 of the Draft Articles on Diplomatic Protection, only consisted in the continuation of the seizure of the fishing vessel which, manifestly, increased the economic damage suffered by the Greek company day-by-day. All this is to say that the “internationally wrongful act” committed by the Guinea-Bissau, and contested by the European Union, did not consist in a breach of the bilateral treaty but rather in imposing an excessive penalty if compared with the gravity of the offense made by the Greek company under customary international law.

Therefore, the European Union fulfilled its “duty to provide diplomatic protection” in favour of Odigitria by arguing that Guinea-Bissau was violating the principle of proportionality, namely one of the general principles of international law applicable in the area of States’ responsibility and, in particular, in determining the lawfulness of the injured State’s response to the offense suffered.⁴⁰

³⁸ Interestingly, the EU was aware that Guinea-Bissau considered the disputed waters to be subject to its sovereignty and that, consequently, it would have applied the agreement to that area. The EU accepted that this area was included both in the agreement with Senegal and in the one with Guinea-Bissau in order not to enter in the dispute between the two States. This choice was approved by the General Court: “[t]he Council and the Commission could not have asked for the zone in dispute to be excluded from those agreements without taking a position on matters forming part of the internal affairs of non-member States. If the Community opposed the claims of the States concerning the zones over which they claim to have jurisdiction or opposed the exercise of that jurisdiction when a dispute exists, those non-member countries would very probably refuse to conclude such agreements with the Community. Moreover, if the Community asked for zones to which other States lay claim to be excluded, that move would certainly be interpreted as interference by the Community in those disputes. The exclusion of such zones at the Community’s request would also have the effect of weakening the claim of the non-member State in question to have the right to exercise such jurisdiction” (case T-572/93 *Odigitria v Council and Commission* cit. para. 38).

³⁹ *Ibid.* para. 76.

⁴⁰ Art. 51 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts cit., named precisely “Proportionality”, states that “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”. It is to be noted that the expression “rights in question” refers “also [to] the rights of the responsible State” (cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries cit. 134-135). On the principle of proportionality cf. E Crawford, ‘Proportionality’ (May 2011) Max Planck Encyclopedia of Public International Law opil.ouplaw.com, who describes it at para. 1 as the general principle according to which “a State’s acts must be a rational and reasonable exercise of means towards achieving a

Odigitria marks an important turn in the international practice of the European Union. The EU intervened against a third State, contesting its conduct in violation of a general principle of international law which caused a damage to a “European” company. *Odigitria* therefore highlights the conviction of the European Union – or its *opinio iuris*, as one might be tempted to say – of being entitled to exercise diplomatic protection.

The events are even more interesting if one considers that in 1990, when the fishing vessel was seized and the Commission intervened against Guinea-Bissau, EU citizenship had no legal basis in the Treaties. Then the Commission exercised diplomatic protection, not on the basis of the “formal” EU citizenship, but rather on the basis of the “material” allegiance between the individuals affected and the European Union, which is perfectly in line with the functional interpretation of customary law on diplomatic protection previously suggested.⁴¹ Noteworthy, when the European judges enacted their rulings, the Treaties had already been amended and the European citizenship established. It does not seem implausible to suppose that the new constitutional setting has played a role in the decision of the judges to vest the European Institutions with prerogatives hitherto reserved to statehood, such as the “duty to provide diplomatic protection”.⁴²

Odigitria may help shed light on the vexed issue of the legal basis of the recent European Union’s action aimed to protect European citizens *vis-à-vis* the United Kingdom.

The European Union did not question the imposition of a sanction on the EU citizens by that State. On the contrary the Commission, as said above, admitted that “[t]he UK is a third country and its national immigration law applies to all travellers, including EU citizens”.⁴³ As in *Odigitria*, the EU did not claim that EU citizens had the right to enter in the territory of the third State concerned, nor did it contest the right of the third State to impose a sanction to their illegal entry. *Vis-à-vis* the United Kingdom, as well as *vis-à-vis* Guinea-Bissau, the EU has rather invoked the excessive severity of the sanction imposed, namely the compliance of the State’s conduct with the general principle of proportionality in the treatment of aliens. Indeed, as previously noted, the EU intervention focused on the modality of the reactions of the United Kingdom to the illegal conduct of

permissible goal, without unduly encroaching on protected rights of either the individual or another State”; E Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’ (2001) EJIL 889; C Kress and R Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2021); TM Franck, ‘Proportionality in International Law’ (2010) *Law & Ethics of Human Rights* 230; J Crawford, J Peel and S Olleson, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading’ (2001) EJIL 963; JG Gardam, *Necessity, Proportionality, and the Use of Force by States* (Cambridge University Press 2004); DW Greig, ‘Reciprocity, Proportionality and the Law of Treaties’ (1994) *Virginia Journal of International Law* 295.

⁴¹ Cf. *supra* section V.2.

⁴² On the possibility to identify the *choses* before the *noms* in international law see PM Dupuy, ‘Le jus cogens, les mots et les choses. Où en est le droit impératif devant la CIJ près d’un demi-siècle après sa proclamation?’ in E Cannizzaro (ed.), *The Present and Future of Jus Cogens* (Gaetano Morelli Lectures Series 2015).

⁴³ Answer given by Vice-President Sefčovič on behalf of the European Commission cit.

the EU citizens and, in particular, on the gross disproportion between the offenses committed that the sanctions imposed.⁴⁴

All these elements point to the conclusion that in both cases the EU conceived of and implemented its action as a form of diplomatic protection under international law and, in particular, as one based on the bond of allegiance between the Union and its citizens. The underlying premise of such an action was that EU citizenship had produced the effect of transferring the consequences of an international wrongful act from the citizen injured to the EU itself. By virtue of its status of injured entity, the European Union maintained to be entitled to exercise diplomatic protection and acted accordingly.

It is noteworthy that neither the EU Member States, nor the third States concerned, and even less other members of the international community contested the legality of the EU actions. Quite the contrary, in the case of the illegal entry of some European citizens in the UK territory, the EU Member States supported the action of the Union, so as the UK acquiesced to many claims of the EU and in no way contested the legality of its intervention for lack of statehood.

These positions seem to indicate a consistent *opinio iuris* of all the players at stake: in accordance with the ILC and the ICJ case law, indeed, “[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*)”.⁴⁵ It does not seem unreasonable to maintain that the parties, through their consistent conduct, recognised the existence of an international law rule allowing the European Union to act in diplomatic protection or, alternatively, recognised that the scope *ratione personarum* of an existing international law discipline, namely the discipline of diplomatic protection, is broader than hitherto supposed, and includes the EU among the entities entitled to exercise the rights connected to it.

This assumption does not necessarily imply that a new rule of international law has already come into existence, or that customary law has already included the EU among

⁴⁴ See *supra* section II. The European Union welcomed the decision of the United Kingdom to “address EU concerns” and to direct the “border guards to prefer immigration bail” instead of detention measures (Answer given by Vice-President Šefčovič on behalf of the European Commission cit.). However, it took the view that detention, when even imposed, should have been “as short as possible and in full respect of all the rights of detainees” (*ibid.*). Furthermore, the Commission highlighted that it would have constantly monitored “the treatment of EU citizens at the UK border” and that it would have not “hesitate to take action to address problems” (*ibid.*). Finally, it shall be noted that even the members of the European parliament who had urged the Commission to act stressed that the sanctions imposed by UK were “disproportionate”, cf. European Parliament, Question for written answer E-002966/2021 to the Commission cit. (“the measures taken by the United Kingdom’s authorities are disproportionate”); A Mituta, D Ciolos, D Pişlaru, V Gheorghe, V Botos, D Tudorache, R Strugariu and N Stefanuta, Letter of 12 May 2021 to President von der Leyen and Vice-President Šefčovič, available at www.twitter.com (“sending young EU nationals to immigration detention centres is grossly disproportionate”).

⁴⁵ International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018, UN Doc. A/73/10 122, Conclusion 10(3). In the same sense, cf. ICJ *Fisheries (United Kingdom v Norway)* (Merits) [18 December 1951] 27.

the entities entitled to act in diplomatic protection: more modestly, the analysis undoubtedly reveals that such evolution in international law is on-going.⁴⁶

VII. THE EFFECTS OF THE PRACTICE OF THE INTERNATIONAL ORGANISATIONS ON CUSTOMARY LAW

The hypothesis just presented relies on the assumption that the EU can influence the contents of customary law. This assumption requires some clarification. The state of the law concerning the participation of international organizations to the processes of formation and development of customary law has evolved over time. If the traditional opinion suggested that only States' practice contributes to these processes, the opposite view is gaining more and more ground.

As largely known, when referring to customary rules, international courts and tribunals mainly look at practice and *opinio iuris* of States. In *Military and Paramilitary Activities in and against Nicaragua* the ICJ the ICJ said that it will "direct its attention to the practice and *opinio juris* of States", and in *Continental Shelf* the same Court noted that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".⁴⁷ However, these contentions do not necessarily mean that the practice of international organizations does not count in the formation of customary law. They simply entail that their conduct is quantitatively less relevant than that of States in order to determine international law, which mainly concerns inter-State relations.

It must be considered that the international organizations' contribution to the formation and to the development of international law has been amply recognised.⁴⁸ In the Conclusion n. 4 of the Draft Conclusions on Identification of Customary International

⁴⁶ The scantiness of the relevant practice does not necessarily prevent the parties from considering that a new rule has emerged, or that a pre-existing customary rule enlarged its scope so as to include, besides States, another entity, namely the EU, as entitled to exercise the rights and duties flowing from it. In *North Sea Continental Shelf*, the ICJ clarified that there is no univocal rule governing the formation of customary law: in particular, in the presence of a clear and univocal consensus of the international community, a customary norm could also arise in a limited time frame and even in as a consequence of a very little practice (ICJ *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)* (Merits) [20 February 1969] para. 74 ff.). Some authors advocated a case for the sudden formation of a customary rule which corresponds to the changing needs of the international community and, albeit not having condensed in practice, collecting a very broad consensus. For an example, cf. the famous *Torrey Canyon* case (J Pfeil, 'Torrey Canyon' (December 2006) Max Planck Encyclopedia of Public International Law opil.oupplaw.com and literature referred to). In general, on instant customary law, cf. B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) IJIL 23.

⁴⁷ ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] para. 183 and ICJ *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [3 June 1985] para. 27.

⁴⁸ For an historical survey on this issue cf. K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201.

Law, endorsed by the General Assembly in resolution 73/203 of 20 December 2018, the ILC, while admitting at para. 1 that “[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States”, at para. 2 indicates that “[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law”.⁴⁹

For our analysis, two elements need to be specified: what practice of the international organizations is to be considered is identifying customary law and when?

As for what practice, it is opportune to recall some observations of the Special Rapporteur. He underlined “the importance of the distinction between the practice of States within international organizations and that of the international organizations themselves”: only the second one would be relevant for Conclusion 4(2).⁵⁰ Similarly he emphasized “the importance of distinguishing between the practice of the organization that related to the internal operation of the organization and the practice of the organization in its relations with States and others”: again, only the second one would be relevant for Conclusion 4(2).⁵¹

As for the question of when the practice of international organizations has to be considered, the answer can be found in the comment on Conclusion n. 4. There the ILC clarified that the practice referred to in Conclusion 4(2) “arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States”.⁵² Significantly, the ILC found that “[t]his is the case, for example, for certain competences of the European Union”.⁵³

Summarizing the reasoning of the ILC, it could be assumed that “when [international organizations] exercise on the international plane exclusive competences or other powers conferred upon them”, then “it is their own practice, in fulfilment of their mandates from

⁴⁹ Draft Conclusions on Identification of Customary International Law cit. 122, 130. For some notes on the relevant passages of the Draft Conclusions on Identification of Customary International Law see, *ex multis*, N Blokker, ‘International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?’ (2017) IOLR 1 and J Odermatt, ‘The Development of Customary International Law by International Organizations’ (2017) ICLQ 491.

⁵⁰ International Law Commission, Report on the Work of the Sixty-seventh Session, 2015, UN Doc. A/70/10, 38 ff., para. 71 legal.un.org. For a survey of the States’ positions with respect to Conclusion 4(2) cf. International Law Commission, Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 14 March 2018, UN Doc. A/CN.4/717, para. 35 ff.

⁵¹ Report on the Work of the Sixty-seventh Session (2015) cit. para. 71.

⁵² Draft Conclusions on Identification of Customary International Law cit. 131.

⁵³ *Ibid.* See also M Wood, ‘The UN International Law Commission and Customary International Law’ (2020) Gaetano Morelli Lectures Series 65; P Palchetti, ‘Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law’ (2018) EJIL 1049; K Daugirdas, ‘International Organizations and the Creation of Customary International Law’ cit. 201.

States, which could be of relevance".⁵⁴ Therefore, where customary law governing a specific issue has to be identified, in addition to collecting the practice and the *opinio iuris* of States, it is necessary to ascertain whether there are international organizations which, with respect to that given matter, act on the international plane instead of their Member States because of a transfer of competences. In that case, the practice and the *opinio iuris* of these organizations shall be considered, on an equal footing to that of States.

VIII. THE EFFECTS OF THE PRACTICE OF THE EUROPEAN UNION ON CUSTOMARY LAW

In the light of the above, the assumption that the practice of the European Union may contribute to determine the customary regime of diplomatic protection, and that this practice aims at enlarging its scope *ratione personarum* so as to include the Union itself, appears more and more reasonable. What is still to be determined is whether the practice of the EU can influence customary law in the specific area of diplomatic protection.

In the Draft Conclusions on Identification of Customary International Law, the ILC established that the area of influence of the practice of an international organization on customary law corresponds to the area of the powers the organization may exercise, on the international level, instead of its member States. The "borders" of the competences transferred to the organization would therefore coincide with the borders of the scope of the effects its practice could produce on international law. Consequently, outside these borders, namely with regard to the matters in which the organization cannot act in the international sphere instead of its member States, its practice is irrelevant.

Applying these legal principles to the European Union, the potential scope of the effects the EU practice can produce on customary law, and therefore on the regime of diplomatic protection, corresponds to the matters falling within the international powers assigned to the European Union. These powers would not only be those explicitly conferred on the Union by the Member States. The potential scope of the effects of the EU practice on customary law would include the competences implicitly conferred to it.

In *Reparation for Injuries Suffered in the Service of the United Nations*, as partially anticipated, the ICJ found that "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an [international organization] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice"⁵⁵. Therefore, "[u]nder international law, [an international organization] must be deemed to have those powers which,

⁵⁴ Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. para. 48.

⁵⁵ *Reparation for Injuries Suffered in the Service of the United Nations* cit. 10.

though not expressly provided in the [founding treaty], are conferred upon it by necessary implication, as being essential to the performance of its duties".⁵⁶

Notoriously, the implied powers doctrine is one of the pillars that the system of the EU foreign power largely rests on. Building upon the provision of the Treaty which provides that "[t]he [Union] shall have legal personality", in *ERTA* the Court of Justice found that, "in its external relations", the EU "enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty".⁵⁷ In particular, "each time the [Union], with a view to implementing [an objective] envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".⁵⁸ Actually in those cases "the [Union] alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system".⁵⁹

IX. THE ACTUAL SCOPE OF THE EFFECTS OF THE PRACTICE OF THE EUROPEAN UNION ON CUSTOMARY LAW

Of course, neither the attribution to the European Union of the power to conclude agreements with third States, nor the actual conclusion of an agreement, does, *per se*, bestow upon the EU the power to exercise diplomatic protection. Arguably, the conclusion of an agreement implies that the Union is vested with the instrumental powers envisaged by international law to implement it on the international plane. But it is one thing to claim compliance with an agreement, it is another thing to exercise diplomatic protection under customary international law. To conclude that the Union possesses this power, a further analysis concerning the effect of EU practice on customary law is needed.

An example will clarify this difference. The existence of an exclusive competence of the Union on fisheries and conservation of marine biological resources can hardly bestow, *per se*, on the EU the power to exercise diplomatic protection in favour of European vessels and fishermen damaged by the illegal conduct of a third State. Nor is it sufficient, to this effect, the conclusion by the EU of an agreement with a third State, namely the exercise of the competence. The conclusion of an agreement certainly confers on

⁵⁶ *Ibid.* 12.

⁵⁷ Case 22/70 *Commission v Council* ECLI:EU:C:1971:32 paras 13-14.

⁵⁸ *Ibid.* para. 17. On the application of the implied power doctrine to the EU cf. G Butler and RA Wesel, 'Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law' (31 March 2021) European Law Blog europeanlawblog.eu; M Cremona, 'External Relations of the European Union: The Constitutional Framework for International Action' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 431.

⁵⁹ *Commission v Council* cit. para. 18.

the Union the power to claim the rights flowing from that agreement, but not yet the prerogatives flowing from customary international law related to the protection of its citizens. What is needed to this effect is that the EU effectively intervenes in defense of a European citizen who suffers a damage related indeed to his fishing activity, but not in consequence of a breach of the agreement. Such action, if recognised by third parties, could be part of the EU practice relevant for the identification of customary law on diplomatic protection, and ultimately bestows upon the EU the power to act in diplomatic protection for a breach of whatever rule of international law which has materially damaged an EU citizen (during his fishing activity, of course).⁶⁰

This is precisely what happened in the *Estai* case. As known, in that case the EU reacted to the seizure of the (Spanish, then) European vessel *Estai*, caught by Canada while fishing Greenland halibut in international waters. The European Commissioner for Fisheries defined the conduct of Canada as an intentional act of piracy⁶¹ and the European Union “protested and asserted that Canada had no right to arrest the ‘Estai’ on the high seas [...] under [...] the international law of the sea”.⁶² Then “extensive diplomatic negotiations between Canada and the European Union followed, which culminated in further agreements on the allocation of the Greenland halibut quotas”.⁶³

X. CONCLUDING REMARKS: IS THERE AN INDIVIDUAL RIGHT TO DIPLOMATIC PROTECTION *VIS-À-VIS* THE EU?

If the hypotheses proposed in this *Article* prove to be correct, and the European Union is vested with the powers and prerogatives commonly referred to under the formula of diplomatic protection, it must still be determined whether these powers and prerogatives also entail, for the Union, a duty to protect its citizens, albeit only within the scope of the European citizenship. If this were the case, since every duty entails a corresponding right, the legal sphere of the EU citizenship would be significantly enhanced.

This duty could be hardly grounded on international law. According to the prevailing view, the international law of diplomatic protection does not establish a duty upon the States of nationality. As pointed out in the Draft Articles on Diplomatic Protection,

⁶⁰ Cf. Draft Conclusions on Identification of Customary International Law cit. 134: “[p]ractice may take a wide range of forms. [...] Forms of State practice include [...] conduct in connection with treaties”. In the commentary, the ILC pointed out that “[t]he words “conduct in connection with treaties” cover acts related to the negotiation and conclusion of treaties, as well as their implementation”.

⁶¹ See F Papitto, ‘Una nave da guerra a difendere le sogliole’ (11 March 1995) *La Repubblica* repubblica.it: the definition by the Commissioner was “un atto di pirateria premeditato”.

⁶² See Answer given by Ms Damanaki on behalf of the Commission E-4682/10EN of 6 September 2010 www.europarl.europa.eu.

⁶³ *Ibid.* and Statement by Mrs Emma Bonino, European Commissioner for Fisheries, on the Occasion of the Initialling of the Agreement Between the European Union and Canada on Fisheries (Greenland Halibut) of 16 April 1995, available at ec.europa.eu.

under international law the State of nationality “has the right to exercise diplomatic protection [but it] is under no duty or obligation to do so”;⁶⁴ that State shall only “give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred”.⁶⁵

However, international law does not prevent the duty to exercise diplomatic protection from being established at the domestic level. As the ILC set out, “[t]he internal law of a State may oblige a State” to exercise diplomatic protection in favour of its citizens.⁶⁶

Thus, the possible existence of a duty to exercise diplomatic protection upon the European Union shall be examined on the basis of EU law. Since there is no provision which expressly confers the power to act in diplomatic protection to the Union, *a fortiori*, the European legal order does not formulate an obligation in this regard. Nevertheless, such an obligation can not only stem from a written law provision, but also from an implied domestic rule. It seems then necessary to assess whether EU law would implicitly entail for the Union a duty to protect its citizens. A positive answer can be based on a number of arguments.

First, art. 3(5) TEU must be considered: in those fields in which the Union acquires the international prerogatives necessary for the exercise of the diplomatic protection, art. 3(5) may be construed as entailing a strong limitation to the discretion of the EU in deciding whether to act.

Art. 3(5) TEU states that, “[i]n its relations with the wider world”, the European Union shall “contribute to the protection of its citizens”. This passage of the provision does not establish, *per se*, a right of the European citizens to be protected by the Union: more modestly, it implies that the protection of the Union’s citizens must be promoted by the EU. Nonetheless, this minor obligation can well produce consequences. Under a settled case of the Court of Justice, the Institutions of the European Union, in the exercise of their discretionary powers, have “a duty [...] to examine carefully and impartially all the relevant aspects of the [specific] case”: among other elements, they have thus to consider the objectives stated by art. 3 TEU.⁶⁷ Then art. 3(5) TEU would imply that the European Union, when acting at the international level, cannot ignore the objective of protecting EU citizens but, on the contrary, must take in due consideration the objective of “contribut[ing] to the protection of its citizens”.

Moreover, attention shall be devoted to art. 21 TEU, as some of the objectives laid down in that provision point in the same direction of art. 3(5).

⁶⁴ Draft Articles on Diplomatic Protection with Commentaries cit. 28.

⁶⁵ Art. 19 of the Draft Articles on Diplomatic Protection cit.

⁶⁶ Draft Articles on Diplomatic Protection with Commentaries cit. 28.

⁶⁷ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* ECLI: EU:C:1991:438 para. 14. In the same sense, case C-77/09 *Gowan Comércio Internacional e Serviços* ECLI:EU:C:2010:803 para. 57; cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240 para. 54; case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 225.

In paras (1) and (2)(b), art. 21 TEU requires the European Union to promote, by its “action on the international scene”, “respect for [...] international law” and “the rule of law”. On analogous terms as art. 3(5), art. 21 TEU does not grant the Union a competence to pursue the objectives it describes. In other words, Member States have not entrusted the Union with the task of attaining the objectives set out in art. 21 TEU. However, when the Union exercises at the international level one of the substantive competences conferred on it by the Member States, it must act by pursuing, *inter alia*, the objectives set out in art. 21.

It is difficult to imagine the objectives set out in art. 21 TEU being violated by the Union if it decides to exercise diplomatic protection. By its very nature, diplomatic protection is designed to remedy to a breach of international law and, unequivocally, tends to ensure respect for its rules. Admittedly, art. 21 TEU does not require the European Union to ensure that international law is complied with at all cost and in every circumstance. But, in principle, the conduct of the EU in the international area, composed of both actions or omission, must be assessed against the prism of the respect, and promotion of compliance with, international law. One can hardly hold that an unmotivated idleness against an unlawful conduct of a third State against its citizens, which would inescapably create a situation of impunity, is consistent with the imperative of “advanc[ing] in the wider world the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity” and, above all, the “respect for [...] international law” established by art. 21 TEU.

Thus, although EU law does not impose an obligation to exercise diplomatic protection, it would impose on the European Union a duty to decide whether to act in diplomatic protection on the basis of a balance of interests that takes into account the objectives set out in arts 3(5) and 21(1)(2) TEU. There would be no obligation of results, but there would be a strict obligation of means.

It cannot be excluded that compliance with this obligation may become the subject of judicial review. In *Air Transport Association of America*, the Court of Justice first specified that “[as] the European Union is to contribute to the strict observance and the development of international law”, “when [...] adopts an act, it is bound to observe international law in its entirety, including customary international law”.⁶⁸ Then, “[many] principles of customary international law [...] may be relied upon by an individual for the purpose of the Court’s examination of the validity of an act of the European Union”: in particular, it could happen “in so far as [...] the act in question is liable to affect rights which the individual derives from European Union law”.⁶⁹ On closer inspection, the decision to

⁶⁸ Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864 para. 101.

⁶⁹ *Ibid.* para. 107.

abstain from acting in diplomatic protection may well constitute an “act liable to affect rights which the individual derives from European Union law”.⁷⁰

In consequence thereof, the set of rights and prerogatives connected with the European citizenship would be significantly enhanced. It does not incorporate a right to diplomatic protection, but includes the right to have the Union assess the individual interests allegedly injured by a third State and, absent other preeminent interests connected to the objectives of the EU’s external action, to be effectively protected. Such a right is certainly more indeterminate than the right to be protected, but it is not devoid of practical effect. It is one of the objectives which contributes to the set of interests which must be balanced with each other to determine the direction of the EU’s external action. Significantly, it is a right which emerges from the combination between the European citizenship and the new international objectives of the EU, the two regimes which have innovated the legal order of European Union and which may innovate the international legal order.

⁷⁰ In the previous sections it was submitted that the EU may acquire the right to exercise diplomatic protection in the field of fisheries against a third State linked to it by a treaty on fishing. In such a situation, on the basis of the treaty on fishing, which “form an integral part” of EU law (case 181/73 *Haegemann v Belgian State* ECLI:EU:C:1974:41 para. 5), and by virtue of the capacity of international agreements’ rules to produce direct effects (*ex multis*, see case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400 para. 13 ff. and case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* ECLI:EU:C:1982:362 para. 26), European citizens may claim the right to fish in the waters of the third State concerned. Thus, if a European citizen suffers a damage as a result of a wrongful act of this State while fishing, and the European Union decides not to exercise diplomatic protection in his favour, that decision would be absolutely “liable to affect rights which the individual derives from European Union law” (*Air Transport Association of America and Others* cit. para. 107).



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

INTEGRATING MACROECONOMICS INTO THE EU SINGLE LEGAL ORDER: THE ROLE OF FINANCIAL STABILITY IN POST-CRISIS EUROPE

FERNANDO LOSADA* AND KLAUS TUORI**

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ABSTRACT: This *Article* follows the trajectory of the EU legal order, from its inception to its current stage, by focusing on the transformations it has experienced resulting from its increasing interaction with macroeconomics. When the Court of Justice declared that a new legal order resulted from the provisions of the Treaty of Rome, its interpretation stemmed from a coherent understanding of the institutional form (indirect administration) and substantive content (microeconomic integration) of European integration. The addition of the macroeconomic layer of integration, with its own institutional form (integrated administration and open method of coordination) but still broadly subject to the same legal order, resulted into a less consistent whole. The crises the Union faced during the last decade tested the resistance of these structures and, although the Court has been consistently interpreting EU law according to the same procedures and techniques without radical deviations, the irruption of financial stability as macroeconomic imperative has rearranged the equilibrium in integration. Now we can argue that institutional form, substantive content and legal order of European integration are again realigned, but instead of resulting from the provisions of the Treaties and from placing the legal rationality of law at the core of the system, financial stability is the rationale coherently arranging them together. The consequences of this rearrangement for the EU legal order are the object of study of this *Special Section*.

KEYWORDS: EU legal order – macroeconomic integration – financial stability – integrated administration – EMU law – economic constitutionalism.

I. INTRODUCTION TO THE *SPECIAL SECTION*: EMU LAW AND ITS RELEVANCE FOR THE EU LEGAL ORDER

The financial and sovereign debt crises forced the European Union (EU) to adopt a series of measures to fight the extremely damaging consequences of unprecedented economic challenges. Aware of this development, lawyers engaged in the doctrinal analysis of the plethora of EU legal acts and international treaties adopted. Legal debates have primarily revolved around their validity according to primary EU law,¹ discussing to what extent they constitute a rupture with, a departure from, or a continuation with the pre-crisis Economic and Monetary Union (EMU) rules.² The Covid-19 pan-

¹ M Ruffert, 'The European Debt Crisis and European Union Law' (2011) CMLRev 1777; A de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) CMLRev 1613; P Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) ELR 231; T Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) CMLRev 1579; N Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) CMLRev 1609; R Palmstorfer, 'The Reverse Majority Voting under the "Six Pack": A Bad Turn for the Union?' (2014) ELJ 186; K Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) ELR 154; A Steinbach, 'The Lender of Last Resort in the Eurozone' (2016) CMLRev 361.

² E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) CMLRev 683; AJ Menéndez, 'The Existential Crisis of the European Union' (2013) German Law Journal 453; Ka Tuori and KI Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Varia-

demic demanded yet a new reaction from European leaders, resulting in interventions and developments of EMU rules whose legality and relevance are currently discussed by the doctrine.³ This *Special Section* goes beyond those discussions and aims to explore, whatever the constitutional status of the new measures is, what are their implications (if there are any) for the EU legal order. The focus of attention is thus the singleness of the EU legal order, and the main question we want to address is how new developments in the EMU may have affected its content, structure and principles.

To reply to these questions this *Special Section* gathers EU lawyers with expertise in different fields of integration, in order to detect and keep track of changes resulting from the revamped, post-crisis and post-pandemic macroeconomic integration. The aim is to determine to what extent recent EMU developments have affected the EU legal order by establishing new priorities, principles or mechanisms alien to pre-crises European integration. In other words, the objective is to test to what extent the self-referential and autonomous legal order of the EU has been altered during the crisis by exogenous elements complementing, adapting or transforming it to the needs of the expanded macroeconomic integration.

The close correlation between the development of a single legal order for the Union and the main goal of integration during the first decades of the process of European integration constitutes the theoretical starting point for this *Special Section*. A second crucial element is the contextual understanding of law. The key role played by law in European integration is widely acknowledged although it must be understood within a given context and therefore as potentially reactive to economic, political and institutional developments in each of the successive stages of the process of integration. Consequently, the theoretical assessments of the changes in the EU legal order need to consider to what extent they are supported by, or even derived from the developments outside the sphere of law. In this *Special Section*, these developments mainly relate to the series of crises of the last decade, although they also have longer origins in the post-war European integration.

Two special features characterise the law that substantively deals with European macroeconomic integration. First, the disconnection between material relevance and legal form is particularly relevant in EMU matters. Consequently, in formal terms EMU law relies on a *variety of legal sources*: From EU legal acts and Treaty amendments to international agreements, soft law measures and even private contracts between sovereigns and

tion or Constitutional Mutation?' (2015) EuConst 434; F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).

³ AAM Mooij, 'The Legality of the ECB Responses to COVID-19' (2020) ELR 713; P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) Legal Issues of Economic Integration 337; D Fromage, 'Towards Increasing Unity and Continuing Executive Predominance Within the E(M)U Post-COVID?' (2020) LIEI 385; B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635.

their creditors. The upshot is that, against what was common practice in previous decades of integration mostly devoted to microeconomic issues, EU law is not necessarily the main legal vehicle for European macroeconomic integration. As a matter of fact, in this field EU law is just one among many driving forces. The second defining feature is *variable geographical scope* of the law substantively dealing with European macroeconomic integration. This may result from reasons inherent to EU law, be they EMU derogation clauses (and, with similar effect, *de facto* EMU derogations by avoiding participation in the Exchange Rate Mechanism (ERM), legal acts adopted by and for euro area members, or measures addressed to a single Member State. Furthermore, not all Member States are signatories of international treaties and agreements: Almost all have ratified the Treaty on Stability, Coordination and Governance in EMU and the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, whereas only euro area members ratified the Treaty on the European Stability Mechanism and its recent revision. A third overlapping geographical scope applies to the banking union, a new material competence conferred to the European Union as a result of the crisis, of which not only Eurozone countries but also Croatia and Bulgaria are members since 2020 – although with a different legal position to the euro area Member States.

Because of the combination of these two features – variety of legal sources and variable geographical scope – EMU law is an extremely complex legal corpus. While EU law has been considered a legal laboratory for developments and changes in well-established constitutional categories and legal concepts elaborated in the nation-state context, the new reality of macroeconomic integration and its specific political objectives constitutes another laboratory where to test, in turn, the resilience of the basic principles of EU law as the foundations of integration and of the EU legal order. In addition, EMU law has arguably extended the reach of law, and in particular of constitutional law, to substantive areas that have traditionally been left open at national level. Our interest is, consequently, to determine to what extent the emergence and development of EMU law has affected the EU legal order – both in terms of substantive contents and formal principles.

To do so this *Special Section* will examine recent developments in European legal integration on the basis of two tensions. First, the one between the singleness of the EU legal order and the specifics of one of its various subsystems, in this case the legal provisions dealing with economic and monetary integration. To address this tension, we will focus on the *EU law on the EMU*. And second, we will also explore the tension between law and macroeconomics in the context of European integration, focussing on the body of law that we label as *EMU law*. Hence, the level of analysis will entail legal theory to address the question of the singleness of the EU legal order and will be complemented with the study of the relation between law and economics from theoretical, substantive and institutional dimensions.

To accomplish that analysis the principle of autonomy of EU law is critical. Our point of departure acknowledges that the foundational principles of the EU legal order derive

from the Court of Justice of the European Union's (CJEU or the Court) decisive interpretation of the Treaties at a time when their core provisions dealt with microeconomic integration. The close connection between the political aims of integration and the interpretation of Treaty provisions explains why EU law not only successfully spread its scope to new areas in accordance with political developments, but also proved particularly susceptible to evolving in its principles, contents and procedures. The pace and speed of this evolution, accelerating in the last decades, can be traced in the recurrent update of textbooks in the field, and even in the revision and expansion of studies on the specific topic of the evolution of EU law.⁴ In this regard, the principle of autonomy is crucial because, rather than keeping EU law detached from all external influence, it articulates its adaptation to new circumstances while formally respecting the internal coherence of the EU legal order. Accordingly, EU law's evolutionary character is part of its DNA.

By definition, all evolution implies changes and transformations in scope, depth, form or substance – or a sum of some or all of the previous. Hence, it is worth asking what changes and transformations EU law has experienced due to recent EMU developments. This is not an original quest and, in fact, the literature exploring this angle is rich: Some research has dealt with the impact of the financial crisis on various areas of EU law,⁵ while others have studied how post-crisis EMU, and in particular banking union, represent a novelty in EU law.⁶ Aware of this, the approach followed in this *Special Section* differs from previous doctrinal efforts in two significant aspects. First, when tracing the evolution of EU law specifically resulting from macroeconomic integration it promotes an overall understanding rather than explaining issues from a specific perspective. Our interest is to determine to what extent core principles of EU law apply to the post-crisis EMU or, on the contrary, to what extent new developments in the EMU determine the content of EU law. Hence, we aim at replicating in the legal domain a debate already existing in the institutional field, where some put the emphasis on the new institutional arrangements governing the array of competences conferred to the EU since Maastricht (the new-intergovernmentalism),⁷ while some others stress the “colonization of ever greater swathes of public policy by institutions designed primarily to

⁴ P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999); P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2009).

⁵ J Schmidt, C Esplugues and R Arenas García (eds), *EU Law after the Financial Crisis* (Intersentia 2016).

⁶ A Witte, ‘The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?’ (2014) *Maastricht Journal of European and Comparative Law* 89; A Pizzolla, ‘The Role of the European Central Bank in the Single Supervisory Mechanism: A New Paradigm for EU Governance’ (2018) *ELR* 2; G Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar 2019).

⁷ CJ Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012); U Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press 2014); CJ Bickerton, D Hodson and U Pueter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015).

create and govern a supranational market”.⁸ A parallel tension takes place in the legal domain regarding the interaction between EU law and new developments in the EMU. Again, a tension ultimately solved by the principle of autonomy of EU law. How has the policy-based macroeconomic integration been accommodated to the overall legal order primarily resulting from microeconomic integration? What has been the impact of the new macroeconomic objectives of integration, and in particular of financial stability, for the teleologically-interpreted EU legal order?

This introductory *Article* to the *Special Section* guides the reader in solving these questions by offering a narrative according to which to interpret the contributions by other authors on their areas of expertise. In section II, we elaborate three developments that had shaped the EU legal order: The first one is marked by the systemic need of the singleness of the legal order, despite the fragmentation foreseen in the treaties; the second results from inconsistencies at the intersection of law and macroeconomics; and the third corresponds to the administrative procedures and enforcement mechanisms of macroeconomic (or monetary) integration, different in spirit and form to the classic indirect administration characteristic of microeconomic (or market) integration.⁹ This forms the theoretical perspective to analyse how the inclusion of initially microeconomic and later macroeconomic governance has affected the passage of EU law as a means of integration. In this regard, section III discusses law and microeconomic integration as a symbiotic relation, which is the origin of the autonomous EU legal order. Section IV turns to law and macroeconomic integration, when the EMU establishes the EU constitutional framework for macroeconomic regulations and governance. In institutional terms, a specific new mode of integration is established. Rather than dividing competences between national and EU levels (indirect administration), an instance of integrated administration was established in the form of the new central banking system with the European Central Bank (ECB) at its head. Section V continues from the previous sections to understand the changes caused by three overlapping debt junctures (sovereign, banking and pandemic) and their rescue measures. In particular, the section sees the appearance of the constitutional objective of financial stability as an EMU-induced rationale that penetrated the EU legal order to formally close the gap between EU law and crises measures, with implications for the EU institutional system and administrative law. At the same time, we point out that the objective of financial stability

⁸ T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) 19.

⁹ The distinction between market and monetary integration is based on the substantive content of integration (an example in S Frerichs and F Losada, 'The Role of Law in European Monetary Integration: A Critical Reconstruction and a Response to Klein' (2021) *Global Perspectives*), whereas the distinction between micro- and macroeconomic integration (first proposed in Ka Tuori and KI Tuori, *The Eurozone Crisis* cit.) relies on the application of an economic lens over the object of integration to determine to what extent it corresponds to the aggregated or disaggregated level.

has very different features compared to the internal market objective, and not least for the purpose of teleological interpretation, which can have important repercussions for the accountability, the rule of law and democracy in the EU.

II. THEORETICAL PREMISE: STUDYING THE EU LEGAL ORDER IN THE CONTEXT OF EUROPEAN INTEGRATION

Law is a social construct dependent on, rather than detached from, its context. Accordingly, fully understanding developments in the EU legal order requires taking into account the context in which they take place. Indeed, during its formation and development EU law relied on several circumstantial elements resulting from given historical, political or economic junctures beyond the legal domain. When approached from this context-sensitive perspective, it is possible to distinguish at least three dimensions relevant for understanding the relation between EMU developments and the evolution, both in form and substance, of EU law and its legal order. Together, these three dimensions constitute the theoretical premise according to which the concrete objects of study in the remaining contributions to this *Special Section* can be analysed.

The first dimension refers to the use of legal dogmatic to interpret new developments in EU law through a legal order as consistent as possible. With the support of the doctrine,¹⁰ the CJEU has played an active role in reconstructing those different legal developments according to a narrative that, while recognizing their different origins, construes them coherently as parts of a single legal order – within the explicit limits imposed by the wording of the Treaties. Moreover, the Court interprets the EU legal order not only as a consistent legal system, but also as autonomous from national and international law.¹¹ As a matter of fact, the autonomy of EU law was the actual basis of the reasoning of the Court in the foundational rulings establishing the EU legal order.¹² This exercise of systematization is possible because of the Court's monopoly over the final interpretation of every EU law provision.¹³

¹⁰ A von Bogdandy and M Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) ELJ 267; A von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) CMLRev 887.

¹¹ C Eckes, 'The Autonomy of the EU Legal Order' (2020) *Europe and the World: A Law Review* 1.

¹² See case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 and case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

¹³ "EU Law does not allow normative gaps to appear. Indeed, autonomy could hardly be achieved in a legal system that was not self-sufficient and complete. In order for the EU legal order to find its own independent space between national and international law, the fragmentation that would inevitably result from constitutional and legislative gaps cannot be allowed to persist. Although the solutions adopted to fill any gaps may be inspired by the constitutional traditions common to the Member States or by international treaties, those solutions must come from within the Union legal order itself. Thus, the very nature of EU law requires the Court of Justice to 'find' the law (*Rechtsfindung*) by fashioning general prin-

The second dimension emphasizes the mismatch occurring at the intersection between law and macroeconomics.¹⁴ Traditionally, in democratic systems these two dimensions tend not to overlap: Macroeconomic management is a task usually in hands of the executive power, because it seems to imply the adoption of discretionary decisions that are subsequently object of political control by the parliament. When macroeconomic issues are instead subject to legal rules, as is the EMU, decision-maker's discretion is replaced by a pre-commitment, limiting the available choices to one concrete option. The role assigned to law in EMU is thus prone to dysfunctions, because legal rules are not flexible enough to adapt to the specific context to which the EU's macroeconomic management is supposed to react. Moreover, monitoring the observance of those rules is subject to a control of legality, thus involving courts rather parliaments. This control function puts courts under heavy stress because they have to reduce to a binary decision (legal/illegal) the review of acts that have extremely important consequences in economic terms and that usually result from subtle and changing political analysis. Importantly, when this role was assigned to courts it also gave them the opportunity (or necessity) to balance between legality and those consequences. The more potentially damaging the latter are, the more interest courts will have in finding an interpretation of the law in force able to validate the legality of the reviewed acts. Having the monopoly over EU law's interpretation, the CJEU is in a particularly privileged position to proceed to a trade-off between legality and the perceived continuation of European integration, on which its mere existence depends. But the price to pay for this trade-off is to assume that the Court is actually exerting a discretionary, and thus a non-legal assessment, and therefore that within the specific framework combining law and macroeconomics in European integration the rule of law is seriously challenged.¹⁵

The third dimension corresponds to the institutional form of integration. In this regard, it is relevant to return to the distinction between micro- and macroeconomic integration. The former aims to achieve an internal market by dismantling all kinds of borders between Member States and by guaranteeing a level playing field. For that purpose, it relies on a model of integration according to which political and administrative decisions are adopted at European level and later implemented at national level. It is thus a model of integration based on an indirect administration, where the enforcement of rules relies on the rational authority of law. Macroeconomic integration, on the other hand, relies on the establishment of an integrated administration (the European

ciples of law where necessary" see K Lenaerts, 'The autonomy of European Union Law' in *Annali Aisdue* (Cacucci Editore 2020) 7.

¹⁴ J García-Andrade Gómez, 'La Regulación de la Política Macroeconómica: Un Desafío para el Derecho Público' (2020) *Revista de Derecho Público: Teoría y Método* 125.

¹⁵ C Joerges, "'Where the Law Runs Out": The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance' in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019) 167.

System of Central Banks (ESCB)) to deal with monetary matters, and on a peculiar entanglement of the Commission with national executives (the European semester) to achieve the coordination of economic policies. Enforcement, in this case, does not depend on legal rules but on other means such as active policies, financial incentives and constraints, and peer pressure (naming and shaming), all complemented in last resort with market pressure. Therefore, the forms and means of indirect and integrated administration as modes of integration are radically different.

In the remainder of this *Article*, we elaborate a historical review of European integration with the aim to explain in more detail a major transformation observable after intertwining these three dimensions, and which constitutes the theoretical premise of this *Special Section*. In a nutshell, when the Court established the existence of the EU legal order, legal form (features of EU law), substantive content (microeconomic integration) and institutional form (indirect administration) were the three of them well aligned and consistent with each other. As a matter of fact, “the Court inferred the legal form of Community law from its content”.¹⁶ Things are nevertheless different in macroeconomic integration, where the integration of new developments into the (single) EU legal order ultimately relies on the principle of autonomy of EU law, and hence on the sole interpretation of the CJEU – operating under the particular constraints mentioned above. In this case legal form (the specific features of EU law) is not well aligned with the substantive content of integration (macroeconomic issues) and its specific institutional form (integrated administration). The objective of this *Special Section* is first to identify those inconsistencies and then to determine how and whether the singleness of the EU legal order has allowed to integrate them into a coherent whole. This *Article* suggests that, in the end, financial stability actually played a facilitating role.

III. THE ORIGIN OF THE AUTONOMOUS EU LEGAL ORDER: THE SYMBIOSIS BETWEEN LAW AND MICROECONOMIC INTEGRATION

With the aim of promoting European integration, the Treaty of Rome (1957) set up a peculiar balance between politics, law and economics. The Treaty designed an overarching framework (the European Economic Community, EEC) enabling the development of economic relations between private actors across Europe. The concrete goal was to establish a common market (later internal market) where all economic actors could compete on a level playing field. Various treaty provisions and legal remedies aimed to guarantee and safeguard this objective. Macroeconomics, on the other hand, was neither a subject of active regulation nor of policies at the European level, as the responsibility in this area was divided between the international level in the form of the Bretton

¹⁶ A Somek, ‘Is Legality a Principle of EU Law?’ in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 67.

Woods system and the very different policy approaches at national level. Consequently, during the first decades of European integration macroeconomics was not part of the Community framework, but rather a source of exogenous instabilities that could jeopardize the achievements of integration.

III.1. THE CREATION AND DEVELOPMENT OF A SELF-REFERENTIAL EU LEGAL ORDER

The EU legal order developed gradually into one of the most defining features of European integration. On one hand, nationals and economic actors from other Member States were entitled with rights to compete without discrimination in the whole Union. The economic assumption was that mobility of economic factors throughout the territory of all Member States would lead to more optimal allocations of production, investment and consumption decisions, which would enhance wealth creation and thus prosperity in Europe. In a crucial step, the Court made the political goal of achieving a common market into an efficient and enforceable legal objective, which led to the recognition and further development of the economic freedoms mentioned in the Treaty through the doctrine of direct effect.¹⁷ On the other hand, the idea that a competitive market order would ensure the best allocation of resources entailed as well the notion that the public sector is tasked to guarantee the opportunity of different economic actors, whatever their economic might, to participate in the market. Public authorities needed to be equipped with means to take decisions on state aid and merger control to facilitate competitive market order. This work was mostly allocated to the Commission as the competition authority with its legal decisions based on increasingly refined economic assessments. For both, the realization of the economic freedoms and the enforcement of competition and state aid rules as the key means of integration, the development of a coherent and efficient legal process and the establishment of a clear set of legal remedies were essential. Accordingly, law had a key role to play in integration, placing a court internal to the treaties and sole interpreter of its provisions in a privileged position to determine the features of the EU legal order.

When solving actual substantive conflicts, mostly about economic freedoms or competition law, the CJEU could rely on its prominent position within the preliminary ruling procedure to declare and develop the foundational principles of the new legal order stemming from the Treaties – direct effect and primacy. Hence, by solving issues mainly related to the interpretation or validity of EU law, the Court was able to define the contours and develop the contents of the legal order resulting from the Treaties. In this regard, two elements are critical for our argument. First, the Court reserved for itself the last word about the interpretation of EU law, whereby no other jurisdiction has a say on the scope, limits or structure of EU law. This is the essence of the new legal or-

¹⁷ The freedom of capital movements remained an exception and was liberalized only to the extent agreed politically by Member States.

der as an autonomous system.¹⁸ Second, when interpreting the provisions of EU primary or secondary law, the politically set goals and objectives of the Treaties were turned into effective legal objectives to determine the scope of competences. This teleological interpretation was part of the rationale to establish the direct effect and primacy of EU law.¹⁹ The combination of the autonomy of EU law with the importance of the teleological rationale in its interpretation established a self-referential legal order.

A corollary of the resulting mode of integration, assigning to law the role of transmission belt between the EU and national level, was the establishment of the principle of institutional and procedural autonomy as key feature of the EU legal order.²⁰ According to this principle, Member States will use their own institutions and procedures to implement and enforce the measures decided at European level by the political institutions. As signatories of an international agreement, they are still responsible for its fulfilment and observance. However, due to the specifics of EU law, the principle of institutional and procedural autonomy encompasses a number of sub-principles (principles of equivalence²¹ and effectiveness²²) that accentuate its EU law character. As a matter of fact, the effectiveness of EU law is so critical to the system that, according to the Court's interpretation, in certain cases EU law itself enables national courts,²³ and even national administrative authorities,²⁴ to set aside national law provisions if they cannot be interpreted in accordance with EU law. The self-referential EU legal order is thus also guaranteeing its own application by entitling courts with powers needed to effectively achieve the integration objectives through a teleological rationale.

III.2. MACROECONOMIC STABILITY BEYOND THE SCOPE OF EU LAW

When the original Treaties were signed by the Member States, they took for granted a certain set of contextual elements that affected the overall design of the integration process, in particular decisions on the economic freedoms. Monetary and currency stability was assumed to be guaranteed by the Bretton Woods system, making it possible for integration to focus on the concrete legal mechanisms required to reach the common market objective through microeconomic integration. The Treaties nonetheless included some general provisions about economic policies (art. 6 EEC) and the balance of payments (arts 108 and 109 EEC), and recommended addressing trade flows, curren-

¹⁸ The systemic relevance of the principle of autonomy for EU law has been recently stressed in case C-284/16 *Achmea* ECLI:EU:C:2018:158 and in opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

¹⁹ In this regard, the very existence of the preliminary ruling procedure was critical for determining that a new legal order of international law has been established with the ratification of the European Treaties.

²⁰ Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188.

²¹ Case C-326/96 *Levez v Jennings Ltd* ECLI:EU:C:1998:577 paras 27 ff., in particular paras 37 and 39-42.

²² Case C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* ECLI:EU:C:1983:318 para. 14.

²³ Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49.

²⁴ Case C-103/88 *Fratelli Costanzo v Comune di Milano* ECLI:EU:C:1989:256.

cy exchange rates and inflation in a coordinated way, as a matter of common concern (art. 103 EEC). Unlike economic freedoms, which entitled private actors with rights, these provisions were considered of a declarative nature, and therefore competences remained national. Member States were aware of the constraints that legislation on macroeconomic issues put on policy discretion and of the potentially negative impact single economic decisions may have when implemented in the different national socio-economic contexts,²⁵ and hence decided not to establish a proper European macroeconomic policy despite the opportunity that art. 103(2) and (3) EEC seemed to present in that regard.²⁶ Importantly, European institutions were required in any case not to affect Member States' internal or external financial stability (art. 6(2) EEC).

From the mid-1960s onwards, the international currency stability started to show its shortcomings, which led to the collapse of the Bretton Woods system in the early 1970s. The resulting monetary instability endangered the eventual functioning of a common market and burdened the Common Agricultural Policy and its system for payments. Consequently, new European-scale currency coordination mechanisms were designed, but without resorting to the provisions of the Treaties. Indeed, the ultimate version, the European Monetary System (EMS), was agreed between the Commission and central banks of the Member States. The new monetary arrangement was politically integral part of the European integration process, but it was completely detached from EU law and free from rules that could be subject to revision by the Court.

From a legal perspective the EMS maintained Member States' and their central banks' discretion with regard to their currency policy, although the practical implications for macroeconomic governance were substantial. By aligning their currencies to the anchor currency, in practice the German mark, Member States were forced to replicate the German policy of price stability if they wanted to maintain their competitiveness. From the mid-1980s onwards, a number of political and economic developments (the signature of the Single European Act, the favourable economic context with a strong US dollar and the fall of communism and the subsequent German reunification) convinced political leaders of the benefits of establishing a single currency.²⁷ In the recurrent European discussion as to the sequence leading to that objective, the traditional insistence on the part of Germany on full economic convergence before establishing a common currency gave way to a more political and less rigid plan according to which economic convergence will result from the common currency. However, in substantive

²⁵ P VerLoren van Theemat, *The Changing Structure of International Economic Law: A Contribution of Legal History, of Comparative Law and of General Legal Theory to the Debate on a New International Economic Order* (Martinus Nijhoff Publishers 1981) 179-180.

²⁶ At least that is what Kaupa argues in C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016) 75.

²⁷ K Dyson and K Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999).

terms the compromise was forged around the successful German experience to disregard short-term political interests and to stress low inflation to maximize prosperity in the long run. Rather than a policy lever at disposal of politicians, monetary policy was considered a technical craft able to be mastered by experts, and central bank independence was a necessary institutional guarantee to pursue the low inflation objective. Along those lines, and again with the key input of central banks during the preparatory stage, it was possible to draft an agreement between Member States establishing an EMU, with a common currency (the euro) and an independent central bank (the ECB) whose primary objective was and still is to guarantee price stability. This political agreement took the legal form of an international treaty (the Treaty of Maastricht) that amended the original treaties and thus became EU primary law.

IV. ESTABLISHING A MONETARY UNION THROUGH AN INTERNATIONAL TREATY: MATCHING LAW AND MACROECONOMICS IN EU LAW WITHIN A “EUROPE OF BITS AND PIECES”

The Treaty of Maastricht manifested, from a legal perspective, the complexity of expanding the substantive areas of the Community, which were complemented with new competences of the Union. Its original, pillar-based structure detached intergovernmental policies in the areas of foreign and security policy and cooperation in police and judicial matters from the basic principles of EU law generally applicable for supranational integration. The special regimes for these policies ranged from including a specific set of legal acts with different legal effects than those of regulations, directives and decisions, to altering the role played by the Union institutions and the balance between them in the political decision-making process, or to reducing the role to be played by the Court (and therefore by law) in these areas. Constitutionally, the EU had a fragmentary structure,²⁸ and the legal regimes for the Union and the Communities differed to the point that the principles developed for the latter were not strictly applicable to the former.

Even though it was also discussed as an independent pillar,²⁹ the EMU was finally inserted in EU primary law as part of the supranational pillar, more specifically as part of the European Community. However, despite being as such primary EU law, it was all but a regular example of integration. First, because it combined competences conferred in exclusive to the supranational level (monetary policy) with national competences that required coordination (economic policies). And second, because instead of relying on EU institutions for adopting decisions to be implemented and enforced by Member States according to their own institutional and procedural rules (thus following the model of indirect administration), EMU provided for two different mechanisms of inte-

²⁸ D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) CMLRev 17.

²⁹ C Zilioli and M Selmayr, *The Law of the European Central Bank* (Hart 2001) 9 ff.

gration. For monetary policy, it detached National Central Banks (NCBs) from national administrations and integrated them in a joint administrative structure, the ESCB, with the ECB as its decision-making body. The internal relation between the ECB (Executive Board and Governing Council) and NCBs was controlled by a specific set of rules with effects exclusively *ad intra*. As to the coordination of national economic policies, it was articulated through the existing European institutions, although with altered roles in the decision-making process. Indirect administration, the hitherto *modus operandi* of European integration, was thus replaced by an integrated administration in the case of the ESCB and by what will become the open method of coordination for the coordination of national economic policies.

The specific feature of the EMU was that law and macroeconomics got closely linked to each other through the petrification of certain political agreements at EU treaty level, an instance of an economic constitution.³⁰ The signatories of the Maastricht Treaty resorted to law to limit the discretion inherent to macroeconomic policy-making. Hence, some key macroeconomic approaches and objectives were fixed at the Treaty level, including monetary policy's primary (and practically sole) objective of price stability, prudent fiscal policy as measured by low deficits, or national responsibility for public sector liabilities and banking sector solvency (financial stability). For the first time macroeconomic integration became a relevant part of EU law. As a consequence, the EU legal order and principles are applicable to the EMU (except when explicitly excluded by the Treaties themselves)³¹ and in turn EMU provisions, as primary law, could affect the interpretation of EU law when using the contextual and teleological methods – as we will discuss in what follows.

IV.1. THE APPLICABILITY OF EU LAW TO THE ESCB

Monetary policy and the broader EU macroeconomic governance became part of the EU legal order as seemingly regular EU law with its by then well-developed legal doctrine. However, the consequences of the mismatch between the material context from which the rules and principles of EU law were inferred (microeconomic integration) and the substantive content at hand (macroeconomics) started to become evident in many key areas of the legal system. First, the set of legal remedies designed in the Treaties to engage private actors in the judicial control of the economic freedoms was designed with microeconomic integration in mind. In the EMU, these remedies lose their role. It is difficult to imagine how a private actor could challenge a legal act dealing with aggregated elements of the economy, especially when the case-law of the Court requires a

³⁰ For a deeper discussion see K Tuori, *The European Central Bank and the European Macroeconomic Constitution: From a Central Bank of Stability to a Central Bank Crisis* (Cambridge University Press, forthcoming).

³¹ It must be noted that, since both supranational and intergovernmental policies were part of the Treaties, they all are primary EU Law.

direct concern from non-institutional actors to present an action of annulment. The same can be said of the preliminary ruling procedure: It is hard to conceive how the solution to the main proceeding, a conflict between parties based on concrete rights, depends on the validity or interpretation of macroeconomic decisions.

An early example of the difficulty to reconcile the specific design of EMU, in particular the independence of the new ECB, with the applicability of the general regime of EU law was the *OLAF* case.³² The ECB refused to accept that the Anti-Fraud Office set up by the Commission could monitor its activities and, as a matter of fact, created its own anti-fraud unit. The ECB insisted that its institutional independence justified that an administrative unit of the Commission should neither have direct access to its premises nor any kind of supervision power over its staff. The CJEU finally found that the status of independence of the ECB, worthy of recognition, did not justify the non-application of general EU law provisions to it. Hence, it can be inferred that the EU legal order, its principles and institutions are applicable to EMU law, which was further clarified in the Lisbon Treaty by listing the ECB among the EU institutions.

A corollary of the mismatch between the EU legal order, inferred from and developed according to microeconomic integration, and macroeconomic integration as designed in the EMU is that any potential conflict between ECB's internal legal instruments (arts 17 and 17(a) of the Rules of Procedure of the ECB)³³ and national legal acts – whatever their rank – is to be solved in accordance with the principle of primacy. This leads to the paradoxical situation of an ECB instruction, guideline or internal decision (administrative acts articulating the relationship between ECB bodies and NCBs) prevailing, as part of EU law, over national rules even of constitutional status. The rationale of primacy is strictly related to EU law's efficacy, but it seems that these *ad intra*, administrative acts of the ECB go well beyond that rationale. Anticipating the unintended consequences of applying the principle of primacy to those acts, the ECB has taken all precautions to assess in advance to what extent such a conflict may happen in order to avoid it.³⁴ However, it cannot be discarded that conflicts may take place.

A most recent and paradigmatic example of the tension between the EU legal order, conformed according to the needs of indirect administration, and the ESCB as instance of integrated administration is the ruling in *Rimšēvičs*,³⁵ by which the CJEU annulled a decision adopted by a national authority – the Anti-Corruption Office – suspending the governor of the Latvian NCB from office. Proceeding to a contextual and teleological in-

³² Case C-11/00 *Commission vs ECB* ECLI:EU:C:2003:395.

³³ Decision 2004/257/EC of the European Central Bank of 19 February 2004 on adopting the Rules of Procedure of the European Central Bank as amended ECB/2004/2.

³⁴ "However, so far there have been no cases of conflict between an ECB guideline and a national law; the ECB's policy has always been to ensure that its guidelines are compatible with national law" in HK Scheller, *The European Central Bank: History, Role, and its Functions* (2nd edn, European Central Bank 2006) 63 fn 7.

³⁵ Joined cases C-202/18 and C-238/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139.

interpretation of art. 14(2) of the Statute of the ESCB, the Court considered that the aim of the Treaties is to shield the ESCB from all political pressure. Accordingly, members of the Governing Council (that include all the euro area NCBs governors) can only be removed from office once proved guilty of serious misconduct. Otherwise, the suspension of functions may affect the functioning of the ECB, and also of the Single Supervision Mechanism (SSM). What is relevant for our argument is that due to the highly integrated system that the ESCB constitutes, “a new legal remedy has been established by which, by way of exception, a decision taken by a national authority may be referred to the Court”.³⁶ The drafters of the Treaties thus amended the system of legal remedies to adapt the features of the action for annulment to the specifics of the ECB. Consequently, members of this independent, non-majoritarian institution have direct access to the CJEU. In this regard, there is a sharp contrast with the judicial protection of other national non-majoritarian institutions – courts – whose independence and non-removability of their members can only be reviewed through an action for failure to act promoted by the Commission.³⁷

IV.2. THE APPLICABILITY OF EU LAW TO MACROECONOMIC GOVERNANCE

The coordination of economic policies within the EMU also faced early difficulties to articulate macroeconomic integration through legal means. The first major conflict took place between the Commission and the Council concerning the excessive deficit procedure opened to Germany and France soon after the establishment of the euro. The Council had not followed the Commission’s recommendation to move the excessive deficit procedure to the next stage for both France and Germany and thus opening the door to an eventual imposition of fines. When the Council was unwilling to adopt a decision as suggested by the Commission, it decided to declare the procedure in abeyance. In its judgment, the Court discussed the discrepancy between the formal procedure established in the Treaties and the margin for discretion required in macroeconomic policy. The CJEU declared that the inability of the Council to reach an agreement could not be considered a failure to act: Non-deciding is part of the political discretion at disposal of Member States.³⁸

This judgment made explicit that macroeconomic decision-making implies wide discretion, although such discretion is at odds with the rule-based nature of the EMU as designed in the Treaty. The ruling also indicated the role to be played by law in macroeconomic integration, where judicial review by the Court could mainly focus on the control of formal legality (observance of procedural requirements and of the legal basis determining the competence) without discussing the material macroeconomic content,

³⁶ *Ibid.* para. 70.

³⁷ Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

³⁸ Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

which was left for the political domain. The general view of legal scholars about the role of the Court in the EMU was precisely that, due to its lack of substantive competence in macroeconomics, judicial review should and could only be limited to procedural matters.³⁹ However, this understanding became challenged during the crisis.

V. THE IRRUPTION OF DEBT RELATIONS AND THE NEED FOR FINANCIAL STABILITY: MACROECONOMICS DETERMINING THE CONTENT AND STRUCTURE OF EU LAW

The previous section showed how the drafters of the treaties neglected or downplayed the potential conflicts arising from reconciling macroeconomic primary law, substantive economic policies and the broader EU legal order. Despite that, the legal regimes applicable to the Community and to the Union gradually merged into a single one, as they were formally consolidated in the Treaty of Lisbon.⁴⁰ This partially alleviated the impact of those inconsistencies, especially during the first decade of operation of the euro. Since then, however, a number of overlapping crises triggered the adoption of rescue measures and consequent institutional changes, making the potential conflicts resulting from those inconsistencies explicit, and the need to face their consequences unavoidable.

The events and measures adopted to deal with these different crises have been well documented.⁴¹ For the purpose of our analysis, we group the events and rescue measures according to three different debt junctures. First, the sovereign debt crisis that started with the Greek rescues in 2010 and culminated in 2012 with the establishment of a permanent structure external to the EU to provide financial assistance (the ESM) and also in the ECB's new role as the main creditor to Member States through its quantitative easing programmes. Second, the banking debt crisis that, worsening the financial crisis that had started in 2008 by coupling sovereign debt difficulties and banking problems, culminated in 2014 by setting up the two main pillars of the Banking Un-

³⁹ MA Orriols i Sallés, *El Banco Central Europeo y el Sistema Europeo de Bancos Centrales. Régimen Jurídico de la Autoridad Monetaria de la Comunidad Europea* (Comares 2004) 444-445; P Leino, 'The European Central Bank and Legitimacy: Is the ECB a Modification of or an Exception to the Principle of Democracy?' (Harvard Jean Monnet Working Paper 1-2001) 15-16.

⁴⁰ A trend described by DM Curtin and IF Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 155. In relation to the Common Foreign and Security Policy see R Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) EuConst 117.

⁴¹ For the financial and sovereign debt crisis in the European context see A Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane 2018); M Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt* (Princeton University Press 2017); and A Mody, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018). As to the Covid-19 pandemic crisis, see A Tooze, *Shutdown: How Covid Shook the World's Economy* (Allen Lane 2021) for a general political and macroeconomic perspective. For the concrete measures adopted in the European Union to deal with the pandemic crisis, see B de Witte, 'The European Union's Covid-19 Recovery Plan' cit.

ion, the Single Supervisory Mechanism (SSM) and Single Resolution Fund (SRF). And finally, the disruption of the economy induced by the Covid-19 pandemic that started in 2020, whose effects and implications are still ongoing but that has reshaped the structure of debt relations within the European Union. In each of these three junctures, debt worked as a transmitter and an accelerator of the risks at hand, therefore increasing the need for financial stability.

V.1. THREE DEBT JUNCTURES SPURRING THE NEED FOR FINANCIAL STABILITY

The initial stages of the great financial crisis were largely handled following the mechanisms and procedures anticipated in the Maastricht Treaty. Accordingly, the ECB took care of the banking sector's liquidity, whereas Member States coordinated their fiscal policies and maintained responsibility over the solvency of their financial institutions. This changed fundamentally when the Greek public finances faced imminent insolvency in early 2010, and similar worries arose for Portugal and Ireland. Facing the effects of this first debt juncture, the EU primary law model of national responsibility was finally replaced by euro area-based rescue measures that provided actual monetary transfers to Member States in trouble (or at least to their creditors). The initial bilateral loans from other Member States to Greece, the Commission's European Financial Stability Mechanism and loans through the European Financial Stability Facility either had no basis in EU primary law, were pushing the boundaries of art. 122(2) TFEU, or were seemingly contradicting some primary law provisions. The latter was in particular the case of the prohibition to assume other Member States' financial responsibilities established by virtue of art. 125 TFEU, which could be considered contrary to any form of mutualisation of debts at European level. One consequence was that the permanent institutional solution, the establishment of the ESM, took place on the basis of an international treaty – as also was the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund. This novelty pushed the scope of EMU law beyond the boundaries of EU law, resulting in a decoupling between the two. Similarly, the measures of the ECB, particularly the Outright Monetary Transactions (OMT) programme, were pushing the constitutional boundaries of the EU monetary policy, as the ECB effectively promised to ensure Member States market funding to the extent that they took part in the ESM adjustment programmes. A similar effect was reached later through the ECB's government bond purchases under the PSPP. At the same time, this part of EMU law became strongly related exclusively to euro area Member States, as proves the newly amended art. 136(3) TFEU, whose drafting now allows the adoption of a vehicle such as the ESM for them only. An additional institutional consequence of the new *de facto* mutualisation of debts in extreme circumstances, this time substantiated

in EU secondary law,⁴² was the increased EU level control over national fiscal policy, particularly through the European Semester.

The second debt juncture resulted from the deeply-rooted problems in the euro area banking sector, and led to new rescue measures and institutional changes. The initial response to the financial and banking crisis, again, combined the central banking measures by the ECB together with non-euro area national central banks. The measures initially remained within the boundaries of EU law. The problems with insolvent banks and subsequent rescues and recapitalisations remained national responsibility, and followed national, and for the state aid also EU legislation. However, the ECB's new form of banking sector funding, the 3-year loans to banks through the Long-Term Refinancing Operations (LTROs) program, dramatically increased the link between the sovereigns in trouble and their banks, particularly in Spain and Italy. As a consequence, the ECB's monetary policy became more closely tied to the fiscal problems in Member States, and particularly to their funding conditions. Consequently, the use of the ESM financing for bank recapitalisations was made conditional on the centralisation of the banking supervision at the ECB. Hence, the main institutional changes were the introduction of the SSM and the SRF for banks. This followed the logic that if rescuing banks can jeopardise Member States' public finances, and if the latter are already part of EMU responsibilities (through the ESM and indirectly through the ECB), then the failures in banking supervision are paid for at the EMU level and the legitimisation of national supervision is gone.

The last debt juncture is the still ongoing pandemic, a health crisis with massive economic and social repercussions. The measures adopted in reaction to the economic meltdown have increased the role of the EU in Member States' fiscal and structural policies. The main difference *vis-à-vis* the previous debt crises is that the EU macroeconomic involvement in Member States is now forward-looking and more allocative. The EU recovery package, labelled Next Generation EU, included the establishment of a Recovery and Re-

⁴² We refer to the Six Pack (Regulation (EU) 1175/2011 of the European Parliament and the Council of 16 November 2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) 1177/2011 of the Council of 8 November 2011 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) 1173/2011 of the European Parliament and the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States; Regulation (EU) 1176/2011 of the European Parliament and the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; and Regulation (EU) 1174/2011 of the European Parliament and the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area) and to the Two Pack (Regulation (EU) 473/2013 of the European Parliament and 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, and Regulation (EU) 472/2013 of the European Parliament and 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).

silience Facility (RRF) containing the bulk of 750 billion euro of support to address the economic and social impact of the pandemic in Member States. From the EU legal order perspective, the new measures have aimed at taking an EU rather than EMU perspective. The main link with the EMU has been the ECB's commitment to ensure Member States funding conditions, again, through large scale bond purchases.⁴³ However, from a structural perspective, it is the role of the Commission, borrowing in markets for subsequent national expending, that has arguably constituted a dramatic re-allocation of competences and administrative power stemming from the pandemic crisis. The fact that the allocation of funds to Member States depends on the Commission's assessment of their spending plans puts the latter in the position of demanding political conditions not directly related to the actual recovery from the pandemic, such as the observance of the rule of law. Interestingly, the measures combine cyclical pandemic and even post-pandemic economic needs with structural and longer-term solutions.

V.2. THE RETURN OF TELEOLOGICAL INTERPRETATION

As a result of these debt-led crises decisive political action had to be adopted in three fronts of EMU's constitutional architecture. The first front was the expansion of the EU exclusive competence of monetary policy beyond the borders of national responsibilities with several unorthodox programs adopted by the ECB in support of the general economic situation, to the point of redefining the very role of central banking.⁴⁴ The second front was the blurring of Member States responsibility over their finances and debts with the establishment of new mechanisms to provide financial assistance to Member States and the issuance of bonds by the Commission. This arguably led to the third front, namely the expansion of European legal and institutional constraints over national budgetary policies and processes, made explicit on the different type of conditionality required in exchange of the assistance (austerity policies, observance of the rule of law, and with pandemic the types of forward-looking programmes). Consequently, the amount of legislation in force regarding the coordination of economic policies multiplied, also expanding to the international law field.⁴⁵ The obvious first consequence of this expansion in the number of rules is that national discretion over economic policy has been radically limited, and subjection to the rule of law is legally and politically more compelling than ever.⁴⁶ While macroeconomic management requires flexibility, the solutions to the crises increased the number, rigidity and enforceability of

⁴³ Under the now 1850 billion euro PEPP purchases. Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

⁴⁴ A Tooze, 'The Death of the Central Bank Myth' (13 May 2020) Foreign Policy foreignpolicy.com; K Tuori, *The European Central Bank and the European Macroeconomic Constitution* cit.

⁴⁵ See the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

⁴⁶ Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

constrains. A paradoxical example of this new approach was the attempt to reduce discretion in the imposition of sanctions within the economic governance framework: By subjecting them to the new “reverse qualified majority voting” a minority of Member States could adopt the decision.⁴⁷ The second consequence is that there is now more basis than ever to rely on courts to challenge economic policy decisions. Financial assistance and attached conditionality constitute a new set of debt-based economic relations between Member States.⁴⁸ Instead of reducing the role of law in macroeconomics to gain flexibility when dealing with unexpected situations and crisis, the introduction of these legal constraints in the context of the common currency triggered the formation of a new legal-administrative apparatus in charge of guaranteeing repayment of debts.

This put the CJEU on the spot when dealing with any single case related to EMU, due to their potentially massive and disturbing economic consequences. But it is precisely because of the relevance of the consequences for economic policy, and even for the constitutional framework of economic and monetary policy-making in the EMU in general, that legal claims in this regard multiplied. The CJEU proceeded in these judgments with its normal analytical apparatus, and therefore it did not decide in EMU cases using different criteria than in other areas of EU law. Instead, the solution that the Court found to deal with the difficulties presented by EMU cases was to determine the intensity of legal review, thus giving certain leeway on economic policy matters to the corresponding actors and focussing its analysis on a procedural control. However, EMU law cases present a structural difference vis-à-vis regular EU law cases, because integrated administration is disconnected from the legal remedies originally foreseen in the treaties. This results in convoluted cases both in constitutional and administrative terms: While individual claims in EMU-related issues were in principle to be discarded due to the misalignment between the aggregated objective of EU law actions and the individual right required by the Court to have *locus standi*, the new turn in EMU law opened the door to the reinterpretation of those claims as constitutional conflicts in the national context. Hence, when subsequently elevating preliminary questions, national courts were presenting a binary conflict where either the national constitution or EU law was breached.⁴⁹ This changed the awareness on the works of the CJEU, from being a silent actor whose decisions on preliminary rulings were noticed mainly *ex post*, to being on the spot under massive political pressure from the very moment the procedure started.

Under these circumstances, the Court had to deal with cases that were on the blurred and undefined area limiting law and macroeconomics. Due to the structure and relevance of the questions posed, the Court had to engage for the first time with the

⁴⁷ R Palmstorfer, ‘The Reverse Majority Voting under the “Six Pack”’ cit.

⁴⁸ F Losada, ‘A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration’ (2020) JComMarSt 787.

⁴⁹ F Losada, ‘On European Macroeconomic Integration and the Ensuing Clash of Courts: Apropos the German Constitutional Court Ruling on the ECB’s Public Sector Purchase Program’ (2020) Ordines 58.

substantive content of macroeconomics, but it could only rely on legal arguments when doing so. The clash between the rationales of law and macroeconomics had to be solved either by imposing a strict reading of EU primary law provisions, disregarding the potential economic implications, or by reinterpreting the said provisions in order to be as flexible as was deemed required by the economic policy institutions involved. It is in this specific situation that the concept of financial stability is used by the Court to legally justify the measures adopted. Importantly, the Lisbon Treaty established for the first time a clear distinction between competences and objectives. The idea of the Treaty drafters was to prevent that new conferral of power towards the European level could be inferred from political objectives.⁵⁰ However, the pressing needs imposed from the dramatic economic and political context elevated financial stability considerations to objective of the EU, in this case just rubber-stamping measures already adopted instead of promoting integration by legal means despite political concerns. Financial stability became a new objective of European integration.

V.3. FINANCIAL STABILITY AS A NEW OVERRIDING OBJECTIVE ADDRESSING THE MISMATCH BETWEEN LAW AND MACROECONOMICS

The recurring crises since 2008 completely changed the model designed in Maastricht for the EMU. The vast array of measures adopted to deal with the entangled sovereign, banking and pandemic debt crises aimed at restoring financial stability under a double rationale: Managing economic shocks and preventing future risks.⁵¹ The managing of economic shocks included redistribution of financial resources, which was problematic not only due to the Treaty provisions prohibiting debt mutualisation, either directly or through the ECB, but also because redistribution requires the adoption of discretionary decisions that are at odds with any rule-based system. Prevention of future risks consisted in the increased and reinforced monitoring of national economic policies (in particular via the European semester), thus limiting the discretion of national economic policy-making, but also in transferring banking supervision to the ECB. For the assisted countries those two sides of financial stability were balanced by requiring them to sign a Memorandum of Understanding (MoU) with the ESM. By virtue of that agreement, conditionality was imposed in exchange of financial assistance: Discretion on national policies was thus limited and the ESM was given the position to formulate the necessary policy measures to be adopted in exchange of the assistance. Financial stability was thus the political objective and ultimate rationale for a very broad range of measures.

Turning to the legal side, the initial textual interpretations of the Treaty provisions, particularly concerning art. 122(2) and 125 TFEU, could be classified as heroic attempts to

⁵⁰ J Larik, 'From Speciality to Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) ICLQ 935 and 958.

⁵¹ G Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Kluwer Law International 2017) 55 ff.

observe the letter of the Treaty. Unfortunately, they were neither convincing nor conducive to the coherence of the macroeconomic framework. This is where the concept of financial stability, formulated as objective of the Union, was of outmost importance in solving the emerging constitutional questions related to the rescue measures and to the new institutional structures. Furthermore, financial stability also gained a legal dimension by the concurrence of being deduced from the treaties, included in international agreements (ESM and the Treaty on Stability, Coordination and Governance (TSCG) in the EMU) and the European treaties (new art. 136(3) TFEU), and interpreted in a teleological way in the case law of the CJEU.⁵²

However, and despite its wide use in legislative and the legal practice, the content of financial stability still remains ambiguous. There was hardly any attempt to define it in any exact or consistent manner. It is thus a relative concept always dependent on the context, indirectly defined as a lack of financial instability, and described in the economic literature in many different ways.⁵³ For this same reason, financial stability has been extremely practical as a legal tool to unify EMU law and the EU law on the EMU. However, the price to be paid in exchange of that alleged coherence is that, as a legally undetermined concept, financial stability enables the use of discretion depending on undefined contextual reasons: It relies on the striking of balances under certain particular circumstances leading in the long term to inconsistent legal decisions. Although extremely convenient in political terms, in the legal domain this leads to arbitrariness and, as such, attacks the very essence of what a legal system aspires to achieve.

V.4. FINANCIAL STABILITY CONSOLIDATING AN AUTONOMOUS AND UNITARY POST-CRISIS EU LEGAL ORDER

The effort to reconcile within the EMU framework the legal and the macroeconomic rationales in a coherent way became much more demanding with the rescue measures than when the Treaty of Maastricht entered into force. On one side, EU law has been extensively applied to the EMU with many new interesting consequences not only for the EMU but for EU law itself. On the other side, EMU law has gone beyond the limits of

⁵² K Tuori and F Losada, 'The Emergence of the New Over-riding Objective of Financial Stability' in M González Pascual and A Torres Pérez (eds), *Social Rights in the EMU: New Challenges for a Social Europe* (Edward Elgar, forthcoming).

⁵³ Starting from the debt-deflation theory by I Fischer, 'The Debt-Deflation Theory of Great Depressions' (1933) *Econometrica* 337, the amount of analyses has exploded more recently. Earlier reflections cover many different aspects of financial intermediators (banks) and markets. Banking sector abilities are discussed, for example, by JH Boyd and EC Prescott, 'Financial Intermediary-Coalitions' (1986) *Journal of Economics Theory* 211 and by JE Stiglitz, 'Credit Markets and the Control of Capital' (1985) *Journal of Money, Credit and Banking* 133. The combined role of banks and markets is more thoroughly analysed in R Levine, 'Financial Development and Economic Growth: Views and Agenda' (1997) *Journal of Economic Literature* 288 and also in E Philip Davis, *Debt, Financial Fragility, and Systemic Risk* (Oxford University Press 1995).

EU law, escaping from the scope of the EU legal order and its remedies, but still having an impact in EU law. As a consequence, the EU legal order and many of its underlying principles could have witnessed changes that only now are starting to become clear.

As previously discussed, one of the key legal achievements of the earlier phase of integration was the reliance on and development of the autonomous rationality of law that found its embodiment in the CJEU landmark decisions that developed the key principles of EU legal order. As Allan Rosas writes in his contribution, the Court largely claimed to follow the earlier approach and the key principles also in cases related to crises.⁵⁴ The key cases contained application of EU law and interpretative methods in similar way to earlier case law. This internal perspective on the application of law could, however, be balanced with an external view that acknowledges the extreme circumstances under which the judgments were deliberated.

Indeed, most EMU related cases since the beginning of the crisis involved substance matters that potentially could have enormous and immediate economic and social consequences. They also involved large measures and institutional changes that had been agreed upon by the EU institutions and decision-making bodies, where the main substance matter was the extent of conferral of competences. The upshot was that legal technicalities (among which several decisions on the Banking Union, the legal standing of parties against ECB programmes or Eurogroup decisions, or on the reach and scope of fundamental rights, to name a few) could have a massive impact on the very existence of the EMU, or at least aggravate the situation and reactivate the market pressure. Hence, it could be argued that whereas the CJEU argumentation apparently relied on the autonomous rationality of law, in reality it had to be open to other considerations due to the massive economic repercussions. This could have had major impact on the EU legal order as many of its key principles, the principle of proportionality perhaps more than any other, were given content that stemmed from the needs of the specific situation rather than the needs of the internal logic and autonomous rationality of the EU legal order.

Furthermore, and interestingly, Rosas does not consider the *ESMA (short selling)* case as relevant for EMU, but just a case about regular EU law.⁵⁵ This case nonetheless merits inclusion in the group of cases stemming from the need to guarantee financial stability in the whole EU and with the same concerns related to macroeconomic integration as with most other cases such as *Gauwailer* and *Weiss* discussed by Rosas.⁵⁶ In any case, *ESMA (short selling)* shows that financial stability has become a primary objective beyond the EMU, defining both structure and content of EU law. Simoncini explores in this *Special Section* to what extent the establishment of the European Supervisory Authorities in the fi-

⁵⁴ A Rosas, 'EMU in the Case Law of the Union Courts: A General Overview and Some Observations' (2021) European Papers www.europeanpapers.eu 1397.

⁵⁵ Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18; see A Rosas, 'EMU in the Case Law of the Union Courts' cit.

⁵⁶ A Rosas, 'EMU in the Case Law of the Union Courts' cit.

financial markets (ESAs, among which ESMA) and the subsequent revision of the doctrine regarding the non-delegation of regulatory powers, have affected the EU legal order.⁵⁷ In this regard, it has been noted that there is an analogy in the application of competition law reasoning to complaints against ESAs decisions to investigate or not some company.⁵⁸ Indeed, the Court made an effort towards the consistency of all areas of EU law by deciding that, against the initial criteria of the Board of Appeal, the procedural position of complainants should be the same as the general EU law regime.⁵⁹

Indeed, financial stability has started to gain traction in different areas of EU law, and not only in those specifically dealing with the management of the various crises. It is therefore important to assess the influence of financial stability in these areas to trace and understand its impact on the EU legal order in general. For instance, some have observed that in the financial services area financial stability considerations constitute a centripetal force leading to a competence creep towards the EU level.⁶⁰ Once competences are European, the likelihood of the ultimate rationale of new legal acts to stem from macroeconomic considerations, and from financial stability in particular, increases notably. For instance, the assessment of third country jurisdictions with similar regulation, relevant in terms of recognizing their applicability in the EU, can vary depending on their impact on EU's financial stability.⁶¹ Furthermore, it has also been pointed out that the goals of financial regulation and private law currently overlap and that both protect the same objectives (financial stability and consumer protection). Hence, in addition to their own goals, "financial regulation addresses consumer protection top-down and private law addresses financial stability bottom-up".⁶² However, there is an inherent imbalance in the intersection of financial stability with other objectives (in this case consumer protection), because none of those objectives can be "pushed to the point of undermining stability itself".⁶³ This is noticeable, for instance, in cases at the intersection between shareholder protection and financial stability, in which the CJEU ruled differently "based on the recognition of the existence of a systemic risk".⁶⁴ Similar developments take place also at the broader and more forward-looking areas. In this *Special Section*, Juutilainen explores to what extent financial stability concerns have determined the content of

⁵⁷ M Simoncini, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2021) European Papers www.europeanpapers.eu 1485.

⁵⁸ P Schammo, 'Actions and Inactions in the Investigation of Breaches of Union Law by the European Supervisory Authorities' (2018) CMLRev 1423 and 1447.

⁵⁹ Case T-660/14 *SV Capital v ABE* ECLI:EU:T:2015:608.

⁶⁰ F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) CMLRev 39.

⁶¹ *Ibid.* 52.

⁶² G Comparato, 'Financial Stability in Private Law: Intersections, Conflicts, Choices' (2021) CMLRev 404.

⁶³ *Ibid.*

⁶⁴ *Ibid.* 412, comparing reasoning in cases C-441/93 *Pafitis and Others* ECLI:EU:C:1996:92 and C-41/15 *Dowling and Others* ECLI:EU:C:2016:836.

measures in designing and implementing the Capital Markets Union as another area where private law and internal market-related EU law could become subjected to the rationales of macroeconomic needs and threats.⁶⁵

Finally, the pandemic responses are likely to result in analogous assessments in coming years. Although in this case the stability threat was fundamentally different, it turned also into a macroeconomic and financial stability issue. Consequently, the balancing between objectives followed the same pattern as in facing a financial stability threat, a model whereby the pandemic instability became an over-riding but not very clearly defined objective that this time eclipsed even the internal market objective in some areas and could be used to rationalise EU measures that would have been impossible before. One example is resorting to art. 175(3) TFEU as the legal basis for the RFF, an article that allows the use of specific funds outside existing EU cohesion policies and that thereby exploited economic cohesion funds for mainly short-term macroeconomic needs.

V.5. INTEGRATED ADMINISTRATION FOR A MORE CENTRALISED EMU GOVERNANCE

We described earlier how the institutional design of integration has evolved corresponding to the increase in the number of objectives, from ensuring the effective achievement of the internal market through the application of regular EU law, to operationalising after Maastricht the new macroeconomic governance model for the EMU. In the first instance, the model was based on indirect administration, while the latter introduced an integrated administration in the area of monetary policy and the open method of coordination for the other parts of the EMU macroeconomic governance. The reaction to the sovereign, bank and pandemic crises focused on guaranteeing the financial stability of the eurozone, and the promotion of this new objective resulted again in new administrative solutions.

Unsurprisingly, this model of developing the institutional and legal dimensions of European integration led to unexpected implications. For instance, differentiated integration in areas where indirect administration is applicable is less problematic, because those Member States participating in the policy at hand implement European decisions according to their own institutions and procedures. However, combining participation in the Banking Union, a two-level supervision including the ECB and national supervisors, with keeping the national currency (the case of Croatia and Bulgaria) requires the adoption of convoluted institutional and legal procedures. The model has to combine national monetary policy with supranational banking supervision, a task requiring the adoption of decisions directly addressed to private economic actors. In the resulting framework, the ultimate responsible of those decisions (the ECB) is also responsible for monetary policy in the Eurozone. This unforeseen situation forced to strike a delicate

⁶⁵ T. Juutilainen, 'The EMU Rationale for Capital Markets Union' (2021) European Papers www.europeanpapers.eu 1505.

balance to guarantee the rights of those Member States, which cannot be involved in the actual decision-making bodies of the ECB. Consequently, the intricate solution adopted is artificial and perhaps unsatisfactory to solve eventual conflicts. It is mainly intended as a waiting room for the euro and, as such, was made into a pre-condition for it, an additional convergence criterion outside of the Maastricht Treaty.⁶⁶

However, the Banking Union also results in new legal conundrums by combining the integrated administration model with a task that entitles economic operators with the right to appeal, first via administrative law and, in last instance, to the CJEU. Hence, the Banking Union combines the institutional form characteristic of macroeconomic integration with the procedural logic corresponding to microeconomic integration. The outcomes of this mismatch are unprecedented. Integrated administration links national and European financial supervisors together, but procedure-wise there are two different stages resulting in composite administrative procedures.⁶⁷ In the course of those procedures, for the first time European institutions (both the ECB and the CJEU) must apply (and interpret) national law. When doing so they have even disregarded national court's rulings if the effectiveness of EU law required so.⁶⁸ Hence, although composite administrative procedures have allegedly been established to safeguard national competences, the outcome is that the CJEU has expanded its control over national law. As a corollary the ECB can impose uniform supervisory tools and sanctions that the local competent authorities must execute even if they are against national legal traditions or result in procedures that are against the principles of the EU legal order.⁶⁹

Another paradox resulting from the overlap of the integrated administration and the general provisions of the EU legal order is the use of delegated and implementing acts in the EMU. Since this is an area of exclusive competences (monetary policy) and of coordination of policies that are still national competence (economic governance), it is in principle unlikely that neither of these fields requires the adoption of delegated or implementing acts. Chamon dissects in his *Article* the number of occasions when these acts have nonetheless been used in macroeconomic integration, identifying the peculiarities of their use when compared to regular EU law. Interestingly enough, although in principle, it seems counterintuitive to picture the Council adopting Implementing Decisions, this has been the case each time the issue at stake was of vital economic rele-

⁶⁶ O Žáček, 'How to Get In? Euro Area Entry Criteria in Books and in Action' (2021) CMLRev 1141.

⁶⁷ FB Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) CMLRev 101; and FB Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Nonjusticiable National Law' (2020) EuConst 63.

⁶⁸ Case C-219/17 *Berlusconi and Fininvest* ECLI:EU:C:2018:1023. See FB Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: *Berlusconi*?' (2019) CMLRev 1355.

⁶⁹ P Weismann, 'Zur ebenenübergreifenden Verflechtung des Einheitlichen Aufsichtsmechanismus (SSM) aus Sicht des Unions- sowie des österreichischen Rechts' (2021) Zeitschrift für öffentliches Recht 799.

vance for the Member States.⁷⁰ This and other unconventional uses of delegated and implementing acts suggest that, as a result of the maladjustment between the EU legal order and the institutional form of integration in EMU affairs (integrated administration), in this area the law of EMU is diverging from standard EU law. Although the conclusions are only tentative, it seems clear that the consistency of the EU legal order is affected by this development.

A different but also vital feature of the EU legal order that is affected by the EMU is transparency. When acting as legislators, European institutions should observe the rules of transparency and citizens must be entitled to gain access and to review the documents on which those decisions are based as a basic principle of democratic governance. However, in instances of integrated administration the European institutions are usually not acting as legislator, but as executive or administrative power. Although this does not exclude opportunities for reviewing their actions and decisions, the confidentiality of their actions can be justified when balanced against other public objectives. This is the case of monetary policy, where confidentiality was made the rule rather than the exception, as Van Cleynenbreugel explains in this *Special Section*.⁷¹ However, when banking financial supervision was transferred to the ECB, it raised doubts about to what extent the transparency of ECB actions depends on the matters it has to deal with (*ratione materiae*) or results from its own institutional provisions (*ratione personae*). In the former case new competences assigned to the ECB should in principle not be subject to the confidentiality regime. In the second case, the ECB would enjoy the restricted transparency regime whatever the activities it exerts, which could have implications for the expansion of ECB's activities. Naturally, banking supervision can justify in itself (thus *ratione materiae*) an extensive confidentiality regime.

Regarding the coordination of national economic policies, the developments have been similarly significant. The emergence of the European semester as the forum where to monitor and, if needed, adjust national fiscal decisions from an early stage of the budgetary process raises concerns from a democratic legitimacy perspective, because fiscal policy competences are national and, therefore, the Commission should not play more than a merely coordinative role.⁷² Despite that, it has gradually increased its influence over national budgets, to the point that the ambitious policy programs established during the pandemic are articulated through the European Semester and the permanent overview of the Commission it entails. However, the provision on regional funds that constitutes the legal basis for the RFF is not related to the EMU secondary

⁷⁰ M Chamon, 'The *Sui Generis* Framework for Implementing the Law of EMU: A Constitutional Assessment' (2021) European Papers www.europeanpapers.eu 1463.

⁷¹ P Van Cleynenbreugel, 'ECB Decision-making Within the Banking and Monetary Union: The Principle of Confidentiality on Its Way Out?' (2021) European Papers www.europeanpapers.eu 1437.

⁷² P Leino-Sandberg and F Losada, 'How to Make the European Semester More Effective and Legitimate?' (July 2020) European Parliament, Economic Governance Support Unit www.europarl.europa.eu.

law acts instituting the European semester.⁷³ This can lead to assume that, once the broad competence is European, actions at EU level can be adopted by EU institutions without restrictions. However, this would disregard the principle of conferral, which imposes limits and conditions to the use of competences at the European level and insists that there can be no unconditional conferral of competences to the Union. Thus using the European semester (in principle a bottom-up process established by secondary law) for the purposes of a policy entitling the Commission to assign resources on a top-down fashion, should raise doubts concerning the principle of conferral. Furthermore, there are indications that the Commission leverage the disbursing of funds to guarantee compliance with other policy programs – not to mention the formal conditionality on the observance of the rule of law.

When seen together, all these developments depict a Union where centripetal forces have been set in motion. This is most obvious regarding the ECB's expanding (monetary) policy programmes and the role of the Commission to guide and monitor national executives within the framework of the European Semester. It is also applicable, but perhaps less evident, regarding the Court and its interpretation of national law within the Banking Union, which would result on a gradual harmonization of the national supervisory regimes. As Fromage indicates in her contribution,⁷⁴ this concentration of power at European level demands adapting or reconceiving the EU's accountability structures, most of which were not designed with these innovations in mind. It thus seems that major efforts are still required to adjust the EU institutional system to core democratic requirements.

VI. CONCLUSION: FINANCIAL STABILITY AS CORNERSTONE OF THE POST-CRISIS EU LEGAL ORDER?

When seen with perspective, it is possible to identify several trends that have transformed both the form and content of European integration. When the Court declared that a new legal order resulted from the provisions of the Treaty of Rome, its interpretation stemmed from a coherent understanding of the institutional form (indirect administration) and substantive content (microeconomic integration) of European integration. The addition of the macroeconomic layer of integration, with its own institutional form (integrated administration and open method of coordination) but still broadly subject to the same legal order, resulted into a less consistent whole. The crises the Union faced during the last decade tested the resistance of these structures and, although the Court has been consistently interpreting EU law according to the same procedures and techniques without radical deviations, the irruption of financial stability as macroeconomic imperative has rearranged the equilibrium in integration. Now we can argue that insti-

⁷³ See the Six Pack and Two Pack cit.

⁷⁴ D Fromage, 'The Parliamentary Accountability of EMU Decisions: Between Informality and Fragmentation' (2021) European Papers www.europeanpapers.eu 1417.

tutional form, substantive content and legal order of European integration are again realigned, but instead of resulting from the provisions of the Treaties and from placing the legal rationality of law at the core of the system, financial stability is the rationale coherently arranging legal form, substantive content and institutional form.⁷⁵ Paradoxically enough, the autonomy of EU law and the central role to be played by the Court has been crucial in this change of paradigm. The consequences of this rearrangement for the EU legal order are the object of study of this *Special Section*.

⁷⁵ J de Miguel Bárcena, 'Estabilidad Financiera en Entornos Federales: la Nueva Constitución Económica del Riesgo' (2016) *Revista de Derecho Constitucional Europeo* 49.



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

EMU IN THE CASE LAW OF THE UNION COURTS: A GENERAL OVERVIEW AND SOME OBSERVATIONS

ALLAN ROSAS*

TABLE OF CONTENTS: I. Introduction. – II. Four main categories of CJEU cases. – II.1. EMU and the euro and debt crisis in general. – II.2. Problems of multilevel decision-making. – II.3. Questions of liability and responsibility. – II.4. Issues relating to the Banking Union. – III. Concluding observations.

ABSTRACT: The main objective of this *Article* is to map and categorize the CJEU's case law relating to EMU. Although in purely quantitative terms, this is not a huge task, there are already enough relevant court rulings, up to 31 December 2020, to enable the establishment of a taxonomy distinguishing between four different categories of EMU-related case law. The first and foremost category will comprise cases dealing with the fundamentals of EMU, including clarifying the distinction between monetary policy and economic and other policies. This category includes a number of well-known cases of great political importance, such as *Pringle* ECLI:EU:C:2012:756, *Gauweiler* ECLI:EU:C:2015:400, *Weiss* ECLI:EU:C:2018:1000, *Kotnik* ECLI:EU:C:2016:570 and *Florescu* ECLI:EU:C:2017:448. A second category relates to the nature of the EU as a system of multilevel governance and the need to determine whether the competence to act is at national or Union level or a mix of the two. Cases in point include *UK v ECB (security clearing)* ECLI:EU:T:2015:133, *Berlusconi* ECLI:EU:C:2018:1023 and *Rimšēvičs* ECLI:EU:C:2019:139. A third group of cases relates to issues of responsibility and liability, including questions of the liability of "abnormal" EU bodies or settings such as the Troika or the Euro Group. Fourth, especially the Banking Union has triggered cases relating to prudential supervision and other more technical issues. This analysis will be completed by some concluding remarks, including the question of the intensity of judicial control (standard of review), viewing the EMU case law in a broader context.

KEYWORDS: Court of Justice – case law – judicial review – EMU – euro crisis – banking union.

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I. INTRODUCTION

While the Court of Justice of the European Union (CJEU)¹ has since its beginning been an important part of the European Union institutional framework and played a crucial role in the shaping of European economic and political integration, the last 20 years or so have marked an even greater role for the two Union Courts in Luxembourg, the European Court of Justice and the General Court, in dealing with issues of considerable economic, political and constitutional significance. This development has led me to ask whether, in the context of European affairs, “all roads lead to Luxembourg” and whether the Luxembourg courts have become the final arbiter of all major problems facing the EU today.²

If put in these terms, the answer to the question is “no”. Not all major problems are submitted to these courts, as some of these problems are dealt with by the national courts of the EU Member States (which are to be considered as forming part of the EU judicial system in the broad sense)³ while others are solved – or regrettably often not solved – by the EU political institutions, the Commission, the Council and the European Parliament (EP), or other EU bodies such as the agencies. It should in any case be recalled that the Union are not in full control of their docket, as cases can only be brought before them by national courts, EU institutions or bodies, EU Member States or private parties.

Yet, it is undeniable that the Union Courts have become more and more involved in settling disputes which are deemed to be important, catch the public eye and, especially since the entry into force of the Lisbon Treaty in 2009, cover a broad range of issues including sensitive areas such as asylum and immigration, criminal law, respect for the rule of law, including the independence and impartiality of the judiciary, and Brexit (the UK’s withdrawal from the Union).

One particular area where the role of judicial control has gained a lot of attention of late is the Economic and Monetary Union (EMU) area. The EMU regime has raised monetary and economic issues that were not previously issues of Union law nor were such issues generally perceived as judicial questions anywhere in the world. Also in the EU, the first decade of the common currency saw very few EMU related issues being brought before the courts. However, during the last ten or so years, the EMU regime has triggered tens of cases before the Union Courts, some of which may be considered vitally important for the future of EMU and even the EU itself.

One of the aims of the present *Article* is simply to map and roughly categorise the EMU-related case law of the CJEU up to the end of 2020, with a certain emphasis on ECJ case law,

¹ According to art. 19(1) TEU, the broader institutional concept of the “Court of Justice of the European Union” includes the Court of Justice, the General Court and specialised courts. The EU Civil Service Tribunal having been dissolved in 2016, there are at the time of writing no specialised tribunals.

² A Rosas, ‘The European Court of Justice: Do All Roads Lead to Luxembourg?’ (CEPS Policy Brief 3/2019).

³ See, e.g. A Rosas, ‘The National Judge as EU Judge: Some Constitutional Observations’ (2014) *SMU Law Review* 717.

as most of the more important cases have been handled by this Court rather than the General Court.⁴ The notion of EMU-related case law will be understood here in a broad sense, to include, *inter alia*, issues relating to the application of the legislation concerning the Banking Union.⁵ Space does not allow a detailed analysis of individual decisions of the Union Courts. On the other hand, some concluding observations will be made on certain aspects which seem particularly relevant in an EMU context, such as the question of the intensity of judicial review and that of the interaction between Union law and national law.

The perspective will be that of a former judge of the ECJ, who is not to be considered an expert on EMU. In fact, it has to be realised that, given the broad and varied range of issues facing the Union courts, the judges of the ECJ, and to an increasing degree also the General Court, are supposed to be generalists rather than experts on particular areas of law. Trusting the judicial review of EMU rules and decisions to such a generalist court carries with it the advantages and disadvantages of any judicial review carried out by any court with a general rather than specialised mandate. In the view of the present author, the advantages outweigh the disadvantages, but this, of course, is a matter of opinion.

II. FOUR MAIN CATEGORIES OF CJEU CASES

It seems possible and instructive to distinguish between four main categories of EMU relevant case law: *i*) general questions relating to the nature and functioning of EMU in a situation of serious disturbance of the economy and financial system such as the euro and debt crisis starting in 2007,⁶ including the powers of the European Central Bank (ECB) and the possibility of financial assistance to Member States in particular difficulties; *ii*) issues of division of competence and powers between Union institutions and bodies and national authorities and between Union institutions and bodies themselves (problems of multilevel governance); *iii*) questions relating to responsibility and liability, notably actions for damages brought by private parties and financial sanctions against Member States; *iv*) more technical issues related to the Banking Union in particular, including the

⁴ The most important EMU-related cases have usually been initiated as requests for preliminary rulings submitted by national courts by virtue of art. 267 TFEU. All preliminary rulings are handled by the ECJ while the General Court is principally engaged with actions for annulment brought by private parties under art. 263 TFEU. Infringement actions brought by the European Commission against a Member State under art. 258 TFEU, or by a Member State against another Member State under art. 259 TFEU, are handled by the ECJ but in the EMU area, art. 126(10) TFEU excludes the right to bring infringement actions under paras 1-9 of this article (which deals with the avoidance of excessive government deficits).

⁵ For an overview of EMU-related law, including the Banking Union, see, e.g. A Rosas and L Armati, *EU Constitutional Law: An Introduction* (Hart 2018) 224.

⁶ On the constitutional aspects of the euro and debt crisis see, e.g. Ka Tuori and KI Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); A Rosas and L Armati, *EU Constitutional Law* cit. 224 ff.

question of prudential supervision of banks. It should be underlined that this is a rough categorisation; there is a certain overlap between these categories.

II.1. EMU AND THE EURO AND DEBT CRISIS IN GENERAL

Cases belonging to the first category include probably the most well-known EMU relevant cases decided by the ECJ, notably *Pringle*, *Gauweiler and Others* (hereinafter *Gauweiler*) and *Weiss and Others* (hereinafter *Weiss*).⁷ All three cases, which were initiated as requests for preliminary rulings by national courts, *Pringle* by the Irish Supreme Court and *Gauweiler* and *Weiss* by the German Federal Constitutional Court, relate in one way or another to the euro and debt crisis or its aftermath. Some cases of general institutional interest, two of which preceded the euro and debt crisis, will be mentioned in section II.2 below.

The main legal question raised in *Pringle* was whether Union law allowed the establishment of a permanent stability mechanism, the European Stability Mechanism (ESM), to provide financial assistance to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, not by a Union legal act but by an inter-governmental treaty.⁸ The answer of the ECJ was in the affirmative. It was based on an analysis of a number of TEU and TFEU provisions of relevance for EMU, such as the no-bail-out clause in art. 125 TFEU, which prohibits the Union and Member States from being liable for, or assume the commitments of, other Member States. The Court held that on certain conditions (such as strict conditionality) the granting of financial assistance is not covered by that provision, as the granting of such assistance in accordance with the ESM Treaty “in no way implies that the ESM will assume the debts of the recipient Member State”.⁹ The judgment, *inter alia*, also deals with the distinction between economic and monetary policy (concluding that the ESM regime belonged to the realm of economic policy, which unlike monetary policy is not an area of Union exclusive competence)¹⁰ and the possibility of Union institutions (in this case the Commission, the ECB and the ECJ) to be involved in the functioning of the ESM, despite its intergovernmental nature.¹¹

From a general constitutional point of view, it is to be noted that in *Pringle*, the ECJ affirmed that despite the general lack of jurisdiction of the Court to rule on the validity of Union primary law (such as the TEU and the TFEU), that does not prevent the Court from

⁷ Case C-370/12 *Pringle* ECLI:EU:C:2012:756; case C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400; case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

⁸ *Pringle* cit. The predecessors of the ESM were the European Financial Stabilisation Facility (EFSF), established in 2010 on an intergovernmental basis, and the European Financial Stabilisation Mechanism (EFSM), established in the same year but by a Union legislative act. On the functioning of these financial support mechanisms see European Stability Mechanism, *Safeguarding the Euro in Times of Crisis: The Inside Story of the ESM* (Publications Office of the European Union 2019).

⁹ *Pringle* cit. para. 139.

¹⁰ *Ibid.* paras 55-63, 93-98.

¹¹ *Ibid.* paras 153-177.

examining the validity of a European Council decision, adopted under the so-called simplified revision procedure by virtue of art. 48(6) TEU, to amend art. 136 TFEU (the provision was amended by inserting a reference to the possibility of Member States to establish a stability mechanism).¹² This was so because the Court must be able to determine whether the conditions for applying the simplified revision procedure had been complied with.

The status of the ESM and the role of the Commission and the ECB in the activities of the ESM also became relevant in cases concerning the restructuring of the Cyprus banking sector. In *Mallis and Malli v Commission and ECB* (hereinafter *Mallis*), annulment of a statement was sought from the Euro Group, which is a framework for informal meetings of ministers from euro Member States.¹³ In dismissing the action, the General Court and the ECJ based their reasoning not only on the informal nature of the Euro Group but also, in line with what had already been stated in *Pringle*, observed that the Commission and the ECB did not have decision-making powers in the framework of the ESM. These two institutions could not have a wider role in the Euro Group than in the ESM, as it was the latter that had concluded a memorandum of understanding with Cyprus and the contested Euro Group statement was of a purely informative nature. Another Cyprus-related case involving an action for compensation against the Commission and the ECB relating to the ESM will be commented upon below (section II.3).

Gauweiler and *Weiss* both concerned the legality of programmes of the European System of Central Banks (ESCB) to purchase government bonds on the secondary market, that is, not directly from governments but from unspecified owners through the capital markets. In *Gauweiler* the programme, which was termed Outright Monetary Transactions (OMT), was limited to countries subject to the conditionality attached to a European Financial Stability Facility (EFSF) or ESM programme.¹⁴ The OMT programme, while announced by the ECB in August and specified in September 2012, was never implemented to actually buy government bonds, however. This fact and some other peculiarities of the programme led many governments to invite the ECJ not to reply to the questions put by the national court. However, in line with the presumption of relevance the ECJ normally attaches to requests for preliminary rulings – and perhaps also because the requesting court was the German Federal Constitutional Court, which had never before submitted a case to the ECJ – the Court did reply (although in view of the non-implemented nature of the programme, the Court could well have declined to answer).

¹² *Ibid.* paras 30–38. See also A Rosas and L Armati, *EU Constitutional Law* cit. 239.

¹³ Joined cases C-105/15 P, C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702. The status and task of the Euro Group, which are laid down in Protocol No 14 annexed to the TEU and the TFEU, have been further clarified in case C-597/18 *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028 referred to in section II.3.

¹⁴ *Gauweiler* cit.

The Court held that the relevant provisions of the TFEU and of the Statute of the ESCB and of the ECB did permit the ESCB to adopt the OMT programme. The main issues considered in the judgment were the definition of monetary policy (the programme was held to fall under monetary policy and thus the remit of the ESCB, although it could have some secondary effects for economic policy),¹⁵ the question whether the principle of proportionality had been respected¹⁶ and whether the programme was in conformity with art. 123 TFEU,¹⁷ which, *inter alia*, prohibits the ESCB from purchasing debt instruments “directly” from Member States (including governmental bodies).

The ECJ judgment in *Gauweiler* was not greeted with any enthusiasm by the German Federal Constitutional Court, which nevertheless came to the conclusion – albeit grudgingly – that the outcome could be tolerated.¹⁸ The tension which could be seen between the approach of the ECJ and that of the German court was brought into open conflict in the context of *Weiss*.¹⁹ This ECJ judgment concerned a more recent secondary markets public sector asset purchase programme (PSPP). As the programme was based on a legal act (an ECB decision),²⁰ the ECJ was asked to rule not only on the interpretation of relevant provisions of the Treaties (in this case art. 4(2) TEU relating to national constitutional identity and arts 123 and 125 TFEU referred to above) but also on the validity of the ECB Decision. Despite the strong doubts as to the legality of the programme expressed by the German Federal Constitutional Court, the ECJ ruled that consideration of most of the questions asked (a question relating to the sharing of losses of national central banks was declared inadmissible by the ECJ) disclosed no factor of such a kind as to affect the validity of the ECB Decision.

With respect to the definition of monetary policy and the distinction between it and economic policy the judgment builds on and develops what was already said in *Pringle* and *Gauweiler*. The Court observed, *inter alia*, that “the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies”.²¹ With regard to the aim of the ECB programme to avoid deflation and achieve annual inflation rates closer to two per cent, the Court observed that “in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought – to different ends – in the context of economic policy”.²² The part of the judgment dealing with the principle of proportionality is in line with what the Court said in *Gauweiler* and is based on the traditional approach of the Court to the intensity

¹⁵ *Ibid.* paras 42-65.

¹⁶ *Ibid.* paras 66-92.

¹⁷ *Ibid.* paras 93-126.

¹⁸ German Federal Constitutional Court judgment of 21 June 2016 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

¹⁹ *Weiss* cit.

²⁰ Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme with later amendments.

²¹ *Weiss* cit. para. 60. See also paras 50-73.

²² *Ibid.* para. 66.

of judicial review in situations where Union bodies are required to make choices of a technical nature and to undertake complex forecasts and assessments (see further below).²³ Finally, the judgment, while again building on the judgment in *Gauweiler*, discusses in some detail the interpretation of art. 123 TFEU and in particular the conditions that the asset purchasing programme is not *de facto* taking place in the primary market, by making the private investor merely an intermediary of the ESCB, or does not encourage the Member State in question to follow sound budgetary principles.²⁴

As is well known, the Court's ruling that these conditions were fulfilled and the reasoning given did not convince the requesting national court, which, by referring, *inter alia*, to the principles of conferral and democratic legitimation and the need to uphold a clear distinction between monetary and economic policy, ruled that the judgment constituted an *ultra vires* act that was not binding upon the Federal Constitutional Court.²⁵ In its view, the ECJ judgment was not comprehensible and therefore had to be considered arbitrary. This was because the ECJ had not carried out a proper proportionality assessment, demonstrating that the effects on economic policy did not go too far. Failure of the ECB to carry out such an assessment also vitiated its decisions. While German institutions such as the Federal Government and the Central Bank had an obligation not to comply with such *ultra vires* acts, the Constitutional Court accorded these two institutions a period of three months to verify that a new ECB decision demonstrate that the programme was proportionate.

No such decision has been adopted by the ECB, which does not consider itself bound by the German Constitutional Court's judgment. The ECB has on the other hand cooperated with the German Central Bank (which, of course, is a member of the ESCB) with respect to information of relevance for a proportionality assessment.²⁶ In view of this information, the German Federal Government and the Central Bank have determined that the Bank may as a member of the ESCB continue to participate in the PSPP.²⁷ It is too early to say what, if any, will be the reaction of the Constitutional Court to these declarations and any new information being made available to it, including complaints by the litigants. If the Court were to prohibit the Central Bank from participating in the PSPP and the latter complied, the ECB could, under art. 35(6) of the Statute of the ESCB and the ECB, bring an infringement action against the Central Bank before the ECJ. The problems arising from the judgment of the German Federal Constitutional Court, as compared with the ECJ judgment, will be further commented upon below (section III).

²³ *Ibid.* paras 71-100.

²⁴ *Ibid.* paras 101-158.

²⁵ German Federal Constitutional Court judgment of 5 May 2020 2 BvR 859/15 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16.

²⁶ See, e.g. ECB, *Press release – ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate in European Central Bank* (5 May 2020) www.ecb.europa.eu. In March 2020, the ECB initiated a Covid19 pandemic emergency purchase programme (PEPP), initially amounting to 750 billion euro and in June increased by an additional 600 billion.

²⁷ See, e.g. D Utrilla, 'Three Months after Weiss: Was Nun?' (5 August 2020) EU Law Live eulawlive.com.

There are some other judgments which can be mentioned in the context of the first category, as they relate to special measures that the Union and Member States instigated with a view to mitigating the disturbance of the economy and financial system and the threat to the financial stability of the Union caused by the euro and debt crisis. To mention briefly a few examples, in *Kotnik and Others* (hereinafter *Kotnik*) the main issue was the conditions relating to burden-sharing and the writing off equity capital and so-called subordinated debt that could be attached to the granting of state aid to banks in the context of the financial crisis and the legal nature of a Commission Communication to that effect.²⁸ In *Dowling and Others* (hereinafter *Dowling*), at issue were measures to re-capitalise a national bank by an increase in share capital and the issuance of new shares in a manner derogating from a Union company law directive²⁹ but called for by the need to overcome the Irish banking crisis and implement the programme of Union financial assistance to Ireland under the EFSM³⁰ and a Memorandum of Understanding (MoU) entered into between the Commission and Ireland.³¹ *Florescu and Others* also related to a financial assistance programme but in this case in favour of a non-euro Member State (Romania) facing difficulties as regards the balance of payments.³² At issue was not the legality of the programme as such but the legality of particular austerity measures imposed by national law, including in the light of fundamental rights.³³ A somewhat similar problem arose in a case concerning austerity measures affecting the salaries of Portuguese judges and whether those measures constituted a violation of the principle of independence and impartiality of judges.³⁴

²⁸ Case C-526/14 *Kotnik and Others* ECLI:EU:C:2016:570. In its replies to questions put by the Slovenian Constitutional Court, the ECJ largely upheld the conditions formulated in the Commission Communication.

²⁹ Second Council Directive 77/91/EEC of the European Council of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.

³⁰ See Regulation (EU) 407/2010 of the European Council of 11 May 2010 on establishing a European financial stabilisation mechanism.

³¹ Case C-41/15 *Dowling and Others* ECLI:EU:C:2016:836. The ECJ concluded that the company law directive did not preclude the special measures, which were taken in a situation of "serious disturbance of the economy and the financial system of a Member State threatening the financial stability of the European Union" (*Dowling* cit. para. 55).

³² See art. 143 TFEU and Regulation (EC) 332/2002 of the European Council of 18 February 2002 on establishing a facility providing medium-term financial assistance for Member States' balances of payments, as amended.

³³ Case C-258/14 *Florescu and Others* ECLI:EU:C:2017:448. The ECJ held that the concrete measures undertaken under national law (implying the lowering of income of some judges) were not required by the Union programme but were measures of national law and moreover that they were not in violation of fundamental rights.

³⁴ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117. The Court concluded that the austerity measures were not far-reaching enough to compromise the independence of the judges concerned.

It is evident that the case law discussed above raises fundamental issues of constitutional significance. The question that seems to be horizontally most relevant for Union law in general is the problem dealt with in *Pringle* in particular concerning the conditions for introducing, in a broader EU context, intergovernmental mechanisms such as the ESM which are formally outside Union law strictly speaking. Another aspect of general interest is the question of the intensity of judicial control when the Court is faced with complex questions of an economic nature. While the cases discussed here certainly raised novel issues relating specifically to the EMU regime it should, on the other hand, be recalled that dealing with “law and economics” was not something entirely new for the Court, as the traditional emphasis of Union law used to be on such areas as agricultural law, the four economic freedoms and competition and state aid law. Of more specific EMU relevance is the important distinction between monetary and economic policy which was at issue in *Gauweiler* and *Weiss* in particular. Problems of a constitutional nature have been also addressed in some cases more specifically dealing with institutional questions and issues of multilevel decision-making. It is to such questions I shall now turn.

II.2. PROBLEMS OF MULTILEVEL DECISION-MAKING

The EU should more and more be seen through the lens of multilevel constitutionalism and multilevel governance.³⁵ This implies, inter alia, that Union law, including Union institutions, bodies, offices and agencies, and national law, including national authorities, are increasingly intertwined.³⁶ EMU law, including Banking Union law,³⁷ offers ample illustration. The use of both Union and national bodies, and Union bodies at different levels, in the pursuit of common goals inevitably raises questions as to which level is primarily competent and bears main responsibility for the carrying out of certain tasks. Some of these questions have been put to the Union Courts as well.

At the outset, two cases should be mentioned which predate the euro and debt crisis. The institutionally more important of the two is *Commission v Council*, dealing with an initiative to instigate sanctions against France and Germany for failure to respect the deficit limits of the Stability and Growth Pact (SGP).³⁸ The Court annulled a Council decision to hold the excessive deficit procedure “in abeyance for the time being”, ruling that while the responsibility for ensuring compliance with the SGP lied essentially with the Council, the procedures laid down in art. 126 TFEU were not at its discretion. The outcome did not change the fact that the procedure under art.126 TFEU was very much controlled by the

³⁵ See, e.g. A Rosas and L Armati, *EU Constitutional Law* cit. 48, 50-51, 77, 85, 98, 102, 294.

³⁶ A Rosas, ‘International Law – Union Law – National Law: Autonomy or Common Legal System?’ in D Petrlik, M Bobek and JM Passer (eds), *Évolution des rapports entre les ordres juridiques de l’Union européenne, international et nationaux: Liber Amicorum Jiří Malenovský* (Bruylant 2020) 261.

³⁷ On the Banking Union see, e.g., G Bándi, P Darák, A Halustyik and PL Láncos (eds), *FIDE XXVII Congress European Banking Union, Congress Proceedings* (Wolters Kluwer, 2016).

³⁸ Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

Council and that the possibility of sanctions against Member States that failed to respect the deficit limits remained subject to political rather than legal considerations. Efforts to make the excessive deficit procedure and economic and fiscal surveillance more robust have been made in the context of the euro and debt crisis (e.g. the so-called Six and Two Pack legislation) but the emphasis has been on preventive measures and conditionality for financial assistance rather than sanctions.³⁹

The other case preceding the euro and debt crisis worth signalling here is a case brought by the Commission against the ECB relating to the powers of the European Anti-Fraud Office (OLAF) with regard to the ECB.⁴⁰ The Court annulled an ECB decision based on the idea that a regulation concerning OLAF's investigatory powers⁴¹ would not be applicable to the Bank. The judgment confirms the broad scope of powers of OLAF.

With respect to more recent cases, in *United Kingdom v Parliament and Council*, the former contested the powers of intervention concerning short selling and certain aspects of credit default swaps conferred on the European Securities and Markets Authority (ESMA), a Union agency.⁴² The case concerned the delegated powers of ESMA both as compared with Union legislative and executive institutions and national authorities. The ECJ dismissed the action in its entirety, implying that the legality of the provision empowering ESMA to adopt certain decisions relating to short selling and credit default swaps was upheld.⁴³ The United Kingdom was more successful in an action against the ECB brought before the General Court, in which it sought the annulment of a policy framework published by the ECB, in so far as it set a requirement for so-called central counterparties (CCPs) involved in the clearing of securities to be located in a Member State party to the Eurosystem (in other words, the policy framework ruled out the location of such clearing-house activities in the UK).⁴⁴ Referring, *inter alia*, to the principle of conferral and the wording of various texts of primary and secondary law, the General Court made a distinction between payment clearing systems and securities clearing systems and held that the ECB lacked competence to regulate the activities of the latter, including a competence to lay down a location requirement for CCPs.

Some of the cases brought before the Union Courts relate to regulatory procedures involving both Union and national authorities in the course of the same procedure. In *Berlusconi and Fininvest* (hereinafter *Berlusconi*), the main issue was the legal nature of the

³⁹ A Rosas and L Armati, *EU Constitutional Law* cit. 231-236. But see case C-521/15 *Spain v Council* ECLI:EU:C:2017:982 referred to in section II.3.

⁴⁰ Case C-11/00 *Commission v ECB* ECLI:EU:C:2003:395.

⁴¹ Regulation (EC) 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

⁴² Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18.

⁴³ The contested provision was Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, art. 28.

⁴⁴ Case T-496/11 *United Kingdom v ECB* ECLI:EU:T:2015:133.

involvement of a national banking authority (the Italian Central Bank) in a procedure leading to the adoption, by the ECB, of a definitive decision approving or rejecting the acquisition of a qualifying holding in a credit institution and the jurisdiction of national courts to review the legality of preparatory acts adopted by the national authority.⁴⁵ Referring above all to the fact that the preparatory acts were not binding on the ECB, the ECJ held that the Union Courts had exclusive jurisdiction to review the validity of the ECB decision and, as an incidental matter, to determine whether the preparatory national acts were vitiated by defects such as to affect the validity of the ECB decision. National courts were thus precluded from hearing an action contesting the conformity of the preparatory acts with Union or national law. The relation between the ECB and national authorities was also present in an action for annulment brought by a German bank contesting the decision of the ECB to subject the bank solely to the ECB's supervision under the system of prudential supervision of credit institutions.⁴⁶

In *Rimšēvičs v Latvia* (hereinafter *Rimšēvičs*), the decision of the national authority at issue was not a preparatory act but the very decision the annulment of which was sought, not from a national court but from the ECJ.⁴⁷ While the Union Courts may not, as a general rule, annul national decisions (although they may determine the incompatibility of a national rule or decision with Union law), the ECJ in this case annulled the decision of the Latvian Anti-Corruption Office to temporarily prohibit the Governor of the Central Bank of Latvia from performing his duties. The outcome is explained by the particular status of national central banks as part of the ESCB and an express provision (art. 14.2.) in the Statute of the ESCB and of the ECB, which provides that a national decision to relieve a Governor from office “may be referred to the ECJ by the Governor concerned or the Governing Council” of the ECB. The Court classified such an action as an action for annulment, akin to actions under art. 263 TFEU. The Court, in its reasoning, observed that the ESCB “represents a novel legal construct in EU law” which brings together national institutions and a Union institution and constitutes a “highly integrated system” including “a dual professional role” and a “hybrid status” of the governor of a central bank.⁴⁸ This constellation (relation between the ECB and national central banks) was also at issue in an infringement case initiated by the Commission against Slovenia, which concerned the search and

⁴⁵ Case C-219/17 *Berlusconi and Fininvest* ECLI:EU:C:2018:1023.

⁴⁶ The action was first brought before the General Court, which dismissed the action (see case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337). The judgment was upheld by the ECJ on appeal in case C-450/17 P *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:C:2019:372.

⁴⁷ Joined cases C-202/18 and C-238/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139.

⁴⁸ See also A Rosas, ‘International Law – Union Law – National Law: Autonomy or Common Legal System?’ cit. 279; T Tridimas and L Lonardo, ‘When Can a National Measure be Annulled by the ECJ?’ (2020) ELR 732, 744 who refer to the judgment as forming part “of a trajectory of increasing hybridity where traditional boundaries between EU and State action break down”.

seizure operations carried out by national law enforcement authorities in the premises of the national central bank, without coordination with the ECB.⁴⁹

When looking at the cases referred to in this section, two major observations come to mind. First, some of the cases concern the powers of various Union institutions and the question who is responsible for what. While at issue have been specific powers as defined in different components of the EMU regime, it is difficult to discern any EMU-specific feature in the approach of the Court to the nature and intensity of judicial review (in other words, the Court seems generally to have dealt with these cases as any question relating to the delimitation of the powers of Union institutions). The second observation takes us beyond the powers of Union institutions and bodies in the strict sense and raises the question, dealt with in some of the cases considered (notably *Berlusconi* and *Rimšēvičs*), of the involvement of national authorities in broader EU regimes and the interplay between Union and national bodies. While these cases do relate to the specificities of the Banking Union, they at the same time bring to the fore a general tendency in EU constitutional developments, implying an increased involvement of the national level in EU decision-making.⁵⁰

II.3. QUESTIONS OF LIABILITY AND RESPONSIBILITY

It is not surprising that the euro and debt crisis, and the measures to mitigate it and to restore the financial stability of the euro area, have triggered litigation relating to issues of liability and responsibility, in particular claims for compensation for damages alleged to have been caused by Union institutions or bodies. Under this heading account will be taken both of cases concerning liability and damages and of a case relating to financial sanctions against Member States. The consideration of relevant cases will be of a summary nature and provide examples rather than an exhaustive presentation.

Some of the cases relate to measures taken in the context of the particular difficulties facing Greece. At least two actions were brought by private investors and commercial banks respectively against the ECB in view of the measures taken by the Bank with regard to the restructuring of the Greek public debt and the related cut in the values of bond holdings.⁵¹ These actions were dismissed by the General Court. An action against the EU Council brought by private persons whose pensions had been reduced suffered the same result.⁵² The General Court, in dismissing these actions, referred, in addition to a number of arguments relating to the conditions for invoking the non-contractual liability of the Union, to the broad discretion conferred on the ECB, the exercise of which entails complex evaluations of an economic and social nature and of rapidly changing situations.⁵³

⁴⁹ Case C-316/19 *Commission v Slovenia* (*Archives de la BCE*) ECLI:EU:C:2020:1030, referred to in section II.4.

⁵⁰ A Rosas, 'International Law – Union Law – National Law: Autonomy or Common Legal System?' cit.

⁵¹ Case T-79/13 *Accorinti and Others v ECB* ECLI:EU:T:2015:756 and case T-749/15 *Nausicaa Anadyomène and Banque d'escompte v ECB* ECLI:EU:T:2017:21.

⁵² Case T-531/14 *Sotiropoulou and Others v Council* ECLI:EU:T:2017:297.

⁵³ See, e.g. *Accorinti and Others v ECB* cit. para. 68.

As already noted above (section II.1), the banking crisis affecting Cyprus and the measures involving a restructuring of the financial sector triggered not only actions for annulment but also compensation demands corresponding to the diminution in value of bank deposits. In *Ledra Advertising v Commission and ECB* (hereinafter *Ledra*), an action brought against the European Commission and the ECB sought both the annulment of parts of a MoU concluded between Cyprus and the ESM but signed by the Commission on behalf of the ESM, and compensation.⁵⁴ With respect to the latter, the General Court held that it lacked jurisdiction in so far as the actions for compensation were based on the illegality of the MoU, as this could not be imputed to the Commission or the ECB. On this point the ECJ disagreed, distinguishing between actions for annulment and actions for compensation. In view of the role played by the ECB and Commission in the conclusion of the MoU, including the obligation of the Commission to ensure that the MoU was not in breach of Union law, it could not be excluded that these two institutions could incur liability. On substance, however, the actions were dismissed as there was no violation of art.17 of the EU Charter of Fundamental Rights (right to property).

It should also be mentioned that there is a recent case where the applicants claimed compensation not only from Union institutions in the strict sense but also the Euro Group, which according to Protocol No. 14 on the Euro Group annexed to the TEU and the TFEU is a forum enabling ministers from euro Member States to “meet informally”. While the General Court found also this aspect of the action admissible, the Advocate General of the ECJ proposed to set aside that part of the judgment and to uphold the plea of admissibility raised by the Council.⁵⁵ The judgment of the Court, in agreeing with the Advocate General that the actions directed against the Euro Group be declared inadmissible, confirmed the informal nature of this body.⁵⁶

Finally, the possibility of imposing financial sanctions against a Member State for breach of Union legislation relating to economic and budgetary surveillance⁵⁷ has given rise to at least one case before the ECJ. On the recommendation of the Commission, the Council adopted a decision imposing a fine on Spain for the manipulation of deficit data, in accordance with a regulation relating to the effective enforcement of budgetary surveillance in the euro area.⁵⁸ Spain contested the decision before the ECJ, which dismissed the action, finding, *inter alia*, that there had been no infringement of the right to defence, the right to good

⁵⁴ Joined cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* ECLI:EU:C:2016:701.

⁵⁵ Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzzella.

⁵⁶ Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:1028.

⁵⁷ On the so-called Six Pack and Two Pack legislation relating to economic and budgetary surveillance see A Rosas and L Armati, *EU Constitutional Law: An Introduction* cit. 229-236.

⁵⁸ 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.

administration or the applicable legislation and that the fine imposed (18,93 million euro) was not disproportionate.⁵⁹

As already mentioned at the beginning of section II.2, the main emphasis in fiscal and budgetary surveillance has been on preventive measures and conditionality related to financial assistance to Member States in difficulties. It is the latter aspect in particular that has triggered a series of cases where private parties have claimed for damages invoking the liability of Union institutions. Such actions have generally failed and this arguably for two main reasons: first, the involvement of the Union institutions has been atypical, and the granting of assistance has been at least formally in the hands of intergovernmental mechanisms such as the ESM. Second, the threshold for obtaining compensation is probably higher in situations of severe crisis, where the authorities cannot be expected to act with exactly the same degree of diligence as in “normal” circumstances. That said, the ECJ has not been blind to the realities surrounding the granting of crisis aid and imposing conditions in that regard, refusing to free Union institutions from all liability. Finally, that only one case concerns sanctions taken against a Member State confirms the limited role played by such repressive measures in the area of economic and fiscal surveillance.

II.4. ISSUES RELATING TO THE BANKING UNION

There are a number of other court cases relating in one way or another to the Banking Union but which do not clearly fall under any of the three categories dealt with above. As many of them are of a primarily technical nature reference will only be made briefly to some examples.

Most of the cases at issue relate to the application of a regulation conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and some related legal acts pertaining to the Banking Union.⁶⁰ A number of actions for annulment of various decisions of the ECB were brought by credit institutions before the General Court. To mention but a few examples, some cases concerned how the prudential supervision was to be organised in the case of a group consisting of different entities and the submission of the group to prudential supervision on a consolidated basis and the consequence of such consolidated supervision e.g. for capital requirements.⁶¹ Some other cases concerned the discretionary powers of the ECB in refusing to accept the exclusion of certain conditions from the so-called leverage ratio.⁶² In this context it could also be noted

⁵⁹ Case C-521/15 *Spain v Council* ECLI:EU:C:2017:982.

⁶⁰ Regulation (EU) 1024/2013 of the Council of the European Union of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

⁶¹ Case T-712/15 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:900 and case T-52/16 *Crédit mutuel Arkéa v ECB* ECLI:EU:T:2017:902. These actions were dismissed.

⁶² Suffice it to mention here the case numbers of some of these cases: case T-745/16 *BPCE v ECB* ECLI:EU:T:2018:476, case T-751/16 *Confédération nationale du Crédit mutuel v ECB* ECLI:EU:T:2018:475, case T-

that in a recent judgment, Slovenia was condemned for having unilaterally seized at the premises of the Central Bank of Slovenia documents connected to the performance of the tasks of the European System of Central Banks and of the Eurosystem.⁶³

From a more general Union law point of view, the most interesting case is *ECB v Trasta Komercbanka and Others* (hereinafter *Trasta Komercbanka*), which concerns the representation of a party (a bank) in its action for annulment against the ECB decision to withdraw the bank's authorisation. This took place in a situation where the bank had become insolvent and the liquidator withdrew the power of attorney of the lawyer representing the bank and where also the shareholders of the bank brought an action for annulment.⁶⁴ The ECJ, in disagreeing with the findings of the General Court, held that the bank, by virtue of its right to effective judicial protection, could still be represented by the lawyer who had brought the case, despite the liquidator having revoked his power of attorney, but, on the other hand, that the shareholders were not directly concerned by the ECB decision to withdraw the authorisation and thus did not have *locus standi*.

Finally, the Single Resolution Mechanism introduced in the framework of the Banking Union (its "second pillar") and the system of *ex ante* contributions that banks have to make to the Single Resolution Fund and to a national resolution fund in particular⁶⁵ has given rise to at least two cases, one a preliminary ruling procedure before the ECJ and the other an action for annulment before the General Court. In *Iccrea Banca*, the main issue was the calculation of the contributions to a national resolution fund.⁶⁶ In three recent actions for annulment brought by German banks, the General Court annulled the decisions of the Single Resolution Board concerning the calculation of the annual contributions to the Single Resolution Fund on several grounds, including failure to state reasons.⁶⁷

As was the case with some of the cases considered in section II.2 above, the cases considered in the present section relate principally to the institutional aspects of the Banking Union and the respective powers of the ECB and other bodies. While these cases are not generally of constitutional significance, they demonstrate a fairly regular involvement of the General Court and/or the ECJ in the judicial control of decisions pertaining to the Banking Union and seem to suggest that judicial review in this area is fairly robust.

757/16 *Société Générale v ECB* ECLI:EU:T:2018:473, case T-758/16 *Crédit Agricole v ECB* ECLI:EU:T:2018:472 and case T-768/16 *BPN Paribas v ECB* ECLI:EU:T:2018:471. In all these cases, the decisions of the ECB were annulled.

⁶³ *Commission v Slovenia* (Archives de la BCE) cit.

⁶⁴ Joined cases C-663/17 P, C-665/17 P and C-669/17 P *ECB v Trasta Komercbanka and Others* ECLI:EU:C:2019:923.

⁶⁵ See, e.g. Commission Delegated Regulation (EU) 2015/63 of the European Commission of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to the payments of contributions to resolution financing arrangements.

⁶⁶ Case C-414/18 *Iccrea Banca* ECLI:EU:C:2019:1036. The ECJ concluded that certain liabilities could not be excluded from the calculation of contributions.

⁶⁷ Case T-411/17 *Landesbank Baden-Württemberg v SRB* ECLI:EU:T:2020:435; case T-414/17 *Hypo Vorarlberg Bank v SRB* ECLI:EU:T:2020:437; and case T-420/17 *Portigon v SRB* ECLI:EU:T:2020:438 (appeals for the three cases are still pending).

This is so especially when it comes to the limits to the powers of the relevant institutions, where there is less room for administrative discretion.

III. CONCLUDING OBSERVATIONS

In considering the case law referred to above, the first observations which comes to mind is that the EMU regime, especially as it has developed as a consequence of the euro and debt crisis, has given rise to a fairly extensive case law which covers a broad range of subjects. Another general observation would be that a part of the case law, notably the cases considered in section II.1 above, has concerned issues of central importance not only for the EMU legal regime (for instance the status and powers of the ESM, the powers of the ECB and the power sharing between the ECB and national banking authorities) but also the EU constitutional order in general. The way economic and monetary policy is conducted is of crucial importance for the Union's present and future development and the cases that have been submitted to the Union Courts, the ECJ in particular, have contributed to setting the basic parameters of the EMU regime.⁶⁸

Considering the particular role played by the Union Courts, as compared to the political institutions, it should be recalled, first of all, that courts do not determine their own agenda as the cases before them are initiated either by national courts (under the preliminary ruling procedure) or by Union institutions, Member States or private parties (in the form of infringement actions, actions for annulment or actions for compensation). Most of the cases considered above have been preliminary ruling requests made by national courts. Whatever procedure is at hand, the question of the *intensity of judicial review* becomes a central issue. In the EMU-related cases, the Union Courts have generally held that the Union institutions enjoy broad discretion with respect to economic and/or monetary choices to be made. To cite an example, in *Gauweiler* the ECJ stated that as regards judicial review of compliance with the principle of proportionality, since the ESCB is required "to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion".⁶⁹ The Court was quick to add, however, that such an approach may require a more robust review when it comes to a "review of compliance with certain procedural guarantees" and that those guarantees include the obligation of the ESCB "to examine carefully and impartially all the relevant elements of the situation and to give an adequate statement of the reasons for its decisions".⁷⁰

That the intensity of judicial review may vary depending on the issues at hand, in particular whether it is a question of substance or procedure, is nothing exceptional but is characteristic of much of the review conducted by the Union Courts. The intensity of

⁶⁸ See further Ka Tuori and KI Tuori, *The Eurozone Crisis: A Constitutional Analysis* cit.; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* cit.

⁶⁹ *Gauweiler* cit. para. 68.

⁷⁰ *Ibid.* para. 69.

judicial review is not a pure black-and-white distinction between broad discretion and light-touch review on the one hand, and absence of discretion and intensive, “full” review on the other.⁷¹ It is more of a sliding scale and sometimes variations in the intensity of review in the context of one and the same case. The fact that the Union Courts grant broad discretion with respect to substantive choices especially if they are of a technical nature or involve complex assessments is nothing peculiar for EMU-related matters. It is entirely appropriate that in such situations judges – unlike what seems to be the approach of the German Federal Constitutional Court – show judicial restraint and do not, for instance, pretend that they have a better understanding of monetary policy than those who have the main responsibility for its conduct. The main task of courts in this area should not be to decide issues of ideological, economic or technical choice but to verify that the choice made is within the confines of the law. The situation is different when at issue are basic questions of competence and the powers of institutions, and respect for applicable procedures, rather than exactly how the powers are exercised when complex economic assessments are at stake.

It is true that in many of the cases considered above, the ECJ in particular has upheld the legality of decisions adopted by Union institutions. These outcomes, on the other hand, have most often than not been in line with the positions taken by all or most EU Member States. The fact that a decision is upheld does not, of course, prove that the Court’s assessment is wrong. Moreover, if the law is ambiguous or in any case open to different interpretations, it is entirely legitimate, as it would seem that the ECJ has done, to give some preference to an interpretation which is in line with what the expert institutions such as the ECB have assessed to be in the interest of the effectiveness of monetary policy and perhaps even necessary with a view to saving the common currency. That said, judicial interpretation should, of course, follow established methods of interpretation. In this respect, it is simply not true that the Union Courts generally favour a teleological instead of textual interpretation. The Union Courts normally proceed in the following order of reasoning: textual interpretation, systemic or contextual interpretation and teleological interpretation.⁷² If the text is clear enough, that is often the end of the story. Words matter. To take an example from the EMU area, the ECJ in *Gauweiler*⁷³ and *Weiss*⁷⁴ paid attention to the fact that art. 123 TFEU prohibits the ECB and national central banks from purchasing debt instruments “directly” from national governments or national public bodies. Why would this word have been inserted if the idea was to prohibit generally also “indirect” purchases (on the secondary market)?

⁷¹ A Rosas, ‘Standard of Review: Court of Justice of the European Union (CJEU)’ (April 2019) Max Planck Encyclopedia of International Procedural Law www.opil-ouplaw.com.

⁷² See also A Rosas and L Armati, *EU Constitutional Law* cit. 40-48.

⁷³ *Gauweiler* cit.

⁷⁴ *Weiss* cit.

Another feature of general interest pertaining to the relevant case law is the way it has been dealing with the interaction between Union law and national law and the recent phenomenon of national law assuming direct Union law relevance in the context of the Banking Union in particular. The cases of *Berlusconi*⁷⁵ and *Rimšēvičs*⁷⁶ are instructive in this respect. Especially in *Rimšēvičs*, the legal nature of the action brought by the ECB with respect to a national decision affecting the status of the Governor of a national central bank was not entirely clear. The ECJ characterised the action as an action for annulment, akin to the actions covered by art. 263 TFEU. With this precedent, the traditional approach, according to which Union Courts may not annul national decisions, has seen its first exception.

Another feature of institutional significance relates to the distinction between Union institutions and bodies and intergovernmental institutions which are Union-relevant, such as the ESM. In *Pringle*, the ECJ accepted that in the area of economic policy (which is a non-exclusive Union competence) such a mechanism could be created at an intergovernmental level while also drawing upon some involvement of Union institutions (such as the Commission and the ECB).⁷⁷ Such intergovernmental mechanisms on the other hand may create uncertainties as to the existence of judicial controls and liability. In *Ledra*,⁷⁸ the ECJ showed that it is sensitive to the problem of formally non-Union institutions such as the ESM performing *de facto* tasks of direct Union relevance and drawing upon the participation in its work of the Commission and the ECB. Non-contractual liability of these two institutions could not be excluded. At least in the context of civil liability, formal constructions may not completely trump what is going on in the real world.

The sensitivities and perhaps also complexities of the EMU legal and economic regime are put in stark relief by the recent judgment of the German Federal Constitutional Court, holding that both an ECB decision and a judgment of the ECJ are *ultra vires* and hence do not bind the German Court. While it is not possible to analyse further the German judgment and its implications here, suffice it to note that generalising the approach taken by the German Constitutional Court, implying that the principle of proportionality must be applied by the Union Courts, and then, arguably, by all national courts in the 27 Member States,⁷⁹ in the same peculiar and far-reaching way as it is done by the German Court, would severely jeopardise the functioning of not only the EMU regime but also the EU constitutional and legal order in general.

⁷⁵ *Berlusconi* cit.

⁷⁶ *Rimšēvičs* cit.

⁷⁷ *Pringle* cit.

⁷⁸ *Ledra* cit.

⁷⁹ On the principle of primacy and its relation with the principle of the equality of Member States see K Lenaerts, 'No Member State is More Equal than Others. The Primacy of EU Law and the Principle of the Equality of the Member States before the Treaties' (8 October 2020) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de/verfassungsblog/de).



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

THE PARLIAMENTARY ACCOUNTABILITY OF EMU DECISIONS: BETWEEN INFORMALITY AND FRAGMENTATION

DIANE FROMAGE*

TABLE OF CONTENTS: I. Introduction. – II. Guaranteeing democratic accountability within the EU. – II.1. Democratic accountability in today's EU. – II.2. Persistent shortcomings in the accountability framework post-Lisbon. – III. Democratic accountability of EMU decisions. – III.1. EMU decision-making procedures and their characteristics. – III.2. Parliamentary involvement in the different fields of EMU: dialogue instead of full involvement. – III.3. Executive and Eurogroup centrality in EMU. – IV. Conclusion: EMU accountability regime is (still) distinct from the standard EU regime... and rightfully so?

ABSTRACT: This *Article* compares the democratic accountability mechanisms in place in the area of Economic and Monetary Union (EMU) with those existing in other fields of EU law. In so doing, it shows that, although democratic accountability standards have generally been improved following the entry into force of the Lisbon Treaty, important shortcomings still exist as a result of institutional flaws and practice in EU decision-making. It then shows that the accountability gap that exists in the field of EMU is even deeper owing to the complexity of the procedures in place, and to the informality that characterises some of them as well as some of the decision-making bodies involved (chief of which is the Eurogroup). The *Article* concludes by making some proposals to improve the current unsatisfactory situation, improvement which will be ever more necessary in post-Covid times.

KEYWORDS: Economic and Monetary Union – democratic accountability – European Parliament – national parliaments – European Semester – democratic deficit.

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I. INTRODUCTION

Like the Great Financial Crisis before it, the Covid-19 pandemic has evidenced in the strongest possible way that European Union (EU) Member States must cooperate, in particular in the responses provided to try and shelter European economies from the dramatic downwards trends caused by the sanitary crisis. This is certainly true of all EU policy areas, but especially so of the Economic and Monetary Union (EMU). Indeed, considering how intrinsically interlinked European economies are, and in view of the differences in the fiscal space available at the national level to bolster the future economic recovery, the EU institutions and the Member States, especially those belonging to the euro area, have had to mobilize swiftly, and collectively. In the period between March and December 2020, they approved an extraordinary range of instruments in policy areas including monetary and fiscal policy, emergency financial assistance to Member States, rules applicable to state aid, or measures to preserve the banking sector.¹ As the adopted measures directly affect Member States' economic, fiscal and budgetary capacities, guaranteeing democratic accountability is of paramount importance. However, this is a particularly complex endeavour owing to the constitutional features of the EMU architecture in place, which, as shown in this *Article*, clearly distinguishes this policy domain from other domains of European integration. In fact, the issue of democracy in EMU has been recurrently addressed, by officials and academics alike, over the past decade.² The question addressed by this special issue regarding whether the rules applicable in the field of EMU are distinct from those generally in force in EU law is thus particularly relevant in relation to democratic accountability in the field of EMU.

The aim to create an EMU is clearly set out in the European Treaties. Art. 3(4) TEU unequivocally states that “[t]he Union shall establish an economic and monetary union whose currency is the euro”. Yet, the euro has not been adopted by all the Member States to date. In fact, Denmark is not even under the obligation to do so, while Sweden is formally under this obligation, but it benefits *de facto* from a right to opt out as well, as no action has ever been taken against it on the ground of its not joining the common currency area. It has also

¹ The European Commission, the European Parliament and the European Banking Institute regularly publish updated accounts of those measures. European Commission, *Timeline of EU action* www.ec.europa.eu; European Parliament, *EU/EA measures to mitigate the economic, financial and social effects of coronavirus* www.europarl.europa.eu; European Banking Institute, *EBI Report on the 'Pandemic Crisis-related' Economic Policy and Financial Regulation Measures: International, EU and Euro Area Levels* www.ebi-europa.eu.

² Ben Crum has noted that “[i]n the steady stream of [official EU] reports on the future of Economic and Monetary Union (EMU) that have appeared in recent years, it has become a common habit to reserve the final section for the question of democratic legitimacy”. See B Crum, ‘Parliamentary Accountability in Multilevel Governance: what Role for Parliaments in Post-crisis EU Economic Governance?’ (2017) *Journal of European Public Policy* 268. Academic publications on this issue have been so numerous that only a few of them may be mentioned here; the most recent ones of them include: M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) and VA Schmidt, *Europe's Crisis of Legitimacy. Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020).

become clear that other Member States, such as for instance Poland,³ are unlikely to take the necessary steps to achieve this goal for political reasons, in the near future at least. Thus, the belief that originally prevailed at Maastricht that “Member States would join as soon as they fulfilled the convergence criteria”⁴ no longer corresponds to today’s reality.

A very important part of the EMU, both politically and economically, is the single currency area and its management, but it is not limited to it. The EMU requires also the co-ordination of Member States’ fiscal and economic policies, in which all EU Member States are involved, even if those belonging to the euro area are submitted to stronger oversight. Even if it has not resulted in the creation of a dedicated institution proper, a distinction between euro area and non-euro area Member States had to be made in the institutional framework of the EU, most visibly in the form of the Eurogroup and the Euro Summit. Due to the possibility open to non-euro area Member States to be part of the European Banking Union (EBU), safeguards had to be established to make sure that they would not be fully marginalised where they avail themselves of this possibility;⁵ the accession to the EBU of two non-euro area Member States (Bulgaria and Croatia) in October 2020 sets those mechanisms to the test for the first time ever. Decisions in EMU matters are thus governed by different logics and institutions depending on whether they affect all the Member States, or euro area or EBU Member States only. Given the (supposed) temporary nature of this distinction, some of the euro area-specific bodies and institutions have not been fully formalised or enshrined in the Treaties, and the resulting informality creates a number of political and legal challenges. In today’s EU, EMU-related decisions are thus made, or at least formally prepared, by the Eurogroup and the Council; the Euro Summit and the European Council; the European Commission (Commission); the European Central Bank (ECB); the European Parliament (EP); and Member States. To make things even more complex, their actions are governed by a series of rules contained in both EU law and *inter se* agreements to which not all Member States are party.⁶ Furthermore, some institutions, and in particular the ECB and the Eurogroup, are involved in several capacities in a wide range of procedures governed by both EU and international law.⁷ The number of existing institutions and bodies could even increase further in the

³ See for a recent account of the Polish case: A Czerniak and A Smolenska, ‘Poland Without the Euro. A Cost Benefit Analysis’ (March 2019) Polityka Insight www.politykainsight.pl.

⁴ Ka Tuori and KI Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) 28.

⁵ Indeed, in banking supervision, the decisions made by the Supervisory Board need to be adopted by the Governing Council in which only euro area central banks are represented. Therefore, a mechanism had to be devised to allow those Member States to object to decisions of the Supervisory Board. See 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, art. 7.

⁶ See on these developments: T Tridimas, ‘Indeterminacy and Legal Uncertainty in EU Law’ in J Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press 2019), 61–84, esp. 63 ff.

⁷ See on the Eurogroup: P Craig, ‘The Eurogroup, Power and Accountability’ (2017) *ELJ* 234. See on the ECB and the difficulty in guaranteeing its accountability: D Fromage, P Dermine, P Nicolaides and K Tuori,

future, should, for instance, the “European Finance Minister” proposed by the Commission ever be implemented,⁸ or should new, original, measures need to be adopted after the current Covid crisis, for example in the form of a European treasury of some sort.

In all, the existing framework is characterised by its complexity, by less transparency than in the ordinary EU decision-making procedures as a result of the informality of certain of the decision-making bodies, as well as by a strong intertwinement between the national, the European and the international levels. Furthermore, in the field of EMU, rules have been applied with a significant margin of discretion, in particular of the European Commission, which was strongly empowered following the adoption of euro crisis law,⁹ and formally non-binding soft law instruments are also commonly used.¹⁰ Against this background, ensuring that adequate democratic accountability standards are adhered to may prove challenging, and in fact recurrent criticism has, among others, already been voiced towards the informal Eurogroup.¹¹

This *Article* sets forth to examine the mechanisms in place to ensure democratic accountability in EMU with a view to comparing them with those that commonly apply to EU decision-making procedures in other fields of EU law. In so doing, it also seeks to outline the effects of the response to the Covid crisis, and to assess whether there are good reasons for democratic accountability standards to be different in the field of EMU, and how this could be improved.

This *Article* is organised as follows. It first depicts the accountability mechanisms in place in the EU in general and highlights their characteristics (section II) before considering those existing in the field of EMU in particular (section III). The final section compares and assesses both frameworks, thereby showing that the situation in EMU is still peculiar, and it makes some proposals to remedy the existing shortcomings (section IV).

II. GUARANTEEING DEMOCRATIC ACCOUNTABILITY WITHIN THE EU

Before delving into the analysis of the mechanisms in place to guarantee democratic accountability within the EU, a few words on the issue of the EU’s “democratic deficit” are in

‘Special Issue: The ECB’s Accountability in a Multilevel European Order’ (2019) *Maastricht Journal of European and Comparative Law* 3.

⁸ Communication COM(2017) 823 final from the Commission of 6 December 2017 on a European Minister of Economy and Finance.

⁹ See on the issue of discretion: M Dawson, ‘How Can EU Law Contain Economic Discretion?’ in J Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press 2019) 85-106. See on the Commission’s empowerment: P Leino and T Saarenheimo, ‘Discretion, Economic Governance and the (New) Political Commission’ in J Mendes (ed), *EU Executive Discretion and the Limits of Law* cit.132-154.

¹⁰ P Dermine, ‘The Instruments of Eurozone Fiscal Surveillance Through the Lens of the Soft Law/Hard Law Dichotomy – Looking for a New Paradigm’ (2021) *Journal of Banking Regulation*.

¹¹ See most recently: B Braun and M Hübner, ‘Vanishing Act: The Eurogroup’s Accountability’ (2019) *Transparency International EU* www.transparency.eu.

order. Indeed, this term, used for the first time by David Marquand in reference to the introduction of qualified majority voting in the Council which deprived national parliaments from their capacity to exercise any veto through their government representative,¹² has since gained considerable popular support, and is often understood as depicting reality within the EU. Yet, it remains that the assessment of the EU's democratic credentials necessarily depends on the yardstick used. The first question thus appears to be how the EU is qualified, *i.e.*, whether it is assimilated to an international organisation, a State or a *sui generis* entity. Secondly, it is also fair to wonder whether (Member) States themselves actually live up to the standards of democratic accountability some have found the EU unable to comply with.

The following paragraphs serve to illustrate the mechanisms in place under the current Treaty framework (II.1), while also highlighting some of the existing shortcomings (II.2).

II.1. DEMOCRATIC ACCOUNTABILITY IN TODAY'S EU

The Lisbon Treaty brought about an important improvement to the democratic credentials of the EU. Prior to its entering into force, the EP (and national parliaments to a more limited extent) had, with no doubt, played an important though insufficient role already, for the latter mostly thanks to prerogatives attributed to them at the national level which allowed them to (imperfectly) scrutinise EU documents or their executive representatives.¹³ Against this backdrop, the Lisbon Treaty undoubtedly contributed to further enhancing democratic accountability within the EU. National parliaments were even deemed to have become "European institutions" post-Lisbon.¹⁴

For the first time ever, this Treaty introduced a definition of democracy (title II of the TEU). In particular, art. 10 TEU states that democracy within the EU is to be based on two main pillars: the directly-elected EP representing EU citizens on the one hand, and national parliaments in charge of holding Council and European Council members to account individually, on the other. To this end, national parliaments and the EP alike were granted a series of prerogatives in the Treaties, so much so that the Lisbon Treaty was dubbed the "Treaty of the parliaments".¹⁵ Three remarks have to be made before examining the powers attributed to the two kinds of parliamentary assemblies more in detail. Firstly, this concerns the principle according to which accountability is to be guaranteed at a same institutional

¹² D Marquand, *Parliament for Europe* (Jonathan Cape 1979).

¹³ See for a historical account of the evolution of parliaments' role within the EU: D Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne. La Participation des Parlements allemands, britanniques, espagnols, français et italiens* (L'Harmattan 2015); A Maurer and W Wessels (eds), *National Parliaments on Their Way to Europe: Losers or Latecomers?* (Nomos 2001).

¹⁴ European Council, *Speech by President Herman Van Rompuy to the Interparliamentary Committee meeting on the European Semester for Economic Policy Coordination* (27 February 2012) www.consilium.europa.eu.

¹⁵ European Parliament Draft report 2016/2149(INI) of 1 December 2017 on the implementation of the Treaty provisions concerning national parliaments, 4.

level. This principle implies that EU institutions are to be held accountable at the EU level by the EP, whilst national institutions are accountable to the national parliaments, a principle that still holds generally.¹⁶ Secondly, the EP is still generally viewed – at least by the European Commission – as the organ in charge of ensuring democratic accountability within the EU *par excellence* even where not all Member States participate in a specific policy area; as illustrated below, this is also the case in EMU and Euro-area matters for instance. Thirdly, it remains that “in the EU, legitimisation chains are still long and rather non-transparent, and accountability is not easily claimed. Council members, for instance, are legitimised via national elections and national parliaments”.¹⁷ The following paragraphs examine in turn the role played by the EP, and by national parliaments.

The EP, which is the organ of direct representation of EU citizens at the EU level (art. 10(2) TEU), exercises functions of political control (art. 14(1) TEU). The European Commission – as a collegial organ – is politically responsible before it (art. 17(8) TEU). Resultantly, the EP is deeply involved in the designation procedure of the Commission.¹⁸ The European Commission regularly reports to the EP on the execution of its duties, for instance in the framework of the budgetary procedure (arts 317-319 TFEU). Interestingly, owing to the EU's peculiar institutional structure characterised by a blurred division of executive and legislative functions,¹⁹ the EP also exercises a control function toward the European Council, and even toward the Council to some extent. The President of the European Council “shall present a report to the European Parliament after each of the meetings of the European Council” (art. 15(6)(d) TEU), and the President of the European Parliament may be invited to make a statement at the beginning of each of the European Council meetings (art. 235(2) TFEU). Nonetheless, considering that the EP may not ask any questions, these procedures do not amount to any relationship of accountability proper,²⁰ as developed further below. The possibility furthermore exists for European Council and Council representatives to make

¹⁶ This is the reason why, for instance, the ECB is primarily to be held accountable by the EP. See European Central Bank, ‘European Central Bank Replies to the Questionnaire of the European Parliament Supporting the Own Initiative Report Evaluating the Structure, the Role and Operations of the ‘Troika’ (Commission, ECB and the IMF) Actions in Euro Area Programme Countries’ (10 January 2014) ECB Research & Publications www.ecb.europa.eu.

¹⁷ C Wiesner, *Inventing the EU as a Democratic Policy: Concepts, Actors and Controversies* (Palgrave Macmillan 2018) 175.

¹⁸ Even if the *Spitzenkandidaten* procedure in place since the 2014 elections to the EP is more the result of practice than a procedure specifically foreseen in the Treaties. In fact, in 2019, Member States discarded the President-elect, and chose their own candidate instead. D Fromage, ‘The Spitzenkandidaten Procedure: a Critical View’ in H Van Eijken, T Marguery and S Platon (eds), *Les élections européennes 40 ans après. Bilans, enjeux et perspectives* (Bruylant 2020) 167-181.

¹⁹ See on the hybrid nature of the Council between executive and legislative organ: E Griglio, ‘Divided Accountability of the Council and the European Council: The Challenge of Collective Parliamentary Oversight’ in D Fromage and A Herranz-Surrallés (eds), *Executive-legislative (im)balance in the European Union* (Hart 2021) 51-66.

²⁰ W Wessels, *The European Council* (Palgrave Macmillan 2016) 90.

statements before the EP at their own initiative (art. 132(1) EP Rules of procedure). Naturally, the EP's strongest power in the daily functioning of the EU is exercised through its capacity as a co-legislator – together with the Council – in most policy areas post-Lisbon, as is illustrated for instance by the fact that the former co-decision procedure is now designated as “ordinary legislative procedure” (art. 289 TFEU).

As regards the control exercised by national parliaments, it varies significantly across Member States. The Lisbon Treaty finally guaranteed them a minimum amount of information and a minimum capacity to be involved at the EU level after the Treaties had long largely failed to mention them, or had done so in protocols and not in the core of the Treaties. Most of those rights and prerogatives may be found in art. 12 TEU that unequivocally establishes that “[n]ational parliaments contribute actively to the good functioning of the Union”. However, on the one hand, beyond the fact that they now receive legislative and certain preparatory documents directly from the EU institutions (art. 1 Protocol 1), the other rights that have been guaranteed to them, such as the possibility to control the respect of the principle of subsidiarity or the right to be informed when a legislative proposal is made based on the flexibility clause (art. 352 TFEU), are not particularly useful for them to play a (pro)active role in the EU. On the other hand, these Treaty provisions merely represent a minimum; some national parliaments have only seen their capacities to participate in EU affairs limited to this, whereas others have been attributed much stronger powers including, for example, the requirement for a law to be adopted before the national representative in the Council may give his consent to a specific decision,²¹ or the definition of a mandate prior to the conduct of negotiations at the EU level.²²

II.2. PERSISTENT SHORTCOMINGS IN THE ACCOUNTABILITY FRAMEWORK POST-LISBON

Despite these significant improvements, numerous shortcomings in the accountability framework in place within the EU persist post-Lisbon. They are mostly related to structural issues as well as to the way in which the EU operates in practice; examples belonging to these two categories are provided here as illustrations of the existing problems.

The most evident and arguably the most important hindrance preventing fully-fledged accountability mechanisms being set up at the EU level derives from the fact that, as defined in art. 10(2) TEU, “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens”. The democratic legitimacy of the Council and of the European Council therefore rests on the (imperfect) individual control mechanisms existing at national level despite the fact that national

²¹ This is, for example, the case in some instances in Germany and Italy. D Fromage, *Les Parlements dans l'Union Européenne après le Traité de Lisbonne* cit.

²² This is typically the model in place in Nordic parliaments. See the chapters dedicated to Nordic parliaments in C Heftler, C Neuhold, O Rozenberg and J Smith (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015).

representatives in fact constitute supranational institutions in their own rights when they come together. Since unanimity ceased to be the rule within the Council, the sum of individual accountability channels in place at the national level may be deemed insufficient. This is all the more true as national parliaments' powers of scrutiny of, and control over, their representatives in Council and especially European Council meetings is still imperfect, in some Member States at least.²³ Even if some interactions between the European Council and the EP exist, as mentioned above, they do not amount to a relationship of accountability understood, following Mark Bovens, as a "relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".²⁴ Whilst the first two criteria may be considered to be fulfilled, the absence of any possibility to ask questions, pass judgement and, most importantly, take any repressive measures indicate that the dialogue between European Council and EP rather amounts to an information channel even if, admittedly, the EP naturally remains free to express its opinion in the form of parliamentary resolutions for instance. Interparliamentary cooperation between national parliaments and the EP has been viewed as a possible, though imperfect, avenue to improve this unsatisfactory situation.²⁵ This possibility, in fact, raises the question as to whether national parliaments should be collectively represented at the EU level, as they used to be prior to the introduction of the direct elections to the EP in 1979. The debate on a second (or third) parliamentary chamber at the EU level regularly resurfaces,²⁶ but does not gain traction. The leap forward in financial solidarity (and responsibility) which derives from the common issuance of debt in response to the Covid-19 pandemic might potentially lead to changes in this regard, as the fact that this topic was discussed during the 2021 edition of the European Parliamentary Week – one of the two yearly interparliamentary

²³ W Wessels, O Rozenberg, M van den Berge, C Hefftl, V Kreilinger and L Ventura, 'Democratic Control in the Member States of the European Council and the Euro Zone Summits' (January 2013) European Parliament Directorate General for Internal Policies Study www.europarl.europa.eu. In 2019, a majority of national parliaments however declared that they were satisfied with their prerogatives in relation to Council meetings. See COSAC, *32nd Bi-annual Report of 14 October 2019 on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* and COSAC, *Annex to the 32nd Bi-annual Report of 14 October 2019 on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* www.secure.ipex.eu.

²⁴ M Bovens, 'New Forms of Accountability and EU-Governance' (2007) *Comparative European Politics* 104, 107.

²⁵ E Griglio, 'Divided Accountability of the Council and the European Council' cit.

²⁶ A report was, for instance, dedicated to this question by the French Senate in 2001 (Sénat, 'Rapport d'information n. 381 (2000-2001) de M Daniel Hoeffel fait au nom de la délégation pour l'Union européenne déposé le 13 juin 2001' (13 June 2001) www.senat.fr) and it was also examined during the debates held by the Convention on the future of Europe in charge of drafting the Treaty establishing a constitution for Europe. National parliaments opposed this possibility though. See COSAC, *28th Meeting in Brussels of 27 January 2003 addressed to the Convention of the Future of Europe, the EU's institutions, the national parliaments and the Presidency* www.cosac.eu.

meetings on EMU – seems to indicate.²⁷ The bonds issued by the European Commission on behalf of the EU in both the framework of Next Generation EU and the temporary Support to mitigate Unemployment Risks in an Emergency (SURE) instrument are, directly and indirectly, backed by national budgets.²⁸ Therefore, national parliaments will have a specific interest in monitoring the use of those funds as was already evidenced by the debates some of them held during the adoption procedures of these instruments,²⁹ whilst the EP will need to be involved owing to the European nature of those funds. Thus, to avoid tensions, national and European parliaments should, at least as a first step, try to establish common instruments of scrutiny rather than solely concentrating on their national governments or on specific individual Member States. This is all the more important as an “emergency brake” mechanism was established at the European Council level where a Member State considers that another State fails to respect the rule of law in its management of EU funds.³⁰

Other difficulties in ensuring adequate accountability derive from the existence of comitology procedures (even if some improvements over time have been noted),³¹ and from an increased institutional fragmentation within the EU overall, notably because of the rising trend towards agencification, that is the continuous establishment of new agencies upon which (EU) executive powers are conferred.³² This is problematic from an accountability perspective, as national parliaments only have limited relationships to agencies, and as the EP is not satisfied with the powers at its disposal to exercise its accountability function.³³

²⁷ European Parliament, *European Parliamentary Week 2021* www.europarl.europa.eu.

²⁸ See on the details of these instruments and the legal constructs underpinning them: A D'Alfonso, 'Next Generation EU. A European Instrument to Counter the Impact of the Coronavirus Pandemic' (6 July 2020) European Parliament Research Service Briefing www.europarl.europa.eu; C Dias and A Zoppè, 'The SURE: Main Features' (26 February 2021) European Parliament Directorate-General for Internal Policies In-Depth Analysis www.europarl.europa.eu; P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe – Between Continuity and Rupture' (2020) LIEI 337.

²⁹ See on these procedures: B Dias Pinheiro and D Fromage (eds), 'National and European Parliamentary Involvement in the EU's Economic Response to the COVID Crisis' (2020) EU Law Live Weekend Edition eulawlive.com 13.

³⁰ See on this and the controversy it sparked: Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget; KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law While Compromising on the Rule of Law' (13 December 2020) *Verfassungsblog* www.verfassungsblog.de; A Dimitrovs, 'Rule of Law-Conditionality as Interpreted by EU Leaders' (11 December 2021) EU Law Live eulawlive.com.

³¹ GJ Brandsma, *Controlling Comitology Accountability in a Multi-level System* (Palgrave Macmillan 2013) ch. 7.

³² See on this trend: M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016).

³³ The limited relationship existing between national parliaments and agencies was recently highlighted in a survey conducted by the Interparliamentary conference of EU affairs Committees. See COSAC, *33rd Bi-annual Report of 14 April 2020 on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny* secure.ipex.eu. See on the EP's position: Resolution 266/359 of the European Parliament of 3 April 2014 on discharge in respect of the implementation of the budget of the European Union agencies for the financial year 2012: performance, financial management and control.

To these shortcomings resulting from the institutional features of the EU proper, others deriving from practice, of which a few examples shall be provided, must be added. For instance, one of these is the result of the *de facto* leading role assumed by the European Council, despite the fact that it is formally only expected to “provide the Union with the necessary impetus for its development and [to] define the general political directions and priorities thereof [...and that i]t shall not exercise legislative functions” (art. 15(1) TEU). In view of its importance in the management of both the Eurocrisis and the current pandemic, at the very least, doubts may be cast as to whether its actions are still in line with what is prescribed by the Treaties.³⁴

In addition, parliaments commonly lack sufficient information: they suffer from informational asymmetry in favour of governments generally,³⁵ and the mechanisms in place to control their representatives in the Council and in the European Council are not always satisfactory as mentioned before.³⁶ The quasi-systematic resort to trilogues in recent years makes this situation only worse: the negotiation procedures bring together Commission, EP and Council to reach an early agreement behind closed doors before legislation is approved in replacement of the lengthier ordinary legislative procedure comprising several readings by both EU legislators.³⁷

Soft law instruments, which may be associated to insufficient parliamentary involvement or difficulties in guaranteeing adequate judicial control, are also recurrently used, as was recently most visible in the immediate response to the pandemic.³⁸

³⁴ See on its role during the eurocrisis among many others: U Puetter, ‘Europe’s Deliberative Intergovernmentalism: the Role of the Council and European Council in EU Economic Governance’ (2012) *Journal of European Public Policy* 161. See as part of the immediate response to the pandemic D Fromage, ‘Towards Increasing Unity Within the E(M)U post-COVID?’ (2020) *LIEI* 385, and for a critical reflection on its importance in recent years generally JG Giraud, ‘The European Council: a Self-Proclaimed “Sovereign” off the Rails’ (Foundation Robert Schuman *European Issues* 574-2020).

³⁵ D Curtin, ‘Challenging Executive Dominance in European Democracy’ (2014) *ModLRev* 1, 15.

³⁶ D Fromage, ‘Executive Accountability to National Parliaments in Post-Crisis EU Affairs: The Persistent Shortcomings in the Council and European Council Oversight’ in D Jancic (ed), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?* (Oxford University Press 2017) 159-175; S Roland, ‘Un déficit démocratique peut en cacher un autre: la responsabilité politique du Conseil européen et du Conseil en question’ in C Geslot, PY Monjal and J Rossetto (eds), *La responsabilité politique des exécutifs des Etats membres* (Bruylant 2016) 219, 235-236; W Wessels, O Rozenberg, M van den Berge, C Hefftlar, V Kreiling and L Ventura, ‘Democratic Control in the Member States of the European Council and the Euro Zone Summit’ cit.

³⁷ See for a recent discussion on this question the special issue on trilogues in the *Journal of European Public Policy* (‘Special Issue: Inside the “Black Box” of EU Legislative Trilogues’ (2021) *Journal of European Public Policy*) and notably G Rosén and AE Stie, ‘Balancing Seclusion and Inclusion: EU Trilogues and Democratic Accountability’ (2020) *Journal of European Public Policy* 1.

³⁸ See on this use of soft law and the advantages and drawbacks of soft law as a crisis management instrument: O Stefan, ‘COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda’ (2020) *European Papers* www.europeanpapers.eu 663-670.

Finally, a further accountability gap within the EU derives from international standardisation: formally non-binding standards are adopted in the framework of international fora with varying forms of national (EU) and EU-wide representations whereby some Member States are full members whilst others are “only” represented by EU institutions. Despite democratic controls by national parliaments and/or the European Parliament not being always sufficiently fully-fledged, these standards may *de facto* shape the content of EU legislation at a later stage, as is for example evidenced by the determining role of the Basel Standards in the area of banking supervision.³⁹

In sum, even if the EU’s democratic credentials are now stronger post-Lisbon, important shortcomings deriving both from the EU’s institutional structure and from practice still exist. The next section turns to the democratic accountability of EMU decisions specifically.

III. DEMOCRATIC ACCOUNTABILITY OF EMU DECISIONS

III.1. EMU DECISION-MAKING PROCEDURES AND THEIR CHARACTERISTICS

Even if the panorama highlighted in the introduction already points to the EU institutional framework’s complexity, EMU decision-making procedures are arguably even more complex, and in dire need for reforms to patch the existing accountability gaps. Five main problems of the EMU governance raise issues concerning democratic accountability.

First, different types of EU competences co-exist in this field. These differences shaped the measures adopted in response to the eurocrisis, and have led to frictions, as evidenced for instance by the most recent judgement of the German Federal Constitutional Court in the *Weiss* case.⁴⁰ As is well known, the EMU framework has been evolving on an *ad hoc* basis (primarily through the adoption of secondary legislation and intergovernmental Treaties) as crises arose instead of being guided by a thorough plan. Second and resultantly, in EMU, more so than in other fields of EU law, a large variety of instruments and implementation procedures co-exist. They include formally non-binding soft law instruments used, for instance in the framework of the European Semester, and the

³⁹ See on these issues: M de Bellis, ‘Reinforcing EU Financial Bodies’ Participation in Global Networks: Addressing Legitimacy Gaps?’ in HCH Hofmann, E Vos and M Chamon (eds), *The External Dimension of EU Agencies and Bodies Law and Policy* (Edward Elgar 2019) 126-144; A Viterbo, ‘The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision’ (2019) JIEL 205.

⁴⁰ German Federal Constitutional Court judgment of the Second Senate of 5 May 2020 n. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 ECLI:DE:BVerfG:2020:rs20200505.2bvr085915. Academics have massively reacted to this case by publishing blogposts, most notably on EU Law Live and Verfassungsblog, and by publishing academic articles. See, for instance, P Dermine, ‘The Ruling of the Bundesverfassungsgericht in PSPP – An Inquiry into its Repercussions on the Economic and Monetary Union’ (2020) EuConst 525 and P Nicolaidis, ‘An Assessment of the Judgment of the Federal Constitutional Court of Germany on the Public Sector Asset Purchase Programme of the European Central Bank’ (2020) LIEI 267.

unique system of multilevel administrative cooperation in the operationalisation of the Banking Union. To this must be added the predominant role of executives at the national and the EU levels, and an important role attributed to informal (or even non-EU) bodies (chief of which is the Eurogroup), which adds to the important degree of discretion permitted to the institutions in charge of the implementation of the rules in place, primarily, the European Commission.⁴¹ The third problematic characteristic when seeking to guarantee democratic accountability is the co-existence of EU and international norms, which in some instances are not fully aligned though not contradictory, with therefore rules in EMU being based on EU and international law. Fourth, the co-existence of three main categories of Member States (EU27/Internal market vs euro area vs Banking Union Member States) among which the distinction is sometimes blurred, makes for extraordinary complexity, institutional and otherwise.⁴² Fifth and lastly, as already mentioned in the introduction, over time the unitary status foreseen for all Member States but Denmark has become more deeply entrenched with, *inter alia*, the Lisbon Treaty having introduced for the first time a possibility for non-euro area Member States not to vote in the Council on decisions that concern euro area Member States only (art. 136(2) TFEU). There are nonetheless some signs that the trend towards an ever-more permanent disunity between, on the one hand, euro area and, on the other, EU27 that had become visible since the eurocrisis may be diminishing as a consequence of Brexit, of the adoption of the euro by a growing number of Member States, and of the pandemic and the response to the economic downturn it has already provoked.⁴³

The institutional balance and the governance structures in place in the field of EMU are therefore different from those existing in other fields of European integration. The following paragraphs focus on depicting the mechanisms of parliamentary control in place in the main areas of EMU, before the centrality of the Eurogroup and the democratic oversight to which it is submitted are considered.

III.2. PARLIAMENTARY INVOLVEMENT IN THE DIFFERENT FIELDS OF EMU: DIALOGUE INSTEAD OF FULL INVOLVEMENT

As underlined by Vivien Schmidt, the EP was the weakest institution when the eurocrisis started, and “[o]ver time, [...] this [...] changed, as the EP pushed to become more of an

⁴¹ This has led to recurrent calls in favour of the simplification of the existing framework. See for instance: Communication COM(2020) 55 final from the Commission of 5 February 2020 to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Economic governance review Report on the application of Regulations (EU) 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013 and on the suitability of Council Directive 2011/85/EU.

⁴² See for a summary of these differences: VA Schmidt, *Europe's Crisis of Legitimacy* cit. 299.

⁴³ D Fromage, ‘Towards Increasing Unity Within the E(M)U post-COVID?’ cit.

‘equal partners’, even if it still has a long way to go”.⁴⁴ This weakness derives from the fact that it is not automatically a co-legislator in all matters related to EMU, like it has become in most other areas of EU law. Notwithstanding this, it was able to exercise (some) influence during the negotiations of eurocrisis law,⁴⁵ but the prerogatives it has secured for itself remain weak. For instance, in the operation of the European Semester for the coordination of economic policies, its role is very limited as it is not involved in the approval of the recommendations and observations issued at the EU level. The EP has, instead, been empowered with the possibility to host ‘economic dialogues’ with a series of EU institutions and bodies. Under the Six Pack and the Two Pack of legislation, the competent committee from the EP (mostly the Committee on Economic and Monetary Affairs – ECON) may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before it. National parliaments have been endowed with a similar opportunity to invite the Commission, when it assesses a Member State’s budgetary plans for example.⁴⁶ The “dialogue” format between the EP and the EU institutions is not limited to economic coordination: it is also resorted to with the ECB in the fields of monetary policy and prudential supervision (where it is open to national parliaments under certain conditions), as well as in the area of banking resolution (also open to national parliaments).⁴⁷ Even if their potential in allowing parliamentarians to exert political pressure on the institutions submitted to them may not be neglected, these dialogical procedures undoubtedly confer only a limited role upon national and European parliaments in the field of economic coordination, a trend that was followed in the design of the economic response to the Covid crisis with the creation of the “Recovery and Resilience Dialogue”.⁴⁸ By contrast, parliaments’ mere control by means of a dialogue with the ECB in the area of monetary policy may be more justifiable, in view of its exclusive EU nature, of the ECB’s strict independence and its sole responsibility in this field. Parliaments’ scrutiny of banking supervision and resolution may call for a different assessment, a fact the EU’s legislator itself recognised when it stated that

⁴⁴ VA Schmidt, *Europe’s Crisis of Legitimacy* cit. 208.

⁴⁵ C Fasone, ‘European Economic Governance and Parliamentary Representation. What Place for the European Parliament?’ (2014) ELJ 164.

⁴⁶ 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, art. 7(3).

⁴⁷ See on these procedures: F Amtenbrink and M Markakis, ‘Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction Between the European Parliament and the European Central Bank in the Single Supervisory Mechanism’ (2019) ELR 3; D Fromage and R Ibrido, ‘Accountability and Democratic Oversight in the European Banking Union’ in G Lo Schiavo (ed), *The European Banking Union and the role of law* (Edward Elgar 2019) 66-86.

⁴⁸ See on this: C Dias and I Lara Miranda, ‘European Parliament Involvement in Scrutinising the Recovery and Resilience Facility’ (September 2021) European Parliament Directorate General for Internal Policies Briefing www.europarl.europa.eu.

“[t]he national parliament of a participating Member State should also be able to invite the Chair or a representative of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority. This role for national parliaments is appropriate given the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States”.⁴⁹

Parliamentary accountability was particularly weak in the field of financial assistance. The European Stability Mechanism (ESM) is established on the basis of an intergovernmental agreement which does not recognise any formal role to the EP (or national parliaments), even after it was recently amended. In fact, issues of governance appear to have been fully absent from the reform discussions that were concluded in December 2020. National parliaments may naturally hold their individual representatives to account and generally be involved in the operations of the ESM in accordance with the existing rules at the national level, but the ESM Treaty only refers to them in their quality as recipients of its annual report.⁵⁰ As to the EP, it is only indirectly involved in the operationalisation of the ESM. It may invite the Chairperson of the ESM Board of Governors, to take part in an “economic dialogue” regarding financial assistance in his capacity as President of the Eurogroup under the Two Pack of legislation.⁵¹ Furthermore, an informal dialogue has developed between the EP and the ESM Managing director.⁵² Its existence has since been recognised in the amended ESM Treaty. The terms used are still weak and limited to this sole recognition.⁵³ The EP shall also receive the ESM’s annual reports from now on,⁵⁴ but nothing further. This situation has already attracted criticism considering the minimal changes introduced by the draft revised ESM Treaty.⁵⁵

As evidenced from the preceding paragraphs, the mechanisms in place to guarantee adequate democratic accountability in the various areas of EMU are thus characterised by their weakness and incompleteness, even if certain improvements were made over time. Efforts in this sense may nevertheless arguably only have a limited impact as long

⁴⁹ Emphasis added. Recital 56 Council Regulation (EU) 1024/2013 cit.

⁵⁰ Art. 30(5) of the Treaty establishing the European Stability Mechanism [2012].

⁵¹ 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, art. 7.

⁵² A Zoppè and C Dias, ‘The European Stability Mechanism: Main Features, Instruments and Accountability’ (October 2019) European Parliament Directorate General for Internal Policies In-Depth Analysis www.europarl.europa.eu 13.

⁵³ Recital 7 of the Agreement amending the Treaty establishing the European Stability Mechanism [2021] (“ESM Members acknowledge the current dialogue between the Managing Director and the European Parliament”).

⁵⁴ *Ibid.* art. 30(5).

⁵⁵ M Markakis, ‘The Reform of the European Stability Mechanism: Process, Substance, and the Pandemic’ (2020) LIEI 417.

as executives, and especially the informal Eurogroup, maintain the central role they have increasingly assumed over the past decade as presented next.

III.3. EXECUTIVE AND EUROGROUP CENTRALITY IN EMU

The centrality of executives in EMU, primarily the European Council and the Eurogroup, is problematic for several reasons. As highlighted in the preceding paragraphs, it is generally an issue because collective accountability mechanisms targeted at the EU bodies and institutions composed of representatives stemming from national governments are, to date, largely inexistent. In the field of EMU, this situation is worsened by two additional factors. First, the EP is not systematically involved on an equal footing in legislative procedures, as was most recently visible in the answer to the Covid crisis. It has managed to assert its power by negotiating two legislative initiatives granting it varying powers as a package deal,⁵⁶ and despite an undeniable transfer of powers to the EU levels in the field of economic and fiscal coordination, it does not have a strong word. Second, two structures co-exist parallel to the European Council and the ECOFIN Council in the form of the Euro Summit and the Eurogroup. The Treaty on Stability, Coordination and Governance (TSCG) formalized the Euro Summits at the level of the heads of State and government and established some mechanisms for the involvement of the European Parliament. For instance, “[t]he President of the European Parliament may be invited to be heard [...and t]he President of the Euro Summit shall present a report to the European Parliament after each Euro Summit meeting” (art. 12(5) TSCG). However, in the years that followed its adoption at least, the EP's participation was not effective. There were few Euro Summits and the EP President was not invited to make a statement at the beginning of the meetings that did take place.⁵⁷ This lack of involvement was however partly mitigated by the fact that the EP President was indeed invited to make a statement as per art. 235(2) TFEU during the European Council meetings taking place in parallel to these Euro Summit meetings. Furthermore, the President of the European Council reports *ex post* to the EP (art. 15(6) TEU),⁵⁸ and it has regularly done so after Euro Summit meetings too.

Contrary to the Euro Summit, the Eurogroup has become a (if not the) central decision-making, or at least preparatory organ in EMU matters. As Paul Craig summarised it: “The Eurogroup has [...] played an increasingly important role in decision-making since the financial crisis. The reality is that it is central to all major initiatives relating to the euro

⁵⁶ This was, for instance, the case of the SSM Regulation and the contemporary reform of the EBA Regulation (I thank Menelaos Markakis for this addition).

⁵⁷ D Fromage, ‘The European Parliament in the Post-crisis Era: an Institution Empowered on Paper Only?’ (2018) *Journal of European Integration* 281.

⁵⁸ JR Vanden Broucke, EM Poptcheva and S de Finance, ‘The European Council and its President’ (January 2015) European Parliamentary Research Service www.europarl.europa.eu and SE Anghel, IC Bacian, R Drachenberg and S Tenhunen, ‘The European Council in 2015 Overview of Decisions and Discussions’ (July 2016) European Parliamentary Research Service www.europarl.europa.eu 22 ff.

area, broadly conceived, which cover structural adjustment, macroeconomic planning, negotiation with states in receipt of aid from the ESM [European Stability Mechanism], and aspects of banking union”.⁵⁹ The Eurogroup more often than not meets in inclusive format, that is in a configuration that is identical to the ECOFIN Council, although the number of attendees including assistants may be significantly less.⁶⁰ It is entrusted with the task to prepare reforms that affect Euro area Member States only, as in the case of the changes to the ESM Treaty, with membership to the ESM Board of governors being additionally identical to the Eurogroup. It also plays a role – in inclusive format – in the negotiations towards the completion of the Banking Union,⁶¹ an initiative in which, to date, only the 19 euro area Member States and two Member States that are currently in the “Euro area waiting room” (ERM II) participate. What is more, the Eurogroup has had to design solutions that affect all Member States in an identical manner as well, as in the case of SURE and the Recovery and Resilience Facility.⁶² Besides this role in crisis management and constitutional design, the Eurogroup plays a particularly important role in the daily efforts of economic coordination. For instance, it receives euro area Member States’ draft budgetary plans and discusses the Commission’s opinions on them.⁶³ The President of the Eurogroup is also involved in the “economic dialogue” with the EP under the same status as the other EU institutions that interact with the EP in their own right (*i.e.*, the President of the Council, the Commission, and the President of the European Council).⁶⁴ It is to the Eurogroup that the ECB’s annual report on supervisory activities is presented, and not to the Council, to which it is however transmitted too, and it is the Eurogroup and not the Council that may hold a hearing with the Chair of the Supervisory Board.⁶⁵ While this important role of the Eurogroup may be justified in view of the responsibility it assumes, and of Euro area Member States’ predominance in the Banking Union, it is more problematic when considering that the Court of Justice still views it as an informal body.⁶⁶ Indeed, the Eurogroup’s nature and the ensuing consequences, in terms of the non-contractual liability of the Union for example, have been subject to recurrent examination by the Court of Justice, most recently in the *Chrysostomides* case.⁶⁷

⁵⁹ P Craig, ‘The Eurogroup, Power and Accountability’ cit. 235

⁶⁰ This precision is owed to Menelaos Markakis.

⁶¹ Euro Summit Statement of 11 December 2020 regarding the Euro Summit meeting, in European Council Press Release 502/20 of 11 December 2020, 2.

⁶² Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁶³ Arts 6 and 7 of the Regulation (EU) 473/2013 cit.

⁶⁴ *Ibid.* art. 15.

⁶⁵ Art. 20 of the Council Regulation (EU) 1024/2013 cit.

⁶⁶ Joined cases C-105/15 P to C-109/15 *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702.

⁶⁷ Joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C2020:1028. See also M Markakis and A Karatzia, ‘The Final Act on the Eurogroup and Effective Judicial Protection in the EU: Chrysostomides’ (22 December 2020) EU Law Live www.eulawlive.com.

The Court insists on its intergovernmental and informal nature, thereby shielding its actions, also when acting as ESM Board of Governors, from judicial review. For this reason, the expansion of its role over the past decade, and over the past year in the management of the Covid crisis, is worrisome and, in fact, there are hints that accountability gaps in EMU-related matters may only be widening despite the apparent recurrent commitment of EU officials in favour of higher accountability standards.

IV. CONCLUSION: EMU ACCOUNTABILITY REGIME IS (STILL) DISTINCT FROM THE STANDARD EU REGIME... AND RIGHTFULLY SO?

As shown in this *Article*, the democratic accountability regime applicable in the field of EMU is still clearly distinct from the one generally applicable within the EU. This is, among other reasons, because EMU is a particularly complex policy field governed by a wide variety of institutions and bodies, defined by sets of formal and informal rules that apply distinctly to varying sets of Member States – rules that have, additionally, been constantly evolving over the past decade. As a result of all the factors that distinguish EMU from ordinary EU law, there exists at present even more numerous and varied accountability gaps in this policy area.

Whilst this is naturally an unsatisfactory situation that needs remedying, and whilst at the very least some pragmatic solutions could be found to improve this situation as proposed in closure, it is argued here that as long as a general overhaul of the E(M)U legal framework is not conducted, it will be impossible for democratic accountability to be fully guaranteed in all circumstances. For instance, if the imbalance in the degree of competence exercised at the EU level in the different areas of EMU were to be corrected through the exercise of more powers at the EU level, then national and European parliamentary involvements should be commensurate to these changes taking due account of parliaments' primary, and unremovable, responsibility in budgetary and financial matters. For these reforms to suffice however, the accountability deficits that generally still persist post-Lisbon within the EU would also have to be resolved. Both this and the changes required in EMU would nonetheless require changes to the Treaties, a goal that appears particularly unrealistic at this stage.

The problematic character from a democratic accountability point of view of the existing EMU architecture has, in fact, long been a well-known fact to both academic and (EU) institutions. In its Reflection paper on the deepening of the EMU published in spring 2017, the Commission stated that "the institutional architecture of the EMU is a mixed system which is cumbersome and requires greater transparency and accountability".⁶⁸ In particular, it noted that "the involvement of the European Parliament and the democratic

⁶⁸ European Commission, *Reflection Paper on the Deepening of the Economic and Monetary Union* (31 May 2017) www.ec.europa.eu 27.

accountability for the decisions taken for or on behalf of the euro area should be enhanced". To this end, the Commission proposed that an "agreement on the democratic accountability of the euro area" signed by the Commission and "other institutions and bodies taking decisions on or acting on behalf of the euro area" be concluded before the next EP elections in 2019, and be later integrated in the EU Treaties, but it never materialised. Likewise, even if criticism on the basis of its thin democratic credentials have recurrently been made, and despite the extended role it was attributed following the reforms agreed in December 2020, the governance of the ESM has not been changed, and its democratic credentials remain insufficient.⁶⁹ The Eurogroup's undefined, informal and thus problematic character is no secret to anyone. Yet, it is resorted to by Heads of States and Governments particularly when in crisis mode, and has been heavily relied upon in the design of the response to the ongoing pandemic.⁷⁰ It should not be neglected that the (imperfect) standard accountability channels in EU matters naturally apply to EMU as well, and that parliamentary oversight over the Eurozone-specific Euro Summits and Eurogroups are even less developed.

Interparliamentary cooperation between the EP and national parliaments, and amongst national parliaments, could contribute to increase their oversight capacities, in particular because interparliamentary cooperation allows them to exchange information and best practices. The TSCG foresees, in its art. 13, that

"[a]s provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty".

On this basis, the Interparliamentary conference on Stability, Economic Coordination and Governance in the EU (SECG Conference) was established in 2013. Nevertheless, it is still unclear whether this Conference can bring much benefit. The idea to establish a fully-fledged "Europarliamentary chamber" has been aired with frequency as well. Although only few of the proposals have gone beyond the mere expression of the idea, for example, detailing all the characteristics of such a chamber, the Treaty on the democratization

⁶⁹ See on the ESM and its (expected) evolution: J Aerts and P Bizarro, 'The Reform of the European Stability Mechanism' (2020) *Capital Markets Law Journal* 159 and M Markakis, 'The Reform of the European Stability Mechanism Pandemic' cit.

⁷⁰ B Dias Pinheiro and D Fromage, 'Parliamentary Oversight of the EU Economic Recovery Plan – Lessons Learned and Which Way Forward?' in D Utrilla and A Shabbir (eds), *EU Law in Times of Pandemic. The EU's Legal Response to COVID-19* (EU Law Live Press 2020) 102-116.

of the Economic and Social Government of the European Union (T-Dem) did include concrete proposals.⁷¹ Nonetheless, thus far, neither the EU institutions, nor most Member States have clearly warmed up to the idea: The European Commission, for instance, has declared that “[i]nterparliamentary cooperation as such does not, however, ensure democratic legitimacy for EU decisions. That requires a parliamentary assembly representatively composed in which votes can be taken. *The European Parliament, and only it, is that assembly for the EU and hence for the euro*”.⁷² As is only logical, this view is also endorsed by the EP itself when it declared that

“[w]hile reaffirming its intention to intensify the cooperation with national parliaments on the basis of Protocol No 1, [it] stresses that such a cooperation should not be seen as the creation of a new mixed parliamentary body which would be both ineffective and illegitimate on a democratic and constitutional point of view; [it also] *stresses the full legitimacy of Parliament, as parliamentary body at the Union level for a reinforced and democratic EMU governance*”.⁷³

Arguments in favour of the EP guaranteeing democratic accountability in the field of EMU including the euro area as well are numerous. They range from its quality as an EU institution and EMU being an EU policy, to the impossibility to introduce any distinction among MEPs who represent EU citizens and not national constituencies, and include most notably the fact that even policies that are applicable to the euro area only (or to the Banking Union only) inevitably have important spill-over effects on all the remaining Member States.⁷⁴ Nonetheless, other, in my view, equally strong arguments actually lead to an adverse conclusion with respect to the EP’s suitability to guarantee democratic accountability at the EU level. For instance, the fact that MEPs elected by citizens who are not directly affected by all EMU policies leads to the claim to ensure democratic legitimacy being broken. Also, accountability at the EU level alone is certainly not sufficient in view of the fact that large part of EMU procedures either still concern areas within the realm of national competences (this includes economic and fiscal policies which are only to be

⁷¹ S Hennette, T Piketty, G Sacriste and A Vauchez, *How to democratize Europe* (Harvard University Press 2019). See for a critical analysis of the T-Dem: C Fasone, N Lupo and A Vauchez, *Parlamenti e democrazia in Europa: Federalismi asimmetrici e integrazione differenziata* (Il Mulino 2020). See for a comparative and critical analysis of the proposals to establish a euro area Parliament made to date: I Cooper, ‘A Separate Parliament for the Eurozone? Differentiated Representation, Brexit, and the Quandary of Exclusion’ (2017) *Parliamentary Affairs* 655.

⁷² Communication COM(2012) 777 final from the Commission of 28 November 2012 on a blueprint for a deep and genuine economic and monetary Union Launching a European Debate, 35. Emphasis added.

⁷³ European Parliament Report 2012/2151(INI) of 19 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup “Towards a genuine Economic and Monetary Union”, 19. Emphasis added.

⁷⁴ See on this: M Markakis, ‘Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles’ (2020) *JIEL* 489.

coordinated at the EU level) or operate through composite administrative procedures whose nature is still subject to diverging interpretations by national and European courts (this is the case of the Banking Union).⁷⁵ Put differently: an accountability gap arises because the mechanisms in place at the EU level are yet to be mirrored by similar procedures to guarantee democratic accountability.⁷⁶ Admittedly, since changes to the treaties are very unlikely at this stage, this is bound to remain a theoretical discussion.

This leads us towards pragmatic solutions à *Traités constants* that should be urgently implemented, to compensate the accountability gaps that exist both within the EU and within EMU in particular. Generally, interparliamentary cooperation, understood here both in its vertical dimension (that is: between the EP and national parliaments) and in its horizontal dimension (that is: exclusively among national parliaments), should be strengthened. Calls in this sense are recurrently made, and initiatives in favour of more interparliamentary cooperation at both a political and an administrative level have been blossoming over the past decade.⁷⁷ This notwithstanding, some more efforts should still be made to make the most out of the exchanges that already take place at present: the format of existing conferences could be improved so that these events become more (politically) attractive to MPs and MEPs, and are able to better cater the need for them to have discussions on key issues as they unfold as opposed to debates on long previously-agreed questions.⁷⁸ More room for debate should be instituted, and pre-written long speeches avoided in as far as possible. Also, new forums could be set up so that most if not all the existing Council configurations be mirrored by a thematic interparliamentary forum, and, more simply, the exchange of best practices and information that already happens could be enhanced. The efforts towards the centralisation of all sources of information on the Platform for EU interparliamentary exchange platform (IPEX) recently made are most welcome, but not sufficient, as more information on current developments in the different parliaments could be published. Even if this will never totally compensate the absence of formal mechanisms to this end, interparliamentary cooperation should also generally be used as a means to interact with the European Council and the Council on a collective basis, be it on the occasion of the different interparliamentary conference meetings or be it through the exchange of information and best practice which each national parliament may, in turn, use in conducting its scrutiny at the national

⁷⁵ See on these diverging views: case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337 and German Federal Constitutional Court judgment of the Second Senate of 30 July 2019 n. 2 BvR 1685/14.

⁷⁶ These shortcomings have been remarkably well described in M Lamandini, D Ramos Muñoz and V Ruiz Almendral, 'The EMU and its Multi-level Constitutional Structure: the Need for More Imaginative 'Dialogue' Among and Across EU and National Institutions' (2020) LIEI 311.

⁷⁷ See on this evolution: E Griglio and S Stavridis, 'Inter-parliamentary Cooperation as a Means for Reinforcing Joint Scrutiny in the EU: Upgrading Existing Mechanisms and Creating New Ones' (2018) Perspectives on Federalism.

⁷⁸ In fact, a reflection on interparliamentary cooperation was launched by the Council presidency in 2020. COSAC, 32nd Bi-annual Report of 14 October 2019 cit.

level. It is beyond any doubt that European and national parliaments have a reinforced duty to – collectively – exercise their budgetary prerogatives in overseeing the implementation of the economic instruments adopted to counter the Covid crisis.

Increased efforts toward transparency could also be made to improve democratic accountability. In 2006, the Commission President Barroso took the initiative to send EU legislative proposals and planning documents to national parliaments directly after the Constitutional Treaty, which would have provided for such a procedure, had been rejected. Similarly, the European Commission could, on its own initiative, transmit more documents to parliaments. This would be a positive development overall, but also particularly in EMU-related matters in view of the importance of the soft law instruments adopted in the framework of the European Semester, for example. Generally, efforts could be made (where legally possible) to try to resort to instruments, which do provide for some form of parliamentary involvement, as opposed to (soft law and other) instruments that do not.

To improve democratic accountability in the field of EMU specifically, all Member States should be submitted to the same regime. Yet, as long as this is an unrealistic target, Euro area Member States will need to come together to discuss policies that are specific to them, and hence the Eurogroup will continue to exist in parallel to the Council, and the Euro Summit will co-exist with the European Council. It is indeed the case that any decision made for the euro area likely affects the rest of the Member States, who thus must legitimately be involved, also because they are, at least formally, bound to adopt the euro in the long run. At the same time, these elements cannot justify the quasi-systematic resort to Eurogroup and Euro Summit meetings in inclusive format we have observed in recent years. This is undesirable and unacceptable for reasons of *clarity* (the already complex institutional structure in place becomes even more obscure and, in no few instances, the justification of the choice between inclusive and non-inclusive format and the choice not to meet in standard (European) Council format is difficult to grasp for outside observers); for reasons of *transparency* (transparency standards applicable to the Eurogroup and the Euro Summit are lower than those in place in the framework of the Council and the European Council) and for reasons of *accountability* (parliaments' prerogatives are generally more limited with regard to Eurogroup and Euro Summits meetings). Agreements concluded by Member States outside of the EU legal framework lead to similar and additional issues, including the need to guarantee that Member States and EU institutions continue to observe their obligations under EU law, and to ensure the consistency and the legality of these instruments with EU norms. Accordingly, wherever possible, EU law-based solutions should be favoured, and resort should be made to standard EU institutions (*i.e.*, European Council and Council) instead of Eurogroup and Euro Summit, especially where these meet in inclusive formats.



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

ECB DECISION-MAKING WITHIN THE BANKING AND MONETARY UNION: THE PRINCIPLE OF CONFIDENTIALITY ON ITS WAY OUT?

PIETER VAN CLEYNENBREUGEL*

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ABSTRACT: Art. 15 TFEU requires EU institutions to work as transparently as possible. Within the framework of that provision, the European Central Bank (ECB) has been able to benefit from a more lenient transparency regime, in which confidential decision-making takes centre stage in relation to monetary policy and prudential supervision. Somewhat contradictorily, other key actors within the banking and monetary Union (national banking supervisory authorities, the Single Resolution Board and the Eurogroup) do not share the ECB's preference for confidential decision-making. This *Article* compares those different transparency approaches and questions whether the lack of coherence between them can still be maintained within the current EU constitutional law framework. In that regard, it submits that maintaining confidentiality at least in the field of prudential supervision is difficult to square with the spirit of art. 15 TFEU. In addition, the German Federal Constitutional Court judgment in *Weiss* has a profound impact on the maintenance of confidential decision-making in the context of monetary policymaking as well. It follows from those observations that the era of confidential decision-making, although not over yet, is at least likely to erode gradually towards more transparency at the ECB.

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KEYWORDS: openness and transparency – access to documents – European Central Bank – Single Resolution Board – Eurogroup – confidential decision-making.

I. INTRODUCTION

In a European Union (EU) based on the rule of law and on democracy,¹ it goes without saying that its institutions need to be accountable for the decisions they make.² One of the ways to increase such accountability lies in requiring them to have more open and transparent decision-making processes in place. It is no surprise, therefore, that the increase in powers and responsibilities of EU institutions has been accompanied by the emergence of a legal principle of transparency governing those institutions' operations. Within the EU, this principle of transparency has been linked most closely to the emergence of a fundamental right to request and obtain access to non-published documents held by different EU institutions.

The European Central Bank (ECB), for its part, has managed to continue operating a governance framework in which confidentiality rather than transparency remains the starting point. This *Article* analyses the key features of the ECB's current confidentiality-focused governance framework (section II). It subsequently compares that framework with the more transparency-oriented features present among other bodies or institutions within the EU banking union (section III). That analysis allows confirming the exceptional nature of ECB confidentiality compared to other banking union actors. Against that background, the *Article* assesses to what extent the ECB's exceptional transparency approach can be maintained within the current EU constitutional framework. At first sight, the letter of art. 15 TEU would not be against those exceptional features to be kept in both monetary policymaking and prudential supervision contexts. However, it will be submitted that maintaining confidentiality in ECB prudential supervision is difficult to square with the spirit of that very provision. The *Article* therefore calls upon the Court of Justice to clarify its scope urgently. In the same way, the German Federal Constitutional Court judgment in the *Weiss* case has a profound impact on the maintenance of confidential decision-making in the context of monetary policymaking as well. It follows from those observations that the era of confidential decision-making, although not over yet, is at least likely to erode gradually towards more transparency at the ECB (section IV).

¹ See art. 1 TEU. On the EU's understanding of the rule of law and its origins in economic integration, see P Van Cleynenbreugel, 'Member States in the EU Economic Constitution: Rule of Law Challenges and Opportunities' (2019) LIEI 329, 330 ff.

² See for a review of accountability issues and their application in the context of the European Central Bank, D Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency' (2017) ELJ 28. See more generally within the framework of the Economic and Monetary Union, M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) 52-54 on transparency problems as accountability issues.

II. THE ECB'S TRANSPARENCY EXCEPTIONALISM WITHIN THE EU CONSTITUTIONAL FRAMEWORK

Transparency is a key principle of EU constitutional law.³ Since the entry into force of the Lisbon Treaty, art. 15 TFEU obliges all EU institutions to work as openly as possible and to have transparent procedures in place in order to promote good governance and ensure the participation of civil society. According to the third paragraph of that same provision, each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents. The latter right is also guaranteed by art. 42 of the Charter of Fundamental Rights of the European Union (the Charter).

In principle, the ECB, mentioned explicitly since the Lisbon Treaty among the EU institutions,⁴ is also subject to those obligations. art. 15(3) TFEU nevertheless states that the abovementioned obligations apply only to the ECB when exercising its “administrative tasks”.⁵ Any information relating to other tasks executed by that institution would not have to be part of its access to documents regime. Absent any further clarification of what constitutes an administrative task document at this stage, it seems that the ECB feels confident to restrict significantly the access to documents that concern both its monetary policymaking and prudential supervision activities. As a result, any potential access to those documents could still be governed by a presumption or principle of confidential decision-making. It is against that background that confidential decision-making still reigns at the ECB in both monetary policy (II.1) and banking supervision (II.2).⁶ In 2019, the Court of Justice confirmed that the ECB's confidentiality approach in monetary policy is compatible with EU constitutional law (II.3).

II.1. CONFIDENTIALITY AS A NECESSARY GOVERNANCE TOOL FOR ECB MONETARY POLICY

The ECB's key responsibility is to determine monetary policy in the Eurozone. Situated at the heart of the European System of Central Banks (ESCB), its core task remains

³ See again art. 1 TEU, which states that within the EU, decisions are taken as openly as possible and as closely as possible to the citizen.

⁴ See art. 13(1) TEU.

⁵ Art. 15(3) TFEU, fourth indent extends the same exception to the Court of Justice and the European Investment Bank. The Court has made it clear that it will only grant access to documents that are not linked to its judicial function: see Decision 2020/C 45/02 of the Court of Justice of the European Union of 26 November 2019 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions; see also case T-433/17 *Dehousse v Court of Justice of the European Union* ECLI:EU:T:2019:632 para. 34, where the General Court stated that transparency is to be the rule and confidentiality the exception.

⁶ See also P Van Cleynenbreugel, ‘Confidentiality behind Transparent Doors: the European Central Bank and the EU Law Principle of Openness’ (2018) *Maastricht Journal of European and Comparative Law* 52.

maintaining price stability in the Eurozone, *inter alia* by having the exclusive right to authorise the issuing of Euro banknotes.⁷ The ESCB more generally structures the Eurozone's monetary policy, coordinates foreign-exchange operations and ensures the smooth operation of payment systems in the Eurozone.⁸

Within the context of that mandate, confidential decision-making remains the starting point. Art. 132(2) TFEU states that "[t]he European Central Bank *may decide* to publish its decisions, recommendations and opinions".⁹ That provision already hints at the ECB's discretion in making its decisions public. That could be interpreted as reflecting a preference for confidential decision-making, as was and still is common in monetary policy activities. Art. 10(4) of the ECB Statute confirms even more explicitly that "[t]he proceedings of the [Governing Council] meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public". Again, this provision clearly indicates that the actual minutes of the deliberations will not be deemed publicly available, only the outcome of decisions *may* be made public; publicity thus constitutes the exception rather than the rule.

That preference for confidentiality makes sense when one links it to the very nature of monetary policy. This type of policy and the initiatives taken to maintain price stability are by their very nature activist interventions in the market.¹⁰ Given the impact such decisions may have and the speculative actions they may result in if it becomes fully clear how and how far the ECB is willing and able to go in its short-term decision-making, confidentiality serves as a tool to 'manage expectations' among stakeholders. As such, confidentiality serves as an instrument directly to avoid that the actual conduct of effective and efficient monetary policy is rendered impossible.

The confidentiality posture has been confirmed in the ECB Rules of Procedure and in the ECB's 2004 access to documents decision. According to art. 23.1 of the Rules of Procedure, proceedings of decision-making bodies shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public. The same Rules state that not only the proceedings are confidential; any document drawn up or held by the ECB shall be classified and handled in accordance with the organisational rules regarding professional secrecy and management and confidentiality of information. Only after 30 years will the documents become publicly available.¹¹ The

⁷ Art. 127(1) TFEU.

⁸ Art. 127(3) TFEU.

⁹ Emphasis added. See for an example Decision 150/2001/EC of the European Central Bank of 10 November 2000 on the publication of certain legal acts and instruments of the ECB.

¹⁰ See for background on the nature of ECB monetary policy, K Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer' (2019) *Maastricht Journal of European and Comparative Law* 94.

¹¹ Decision 257/2004/EC of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank, art. 23(3). See also Decision 2/2004/ECB of the European Central Bank of 17 June 2004 adopting the Rules of Procedure of the General Council of the European Central Bank, art. 10(3).

2004 access to documents decision allows individuals to request access to ECB documents. However, art. 4(1)(a), first indent also maintains that access to documents can be refused when such access would go against the public interest in maintaining the confidentiality of the proceedings of the Governing Council.¹² In the exercise of its mandate conferred by the TFEU, the ECB clearly favours confidential decision-making.

II.2. EXTENDING THE SAME CONFIDENTIALITY APPROACH TO ECB PRUDENTIAL SUPERVISION

Since November 2014, the ECB has also come to play a most important role in the prudential supervision of significant credit institutions established in a eurozone Member State.¹³ Being part of the on-going EU banking union, ECB prudential supervision takes place in the context of the single supervisory mechanism (SSM) set up by Council Regulation 1024/2013.¹⁴ Effectively replacing the role of formerly national prudential supervision authorities, the ECB is responsible within the SSM for the assembly of data and the adoption of decisions relating to individual credit institutions, starting with authorising their activities to adopting sanctioning decisions.¹⁵ As such, the ECB complements its macro-economic monetary policy powers and scarce macro-prudential – stability-focused powers with micro-prudential oversight over specific credit institutions.¹⁶

As part of its supervisory activities, the ECB applies the sector-specific Directives and Regulations governing the prudential supervision of credit institutions. Those different instruments contain specific provisions on safeguarding professional secrecy, which have to be respected by the ECB. The professional secrecy obligations relating to financial market supervision are so extensive that one could be inclined to believe that financial supervisory decisions are also subject principally to the principle of confidential decision-making.¹⁷ The ECB certainly operates on the basis of that premise, as art. 23(1) of its Rules of Procedure

¹² Decision 258/2004/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents.

¹³ On the emergence of the Banking Union and the ECB's role in that regard, see among others N Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) CMLRev 1609 and BS Nielsen, 'Main Features of the European Banking Union' (2015) European Business Law Review 805.

¹⁴ On the Single Supervisory Mechanism in particular, see among others B Wolfers and T Volland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank' (2014) CMLRev 1463.

¹⁵ Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, art. 4.

¹⁶ On macro-prudential supervision powers, which are entrusted to the European Systemic Risk Board, the secretariat of which is assured by the ECB, see Regulation 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, and C Papathanassiou and G Zagouras, 'A European Framework for Macro-Prudential Oversight' in E Wymeersch, KJ Hopt and G Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press 2012) 159.

¹⁷ That has also been a position defended by Advocate General Bot, in case C-15/16 *Baumeister* ECLI:EU:C:2017:958, opinion of AG Bot, para. 41.

extends confidential decision-making to the ECB Supervisory Board. The ECB thus seems to operate on the assumption that all documents relating to financial supervisory tasks are confidential and may not be communicated. The abovementioned art. 4(1)(a), first indent of the 2004 access to documents decision also states that access to documents can be refused when such access would go against the public interest in maintaining the confidentiality of the proceedings of the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013. Exceptions to such confidentiality exist, yet are phrased as exceptions to the professional secrecy obligations also in place. When no such exception exists, the general idea would be that banking supervision documents at ECB level remain confidential and are not to be made accessible for individuals.

However, Regulation 1024/2013 does not seem to accept confidential decision-making unequivocally within the EU banking union's overall prudential supervision framework. According to recital 59 of that Regulation, "[t]he regulation referred to in art. 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU". That recital requires the determination of detailed rules enabling access to documents resulting from the carrying out of supervisory tasks. For documents falling outside the scope of its professional secrecy obligations, the ECB would thus have to ensure that individuals can request access to them in accordance with a Regulation adopted to that extent by the Council and the European Parliament. At present, the only Regulation in place on the basis of that provision is Regulation 1049/2001, which covers only Commission, European Parliament and Council documents.¹⁸ ECB documents, not even those held in the context of its prudential supervision mandate, do not benefit from a similar access to documents regime.

The policy choice to exclude prudential documents from a more generous transparency legal regime may come as a surprise. Prudential supervision is fundamentally different from monetary policymaking. Where in the latter case the risks of speculation and on the spot decision-making warrant a significant amount of confidentiality, the former essentially concerns criteria and frameworks on the basis of which the solvability of credit institutions will be assessed. In order to guarantee an equal and correct application of those rules in all individual cases, transparency by means of access to documents could be considered a hallmark of good administration. The ECB, for its part, decided to keep such decision-making processes confidential nonetheless, in apparent contradiction with the spirit of Regulation 1024/2013, yet in line with its predominantly confidential monetary policymaking features.

¹⁸ Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

II.3. THE COMPATIBILITY OF ECB MONETARY POLICYMAKING CONFIDENTIALITY WITH EU CONSTITUTIONAL LAW

The limited scope accorded to the principle of transparency in ECB governance has given rise to criticism.¹⁹ It is not surprising that the question as to whether confidentiality can remain at the heart of ECB policymaking has ended up before the EU Courts. In the *Espírito Santo* case, the Court had an opportunity to address that issue in the context of monetary policy. Banco Espírito Santo (BES), a Portuguese credit institution, came under financial pressure and saw its liquidity position deteriorating. The Portuguese national bank granted an emergency liquidity credit, which was later confirmed and limited up to a certain ceiling by the ECB Governing Council. After one month, the ECB decided to suspend BES' access to emergency liquidity and order all credit granted already to be repaid. In the minutes accompanying the decision mentioning the suspension, the amount of the credit offered and the maximum amount that could be granted were mentioned.²⁰ As a result of the Decision, BES had to initiate insolvency proceedings and entered into resolution. The holding company behind the insolvent bank requested access to those minutes, which was granted partially by the ECB.²¹ However, said amounts were not made public. According to the ECB, disclosure of the document would undermine the protection of the public interest as regards the confidentiality of the proceedings of the ECB's decision-making bodies.²² In the subsequent action for annulment against the ECB's refusal decision, the General Court held that the exception grounded in the confidentiality of proceedings could not be invoked as such without any further explanation.²³ Refusing access to a document simply because it concerned a confidential Governing Council decision was not sufficient according to the General Court. The ECB would have to explain how and why the confidentiality of procedures was at risk in the specific case at hand.²⁴

However, the Court of Justice on appeal confirmed that the access to documents decision cannot be interpreted in such an extensive way.²⁵ The Court implicitly seems to agree that art. 15(3) TFEU shields the ECB from having to grant as wide an access to documents that do not relate to its purely administrative tasks. Monetary policy, the Court additionally

¹⁹ See on that point, P Leino-Sandberg, 'Public Access to ECB Documents: Are Accountability, Independence and Effectiveness an Impossible Trinity?' in European Central Bank (ed) *Building Bridges: Central Banking Law in an Interconnected World*, Proceedings of the ECB legal Conference 2019, 24 June 2020 www.ecb.europa.eu 206.

²⁰ Case T-251/15 *Espírito Santo Financial (Portugal) v ECB* ECLI:EU:T:2018:234 para. 5.

²¹ *Ibid.* paras 12 and 15.

²² *Ibid.* para. 52.

²³ *Ibid.* paras 81 and 125.

²⁴ See also case T-730/16 *Espírito Santo Financial Group SA v ECB* ECLI:EU:T:2019:161, which resulted in a similar conclusion.

²⁵ Case C-442/18 P *ECB v Espírito Santo Financial (Portugal)* ECLI:EU:C:2019:1117 para. 42. The Court reached the same conclusion in case C-396/19 P *ECB v Estate of Espírito Santo Financial Group* ECLI:EU:C:2020:845.

appears to presume, is not part of those tasks. As a result, if the Governing Council decided not to make certain information public, art. 4(1)(a) first indent implies that no access to that information can be given.²⁶ No further detailed or specific motivation would be required from the ECB when it refuses access to documents on confidentiality grounds.²⁷

In practice, it follows from the Court of Justice's ruling that the principle of confidential decision-making still weighs more heavily than the right of access to ECB documents in the context of ECB monetary policymaking. The ECB retains the discretion to exclude a large amount of information and documents from the overall principle of transparency. In doing so, it can elevate confidential decision-making to a principle that supersedes transparency in the context of its decision-making procedures. According to the Court, the EU law principle of transparency clearly has its limits within this particular context. Although the ECB has other accountability mechanisms in place, including its accountability to other EU institutions,²⁸ its independence guaranteeing its expert-based functioning,²⁹ and its extensive communication of its decisions,³⁰ the fact remains that the room for transparency as an accountability tool is more limited in this context than in the framework of the functioning of other EU institutions.³¹

The Court arrived at this conclusion in the framework of monetary policymaking. An important open question nevertheless remains as to whether the same reasoning would apply in the context of prudential supervision of credit institutions. In the absence of a clear answer given to that question by the Court of Justice, however, it remains to be seen whether the ECB's choice to extend its confidential governance features into that domain as well would be considered compatible with EU primary law.

III. THE EXCEPTIONAL NATURE OF ECB EXCEPTIONALISM

The previous section highlighted that confidentiality remains at the heart of ECB decision-making and that EU constitutional law, by virtue of art. 15(3) TFEU, at least implicitly

²⁶ *ECB v Espírito Santo Financial (Portugal)*, cit. para. 44.

²⁷ *Ibid.* para. 56.

²⁸ See for background, F Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-Crisis Governance Framework' (2019) *Maastricht Journal of European and Comparative Law* 165.

²⁹ See D Fromage, 'Guaranteeing the ECB Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?' (2019) *Maastricht Journal of European and Comparative Law* 48.

³⁰ See P Van Cleynenbreugel, 'Confidentiality behind Transparent Doors: the European Central Bank and the EU Law Principle of Openness' cit. 59 ff. On the difficulties of communicating within the context of banking supervision, see M Bozina Berós, 'The ECB's Accountability within the SSM Framework: Mind the (Transparency) Gap?' (2019) *Maastricht Journal of European and Comparative Law* 122. For a proposal to allow experts audit confidential decisions, see P Nicolaïdes, 'Accountability of the ECB's Supervisory Activities: Evolving and Responsive' (2019) *Maastricht Journal of European and Comparative Law* 136.

³¹ See on that point, P Leino-Sandberg, 'Public Access to ECB Documents: Are Accountability, Independence and Effectiveness an Impossible Trinity?' cit. 215.

tolerates its precedence over the principle of transparency. As such, the ECB's decision-making framework appears to reflect an anomaly in the EU legal order's overall attention to transparency. Indeed, transparency takes centre stage in other sub-fields of EU banking supervision and monetary policy.³² Despite confirming explicitly the legality of confidential ECB decision-making under EU law in the context of monetary policymaking, the Court of Justice has taken transparency rather than confidentiality as a starting point in relation to the powers and mandates of national supervisory authorities also entrusted with banking supervision (III.1). In the same way, the newly created Single Resolution Board (SRB) within the Single Resolution Mechanism (SRM) for winding up insolvent credit institutions has taken transparency and the legal regime of Regulation 1049/2001 as its key starting point. Unsurprisingly, the Appellate Panel attached to that Board has also promoted a widest possible access to documents (III.2). Even more remarkably, the Eurogroup, an informal meeting of Eurozone finance ministers that does not qualify as an institution under EU law,³³ has made transparency the starting point of its decision-making operations, taking precedence over confidential decision-making (III.3). As a result, the ECB's reliance on confidential decision-making to limit access to its documents truly represents an exceptional EU governance modus within the EU banking and monetary unions.

III.1. PROFESSIONAL SECRECY AND CONFIDENTIALITY IN BANKING SUPERVISION

The prudential supervision mechanism of credit institutions set up within the Eurozone entrusts the ECB with the prudential supervision over significant credit institutions established in a Eurozone Member State.³⁴ In addition to the ECB, however, national competent supervisory authorities, coordinating their activities within the European Banking Authority,³⁵ also play a key role in supervising banks on a daily basis.³⁶ When enforcing EU banking supervision law, those national authorities are acting within the scope of EU law³⁷ and

³² We specifically focus on domains of banking and monetary law covered by EU law. The European Stability Mechanism, established by international Treaty and operating in accordance with public international law, is not covered by our analysis. See Treaty establishing the ESM [2012]. The ESM does not have a transparency/access to documents regime in place, although calls have been made to pay attention to this, see M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* cit. 147.

³³ This was confirmed in the context of an action for annulment on the basis of art. 263 TFEU in joined cases C-105/15 P to C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702 paras 47-49. Advocate General Pitruzzella confirmed that position in his opinion in a case on EU liability for damages caused by Eurogroup actions, see joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzzella, paras 62-107.

³⁴ See art. 4 Regulation 1024/2013 cit. See also for background G Bassani, *The Legal Framework applicable to the Single Supervisory Mechanism: Tapestry or Patchwork?* (Kluwer Law International 2019).

³⁵ See 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 716/2009/EC and repealing Commission Decision 2009/78/EC.

³⁶ See, by way of example, art. 6 of Regulation 1024/2013 cit.

³⁷ At least according to case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 28.

therefore, in principle, subject to EU fundamental rights. However, art. 15 TFEU and art. 42 of the Charter only apply to EU institutions, offices, bodies and agencies and cannot therefore directly extend to the operations of national supervisory authorities under EU law.³⁸

It can nevertheless be questioned to what extent the EU law principle of transparency, which underlies aforementioned Treaty and Charter provisions, also plays out in the operations of those supervisory authorities. To the extent that this is the case, transparent and open governance should be the rule and confidential decision-making the exception. Absent any EU primarily law provision similar to art. 15(3) TFEU that could be interpreted as justifying the inverting of that order,³⁹ the confidentiality of proceedings cannot in principle trump the principle of transparency.

Within the framework of banking supervision, no provisions are consecrated explicitly to the right of access to documents held by national supervisory authorities in the execution of their supervisory mandate. The only provisions somewhat related to this issue concern the professional secrecy obligations. According to those provisions, which appear in slightly different forms throughout different EU legislative instruments,⁴⁰ officials of supervisory authorities cannot in principle disclose documents exchanged or obtained from another national supervisory authority. In order to keep ensuring the effective exchange of such data and to enhance mutual trust between national authorities to exchange that information, its confidentiality is to be guaranteed. EU secondary legislation acknowledges some exceptions to that non-disclosure principle, such as in cases where this information is necessary to be used in criminal procedures.⁴¹ Exchanged information protected by professional secrecy obligations thus remains confidential. At first sight, it would seem tempting to infer from the foregoing that, as a result, all EU-mandated banking supervision operations engaged in by national supervisory authorities operate, just like the ECB, under the principle of confidentiality, which supersedes the principle of transparency. That was also the position defended by Advocate General Bot in a 2017 Opinion to the *Baumeister* case.⁴² However, the Court of Justice did not agree with that position. It rather stated that the information protected by professional secrecy was to be limited to “information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning

³⁸ As confirmed in case C-594/16 *Buccioni* ECLI:EU:C:2018:717 para. 20.

³⁹ As done by the Court in *ECB v Espírito Santo Financial (Portugal)* cit. para. 56.

⁴⁰ For an overview, see case C-594/16 *Buccioni* ECLI:EU:C:2018:425, opinion of AG Bobek, para. 43; see also R Smits and N Badenhoop, ‘Towards a Single Standard of Professional Secrecy for Supervisory Authorities: A Reform Proposal’ (2019) ELR 295.

⁴¹ By way of example, see Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, art. 76(1).

⁴² *Baumeister*, opinion of AG Bot, cit. para. 41.

of the system for monitoring the activities of investment firms that the EU legislature established".⁴³ Such information can only be disclosed on the basis of explicit legal provisions allowing for such disclosure.⁴⁴ By contrast, information not meeting those criteria is not confidential and can benefit in principle from access to documents, even when it is obtained in the framework of financial market supervision.⁴⁵ The Court confirmed this approach in its *UBS Europe*⁴⁶ and *Buccioni*⁴⁷ judgments.

As Advocate General (AG) Bobek summarised in his Opinion to *Buccioni*, three levels of transparency principles exist. In general, the principle that all documents held by a public authority are in principle accessible upon request. That principle is not absolute, as certain documents can be excluded from access, unless they meet specific conditions for disclosure of confidential information. Confidential information protected by professional secrecy obligations constitutes an exception to the overall transparency principle and EU law provides a limited series of circumstances in which such confidential information can be disclosed nonetheless.⁴⁸ At the outset, however, the category of confidential information may not be construed excessively broadly in this context.

The approach taken by the Court in this particular context is different from the one taken in relation to ECB monetary policy in *Espírito Santo*. As submitted in the previous section, the ECB has been given the opportunity to allow a principle of confidential decision-making to take the place of transparency. It follows from the judgments discussed here that this is not the case in relation to national banking supervisory authorities. Although EU secondary legislation offers relatively broad professional secrecy and confidentiality frameworks, those continue to operate against the background of the EU law principle of transparency and the idea of the widest possible access to documents. The Court decided not to follow AG Bot's suggestion to apply the ECB confidentiality logic to this field. From a coherence point of view, that is most regrettable. As both the ECB and national supervisory authorities engage in banking supervision activities, different disclosure regimes may apply to those supervision-related documents that do not fall within the professional secrecy obligations. It may as a result be easier to obtain such documents from national authorities than from the ECB, which results in a rather incoherent prudential supervision transparency framework.⁴⁹ In our opinion, that inconsistent framework does not deserve to remain in place, if only because it creates different

⁴³ *Baumeister* cit. para. 35.

⁴⁴ *Ibid.* para. 43.

⁴⁵ *Ibid.* para. 44.

⁴⁶ Case C-358/16 *UBS Europe and Others* ECLI:EU:C:2018:715.

⁴⁷ *Buccioni* cit. para. 30.

⁴⁸ *Buccioni*, opinion of AG Bobek, cit. para. 32.

⁴⁹ Although, given the ECB's particular role in relying on prudential supervision insights to develop effective monetary policies, it could also be argued that internal coherence *vis-à-vis* the accessibility of documents would be more important than coherence between national authorities and the ECB in access to prudential supervision documents. The Court has not had the opportunity to address that point in the case law referred to here.

accountability standards for actors involved in similar processes. At present, however, the Court of Justice implicitly confirms that those differences exist, resulting in ECB decision-making remaining an exception to the transparency principle.

III.2. TRANSPARENCY AND ACCESS TO DOCUMENTS IN THE CONTEXT OF THE SINGLE RESOLUTION MECHANISM (SRM)

As part of the EU's banking union, a single resolution mechanism has been set up in addition to the single supervisory mechanism in which the ECB and national banking authorities cooperate. The purpose of the single resolution mechanism is to ensure the orderly and coordinated winding down of insolvent credit institutions.⁵⁰ To avoid such procedures being done at the expense of taxpayers, banks have to contribute to a single resolution fund.⁵¹ Regulation 806/2014 sets up this mechanism and entrusts a new EU agency, the SRB, with the adoption of resolution decisions.⁵² Given the financially and often politically sensitive nature of resolution procedures, professional secrecy and confidentiality obligations have been put in place.⁵³ Within the context of SRB operations, attention has nevertheless also been paid to transparency and access to documents. Contrary to the framework maintained by the ECB, the SRB transparency framework closely aligns with Regulation 1049/2001 and its precedence of transparency over confidential decision-making.

According to art. 90 of Regulation 806/2014, Regulation 1049/2001 shall apply to documents held by the Board. In addition, persons who are the subject of the SRB's decisions shall be entitled to have access to the SRB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board. The SRB had to adopt specific rules on how that Regulation would be implemented in the context of its operations.

In February 2017, the SRB adopted its access to documents decision.⁵⁴ Acknowledging that art. 15 TFEU and Regulation 1049/2001 seek to guarantee access to documents to the fullest extent possible, the SRB Decision undertakes to define the conditions and

⁵⁰ Recital 10 of 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) 1093/2010.

⁵¹ Art. 67 of the Regulation 806/2014 cit.

⁵² Art. 42 of the Regulation 806/2014 cit. On the SRB's extensive powers, see IG Asimakopoulou, 'The Single Resolution Board as a New form of Economic Governance' in H Hofmann, K Pantazatou and G Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019) 279.

⁵³ Art. of the 88 Regulation 806/2014 cit.

⁵⁴ Decision (SRB/ES/2017/1) of the executive session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (hereinafter SRB access to documents Decision).

limits of public access to its documents.⁵⁵ Similar to the 2004 ECB Decision and contrary to Regulation 1049/2001, art. 1 of the SRB Decision does not mention that it intends to grant the widest access possible to those documents. However, despite the absence of a reference to such widest access, the exceptions to access have been phrased in a narrower way than in the ECB Decision. Just like Regulation 1049/2001 and the ECB Access Decision, the Decision distinguishes mandatory exceptions to disclosure (“shall refuse”) and exceptions to disclosure when no overriding public interest would nonetheless justify disclosure. The second category of exceptions is a perfect copy of Regulation 1049/2001. As to the mandatory exceptions, access to SRB documents shall be refused in case disclosure would undermine *i)* the public interest as regards the financial, monetary or economic policy of the Union or a Member State, the stability of the financial system of the Union or a Member State, the Union’s or a Member State’s policy relating to the resolution of credit institutions or other financial institutions, international relations, public security and the purpose of inspections, *ii)* the privacy and integrity of an individual with regard to his personal data and *iii)* the confidentiality of information protected as such under EU law.⁵⁶ The exceptions list is comparable to the one in Regulation 1049/2001, with the additional nuance that the SRB explicitly excludes confidential information protected by EU law from the scope of disclosure. In doing so, the Decision mainly confirms what had already been stated in Regulation 806/2014.⁵⁷ Documents relating to preliminary consultations or deliberations shall be refused even after decisions have been taken unless an overriding reason in the public interest requires disclosure. For exchanges with national resolution authorities, national banking supervision authorities and the ECB, this rule applies unequivocally. For exchanges with other bodies, the SRB will have to show that disclosure would undermine its decision-making processes.

Applicants for documents who have been refused full access need to submit a confirmatory application. Against the confirmatory decision, an internal appeal before the SRB Appeal Panel needs to be lodged, prior to submitting the case for review to the EU Courts or the European Ombudsman.⁵⁸ In the context of the winding down of *Banco Popular*,⁵⁹ the Appeal Panel has had the opportunity, throughout a series of cases, to confirm the need for the SRB to adhere to the key principles set out by Regulation 1049/2001. In those cases, the Appeal Panel confirmed that the SRB is to operate on the basis that, in principle, every document should be accessible unless certain overriding interests mandate against disclosure. That does not mean that certain categories of documents cannot be presumed confidential.⁶⁰ In that case, just like in the framework of Regulation

⁵⁵ Recitals 1 and 2 of the SRB access to documents Decision cit.

⁵⁶ Art. 4(1) of the SRB access to documents Decision cit.

⁵⁷ Art. 90(4) of the Regulation 806/2014 cit.

⁵⁸ Art. 90(3) of the Regulation 806/2014 cit.

⁵⁹ For an overview, see the decisions of the SRB regarding *Banco Popular* at srb.europa.eu.

⁶⁰ See, by way of example, Single Resolution Board Appeal Panel, final decision of 19 June 2018, case 54/17 para. 20.

1049/2001, it falls upon the applicant to demonstrate an overriding interest justifying why a document falling within that category is to be made public.

An important question that remains unaddressed so far is the extent to which the SRB can rely on exceptions to disclosure that were not directly covered by Regulation 1049/2001. Art. 90(2) of Regulation 806/2014 determines that the Board is to adopt a decision explaining how Regulation 1049/2001 will be applicable to it. That provision does not allow the SRB to envisage additional exceptions justifying non-disclosure of documents. At present, an appeal is pending before the General Court against an Appeal Panel decision invoking precisely that argument. It remains to be seen how the Court will rule in this respect.⁶¹

The uncertainty about the scope of non-disclosure exceptions notwithstanding, it cannot be denied that access to SRB documents cannot simply be refused in order to protect the confidentiality of banking resolution proceedings. As required by Regulation 1049/2001 and the case law interpreting it, the SRB has to offer a detailed description of the circumstances in which access to a document is refused. By obliging the SRB to take that position, transparency instead of confidentiality is being considered as the principle governing SRB operations. As such, the SRB operations are different from those of the ECB, which continues to allow confidentiality of its decision-making to be used as a justification in access to documents requests.

III.3. TOWARDS INCREASED TRANSPARENCY IN EUROGROUP ACTIVITIES?

To further highlight the ECB's transparency exceptionalism within the overall framework of EU banking supervision and monetary policy, it is useful also to compare its transparency approach with the one taken by the Eurogroup. A body not explicitly conferred powers as a matter of EU law,⁶² the Eurogroup nevertheless plays an important role in the institutional setup of the Eurozone. It should not surprise, therefore, that concerns have been voiced regarding the transparency of that body as well. In that context, it is interesting to note that the Eurogroup itself has taken steps to become more transparent. Those steps resemble the approach the ECB has taken towards transparency throughout its policies.

At first sight, the Eurogroup appears to have a rather shady status as a matter of EU constitutional law. Prior to the Lisbon Treaty, the Eurogroup was not recognised as such. An informal meeting of eurozone finance Ministers often preceding regular Council meetings, the Eurogroup became a forum in which eurozone Member States discussed their economic and budgetary policies and through which they sought, informally, to streamline those policies.

⁶¹ See, to that extent, pending case T-62/18 *Aeris Invest v CRU*, pending case – action brought on 6 February 2018, first plea in law.

⁶² *Mallis and Malli v Commission and ECB* cit. paras 47-49.

Existing without a clear legal basis since 1998,⁶³ the Lisbon Treaty acknowledged its existence by inserting art. 137 TFEU, which states that arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group. According to art. 1 of Protocol N. 14 attached to the TFEU, the Ministers of the Member States whose currency is the euro shall meet informally.

A hybrid body not being part of the Council or the European Council as such, its meetings are prepared and administered by a Eurogroup Working Group (EWG), the secretariat of which is assured by the European Commission. As a preparatory committee, the discussions within that Working Group are kept confidential, meaning that agendas and documents supporting preparatory work are not made public at the outset.⁶⁴

Given its hybrid status within the EU constitutional framework and its reliance on EU administrative services to support its operations, questions have arisen regarding the applicability of the EU law principle of transparency to Eurogroup operations. As a body not explicitly mentioned in Regulation 1049/2001, documents maintained by the Eurogroup would in principle not be amenable to access under that Regulation, above all absent a specific Decision or Regulation targeting the Eurogroup. At the same time, however, the fact that the Commission and Council General Secretariat maintain certain documents relating to the Eurogroup and EWG, would seem to make it possible for individuals to request access to them under Regulation 1049/2001. Indeed, per art. 2(3) of that Regulation, all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the EU can be the subject of an access request. The fact, however, that Eurogroup documents were not included in the Council's public register made it difficult to assess on what basis the EWG and Eurogroup decided to adopt or agree on certain policies. The complex institutional setup of the Eurogroup thus makes it very difficult to evaluate its decisions and to effectively hold it to account.

In a 2013 Report by Transparency International, the lack of transparency and accountability of the Eurogroup was put forward explicitly.⁶⁵ In reaction to calls for increasing transparency, the Eurogroup's then-President Jeroen Dijsselbloem decided to take action.⁶⁶ In March 2016, the Eurogroup agreed upon the principle that documents submitted to the Eurogroup will, as a rule, be published after the meetings, unless well-founded objections warrant against such publication.⁶⁷ At the same time, it was stated that the Eurogroup is not an EU institution and would not therefore fall within the scope

⁶³ See, to that extent, the site of the Eurogroup at the website of the Council of the European Union, www.consilium.europa.eu.

⁶⁴ This is based upon recital 11 of Regulation 1049/2001 cit.

⁶⁵ An update in B Braun and M Hübner, *Vanishing Act: The Eurogroup's Accountability* (Transparency International EU 2019) transparency.eu.

⁶⁶ Remarks by Eurogroup President following the meeting of 11 February 2016 www.consilium.europa.eu.

⁶⁷ Remarks by Eurogroup President following the meeting of 7 March 2016 www.consilium.europa.eu.

of Regulation 1049/2001.⁶⁸ Documents held by or prepared by Eurozone Member States can only be accessed in accordance with their national transparency regimes. To the extent that documents are held by the Commission or Council secretariat, those bodies can be called upon, in accordance with the procedure set out in Regulation 1049/2001, to consider applications for access to documents.⁶⁹

Against the background of the pressure exerted by the European Ombudsman, the Eurogroup in 2018 decided to revise its transparency policy. In September 2018, Eurogroup President Centeno put on the agenda the review of the communications' strategy in order to improve it further for the future.⁷⁰ That review resulted in important modifications being made to the governance of the Eurogroup as of September 2019. From that point onwards, as part of those modifications, an online repository of publicly available Eurogroup documents, featuring a search engine and filtering options, was created. In addition, the Eurogroup's webpage now mentions explicitly that the right to access to documents can be exercised by addressing requests for access to documents related to the activity of the Eurogroup and its preparatory instances to the EU institution holding them, notably the Council or the Commission.⁷¹ As a result of those steps, the Eurogroup will no longer be able to simply refer to confidentiality as a reason not to make documents public. Without the presence of another public interest justifying non-disclosure, transparency and the disclosure of document underlies Eurogroup working methods.

IV. THE PRINCIPLE OF ECB CONFIDENTIAL DECISION-MAKING ON ITS WAY OUT?

The main observation that can be derived from the overview in the previous two sections is that the ECB maintains a *status aparte* from a transparency point of view compared to other actors within the EU banking union. Although in practice all actors have the opportunity to protect confidential documents, the ECB is the only one, relying implicitly on art. 15(3) TFEU, to put confidentiality instead of transparency at the centre of its governance framework.

The fact nevertheless remains that the confidentiality-centred governance framework of the ECB in both monetary policy and banking supervision sits uneasily with the overall ambition of the EU to place transparency through access to documents more directly at the forefront of its decision-making processes. Recent developments may therefore even hint at a gradual erosion of confidential decision-making at ECB level and caution against the ECB remaining all too firmly attached to all of its current confidential governance policies.

⁶⁸ Reply from the Eurogroup President to the European Ombudsman of 16 May 2016 on recent initiatives to improve Eurogroup transparency www.ombudsman.europa.eu.

⁶⁹ *Ibid.*

⁷⁰ Remarks by Eurogroup President following the meeting of 7 September 2018 www.consilium.europa.eu.

⁷¹ See Eurogroup transparency policy review and way forward of 20 September 2019 www.consilium.europa.eu 3.

Two such developments will be distinguished in this section. First, although ECB confidentiality also extends to the framework of prudential supervision within the SSM, the ongoing transparency evolutions in related banking union actors (national prudential supervisors applying EU law and the SRB) in our opinion constitute, if not a legal obligation, at least a very clear invitation to the ECB to modify its confidentiality approach in relation to its SSM supervisory tasks. The ECB could even be obliged to do so, to the extent that the Court of Justice would classify its prudential supervision activities as ECB “administrative tasks” under art. 15(3) TFEU. We submit that this interpretation would not be completely unlikely (IV.1). Second, although, in contrast with prudential supervision, there are better policy reasons to keep a confidential decision-making framework in place in monetary policymaking, it has become evident that changes may also need to be contemplated in that context. The German Federal Constitutional Court’s (BVerfG) judgment rendered on 5 May 2020 in the *Weiss* case constitutes an important illustration in that regard.⁷² That judgment can be understood as criticising the ECB’s confidential decision-making process. It is therefore submitted that the best way to avoid the BVerfG from disregarding judgments of the Court of Justice and starting to rule itself on the compatibility of ECB measures with EU law would be to envisage the introduction of institutional transparency sandboxes in a selected number of cases involving monetary policymaking (IV.2). Both developments show that, albeit to different extents and in different ways, the principle of confidential decision-making is expected to face increasing scrutiny in the coming years (IV.3).

IV.1. PRUDENTIAL SUPERVISION ACTIVITIES AS “ADMINISTRATIVE TASKS”?

Art. 15(3) TFEU obliges the ECB only to set up an access to documents regime covering documents relating to its administrative tasks. The Court’s validation of ECB confidential monetary policymaking in the *Espírito Santo* case implicitly and indirectly confirms that monetary policymaking is not an administrative task and can therefore be shielded from wider access to documents requirements.⁷³ It nevertheless remains unclear to what extent that same reasoning also applies to the ECB’s prudential supervision activities. At first sight, the two domains are fundamentally different. Whereas monetary policymaking involves engaging in short-term corrective interventions in the functioning of the market and monetary system, prudential activities in essence constitute an administrative supervision mandate similar to many other market supervision frameworks and procedures. Given those differences, it may very well be possible to maintain different access to documents approaches in both fields.

⁷² German Constitutional Court judgment 2 BvR 859/15. On the judgment, see D Kyriazis, ‘The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango’ (6 May 2020) European Law Blog europeanlawblog.eu and A Viterbo, ‘The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank’ European Papers (European Forum Insight of 26 June 2020) www.europeanpapers.eu 671.

⁷³ *ECB v Espírito Santo Financial (Portugal)* cit. para. 42.

In addition, the developments that have been taking place among other EU banking union actors (national prudential supervision authorities and the SRB) cast additional doubt on the ECB's continued reliance on confidential decision-making in this field. It follows from the overview of transparency steps taken by other actors within the banking union in the previous section that transparency rather than confidentiality constitutes the governance starting point for those actors. On top of those evolutions, it is important to recall that recital 59 of Regulation 1024/2013 seems to prefer a more transparency-oriented policy in that regard at the level of all authorities involved in prudential supervision, including the ECB. The ECB's involvement in the SSM would mean that it would also have to take that call for more transparency seriously. The fact that national prudential supervision authorities are subject to wider access to documents obligations and the interest the EU may have in ensuring a coherent application and interpretation of its prudential supervision regulatory framework could also argue in favour of more transparency at least in the ECB's prudential supervision access to documents framework.

The ECB for its part seems convinced that it is not in the same way affected by this drive towards more transparency in prudential supervision. Art. 4(1)(a) of its 2004 access to documents decision continues to refer to the confidentiality of Supervisory board procedures in that regard. As a result, documents related to prudential supervision activities can also, as a matter of principle, remain protected by confidentiality. From an EU constitutional law's perspective, the ECB's extension of confidentiality to prudential supervision tasks implicitly relies on the presumption that ECB prudential supervision activities, just like those relating to monetary policymaking, do not relate to its administrative tasks. As a reminder, it is only for those tasks that art. 15(3) TFEU requires the presence of a full-fledged access to documents legal framework.

Although the Treaty does not define administrative tasks, the European Ombudsman in 1997 indicated that such concept relates only to documents involving an institution's internal administration (its organisational features, its tenders, its human resources decisions etc.).⁷⁴ That narrow interpretation has been relied on by the ECB to set up a more lenient access to documents regime in relation to monetary policymaking and prudential supervision activities. In that narrow understanding, prudential supervision tasks are not administrative tasks, which implies that the ECB could retain full discretion to limit access to any document that is not related to the exercise of those tasks.

It goes without saying that neither a recital to Regulation 1024/2013 nor the fact that national authorities applying the same or similar rules of EU secondary legislation act in a more transparent way, can supersede a provision of EU primary law such as art. 15(3) TFEU that limits transparency to documents relating to administrative tasks. The issue nevertheless remains that the notion of "administrative tasks" has not been defined yet authoritatively by the Court of Justice. Absent such a final interpretation, the ECB

⁷⁴ Draft recommendation of 20 January 1997 of the European Ombudsman on the own initiative inquiry into public access to documents, 616/PUBAC/F/IJH www.ombudsman.europa.eu.

currently relies on a non-binding interpretation of that notion by the European Ombudsman. That interpretation was put forward in 1997, at a time when it was rather unimaginable that the ECB would also act as a banking supervisor in its own right, which essentially amounts to the administrative supervision of major credit institutions. Compared with monetary policymaking, which deals with *ad hoc* interventions on the market and of which the Court has confirmed their non-administrative task nature,⁷⁵ prudential supervision in essence constitutes an act of administrative supervision that is recurrent and remains on-going, results in the adoption of administrative decisions and potentially sanctions. In addition, the activity of prudential supervision consists in the application and interpretation of EU legislation that is already in place instead of taking (pro-)active measures to intervene in the functioning of markets on an *ad hoc* basis. Traditionally speaking, such tasks could be classified as administrative in nature, which could result in them also being considered as such for the purposes of art. 15(3) TFEU.

Given their more administrative nature and focus compared to monetary policymaking, we submit that it cannot be excluded that the Court of Justice, should it have the occasion to do so, would interpret art. 15(3) in a more transparency-oriented fashion in the context of prudential supervision activities. That is especially true given the Court's confirmation that national prudential supervision authorities implementing and applying the same EU secondary legislation instruments as the ECB need to have such access to documents regimes in place. It is difficult to justify why the same types of documents could be accessed at national level whereas the mere fact that a credit institution is overseen by the ECB shields those documents from being made accessible. To the extent that disclosing such documents does not impinge upon the effectiveness of ECB monetary policymaking or on professional secrecy obligations, their disclosure should be considered. Given the interest the EU has in ensuring a consistent interpretation of its secondary legislation at both EU and national levels and the fundamental differences that exist between prudential supervision and monetary policymaking, this interpretation is not to be excluded at the outset.

To the extent that such an interpretation appears likely against the background of more general transparency evolutions within the banking union, prudential supervision-related "administrative tasks" at ECB level should, per art. 15(3) TFEU, be accompanied by a wider access to documents legal regime. It remains to be seen when and whether the ECB, rather than wait for such an interpretation by the Court of Justice, would be willing pro-actively to take steps in that direction and remove the confidentiality focus from its prudential supervision activities. Although that would do away with the current coherence in the ECB's overall confidentiality governance framework extending both to monetary policymaking and prudential supervision, it would align ECB prudential supervision practices more directly with transparency and access to documents obligations that are already imposed on national prudential supervisors.

⁷⁵ *ECB v Espírito Santo Financial (Portugal)* cit.

IV.2. *WEISS*: THE *BUNDESVERFASSUNGSGERICHT*'S IMPLICIT CRITIQUE ON THE ECB'S CONFIDENTIAL MONETARY POLICYMAKING

Within the framework of monetary policymaking, the BVerfG's *Weiss* judgment may also herald modest steps towards an increasingly transparent governance framework. The judgment above all held that the Court of Justice acted *ultra vires* in applying a too-deferent proportionality test to the assessment of an ECB programme,⁷⁶ allowing for the purchase of government bonds (the public sector asset purchase programme or PSPP).⁷⁷ Although the BVerfG above all criticised the Court of Justice for having failed to engage in a full proportionality review of the ECB's PSPP decision, it also criticised the way in which the ECB had justified the need for this programme under its monetary policy competences. According to the BVerfG, it was unclear to what extent the ECB had balanced the economic and social policy effects of its programme against the need for price stability interventions.⁷⁸

The judgment particularly emphasised that this lack of detailed reasoning constitutes an *ultra vires* act on behalf of the ECB.⁷⁹ The lack of a sufficient amount of information available⁸⁰ makes it impossible for the Court of Justice of the European Union and the German legislator to fully determine whether the ECB could maintain such a programme. The BVerfG therefore called upon the ECB Governing Council to adopt "a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme".⁸¹ In doing so, the ECB has to ensure that it is sufficiently transparent and open about those reasons, in order to allow the Court of Justice and national Parliaments fully to assess and review the decisions taken in that context.

In general terms, the BVerfG's critique on the PSPP programme is essentially a critique on the way in which ECB decision-making is held to account.⁸² The German Court does not however impose or mandate an immediate change in the ECB's transparency-confidentiality balance. It only wants to ensure that the reasons underlying and motivating certain programmes and decisions can be understood and reviewed better at Member State level. We nevertheless submit that the BVerfG judgment can be understood to consider as problematic the opaque and confidential nature of decision-making at the

⁷⁶ Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

⁷⁷ See for that programme, Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10). In the meantime, that Decision had been replaced by Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9).

⁷⁸ German Constitutional Court judgment 2 BvR 859/15 cit. paras 176-177.

⁷⁹ *Ibid.* para. 178.

⁸⁰ *Ibid.* para. 216.

⁸¹ *Ibid.* para. 235.

⁸² M Lamandini and D Ramos Muñoz, 'Monetary policy judicial review by 'hysteron proteron'? In praise of a judicial methodology grounded on facts and on a sober and neutral appraisal of (*ex ante*) macro-economic assessments' (20 May 2020) EU Law Live eulawlive.com.

ECB level.⁸³ The BVerfG gave a clear sign that the current extent of confidential decision-making may make it difficult to sufficiently review the ECB's actions.

Against that background, the BVerfG judgment could be understood as presenting an opportunity to reconsider the ECB's confidential decision-making framework. The question therefore remains what modifications would be required to improve that framework. It is clear from the aforementioned observations that the BVerfG at a general level took issue with the lack of documentation and information justifying certain features of the PSPP programme. Such criticism would require the ECB to manage expectations better and to disclose the particular information it relies on to make decisions beyond its current open communications strategies.

From a legal point of view, the simplest solution would be to remove the layer of confidentiality surrounding ECB decision-making. In practice, that would imply a change to art. 10.4 of the ECB Statute, which amounts to a modification of the Protocol attached to the Treaties containing that Statute. It goes without saying that, in the current state of affairs, any Treaty change would seem a remote possibility unlikely to succeed. Changes to art. 23.1 of the ECB Rules of Procedure, highlighting that the ECB will operate in a more transparent way would seem to offer a solution. However, the ECB's pledge to be more transparent would not take away the fact that art. 10(4) of the ECB Statute still confirms that confidentiality remains at the heart of the ECB Governing Council. In practice, therefore, any changes made to the Rules of Procedure would risk to remain cosmetic without modifying anything in practice.

It is therefore submitted that, rather than changing the regulatory framework in the first place, it may be more constructive to think about alternative ways that would result in increased openness and transparency, without necessarily having to be accompanied by Treaty changes. One such approach could consist in the Governing Council creating so-called "transparency sandboxes". A transparency sandbox would consist in a framework in accordance with which a selected group of individuals and institutions would be given wider access to documents otherwise considered as confidential. The notion of "transparency sandboxes" is inspired by so-called regulatory sandboxes, safe spaces in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.⁸⁴ Within the context of regulation, regulators sometimes accept businesses to experiment with certain technologies within a closely confined space. By way of analogy, it would not be impossible for the ECB to experiment, in relation to certain kinds of documents, with an openness framework that goes beyond what is usually possible under

⁸³ See also E Cerrato, F Agostini and N Jaberg, 'Why the PSPP judgment of the German Federal Constitutional Court Gives the ECB Another Incentive to Integrate Climate Change Considerations into Monetary Policy' (27 May 2020) European Law Blog europeanlawblog.eu.

⁸⁴ See for the definition of a regulatory sandbox the UK's Financial Conduct Authority's brochure on regulatory sandboxes: Financial Conduct Authority, 'Regulatory Sandbox' (November 2015) www.fca.org.uk 1.

generally applicable confidentiality and access to documents rules. The sandbox would allow, on a case-by-case basis, to make documents more widely available to stakeholders involved in or affected by certain decisions. Stakeholders involved in the decision-making process would receive access to the sandbox documents. However, such access could be accompanied by safeguards and obligations of secrecy not to transfer those documents beyond those allowed entry into the sandbox. To the extent that those decisions may have a (presumed) impact on a larger group of stakeholders, a wider disclosure of those documents could be envisaged. It could even be contemplated in that respect to grant a large number of individuals access to certain sandboxes. That would imply that the ECB or another body closely associated with it, would have to determine whether or not to include a certain decision within a sandbox. In practice, this type of action is exactly what the ECB engaged in in the wake of the BVerfG's *Weiss* judgment. The ECB made certain supporting documents available to the German Central Bank (the *Bundesbank*), which in turn involved the German Federal Ministry of Finance and the Bundestag of the German Federal Parliament in the consultation of those documents.⁸⁵ On the basis of that consultation, the German authorities involved could decide whether or not the ECB had respected the proportionality principle with regard to the PSPP programme.

The organisation of such institutional sandboxes is likely to raise at least four specific questions. First, it has to be decided what documents can be subject to a sandbox. In the PSPP case, the BVerfG indicated clearly that all documents relating to the adoption of that decision and enabling a full proportionality review were to be shared. However, when there is no such external demand for a given document, it may be difficult to anticipate which documents could be made subject to a sandbox. A sandbox framework is essentially *ex post* and responsive, a reaction to an external demand for more transparency. As such, it may be difficult to set up in an *ex ante* and general fashion which documents can be included in a sandbox and under which conditions. It could be envisaged that an independent expert board reviewing ECB classifications and deciding on the scope of sandbox operations could be set up. When that happens, it is not excluded that decisions taken following this internal review procedure will be subject to judicial review before the EU Courts on the basis of art. 263 TFEU. Second, the question remains as to the access to those documents included in the sandbox. Putting those documents there implies that their accessibility is going to increase. However, absent general criteria regarding the persons having access to them, it will fall upon the ECB to determine, on a case-by-case basis the extent of persons benefiting from access to those documents. That implies that the category of viewers of documents has to be determined carefully and in each case. This is obviously a laborious task that requires careful consideration. Third, the decision to include a certain decision in a sandbox and to extend it to certain categories of persons and not others is likely to give rise to disputes and calls for an increased review over those

⁸⁵ See for coverage of those developments A Rinke, 'ECB stimulus plans meets court requirements: German Finance Minister' (29 June 2020) Reuters www.reuters.com.

decisions. It may be necessary also to set up an administrative review mechanism allowing individuals to request a sandbox treatment or to contest decisions responding negatively to their request. In any case, the mere possibility of introducing institutionalised transparency sandboxes would need to be accompanied by new administrative structures within the ECB as well. Fourth, it is likely that the sandbox approach would result in incoherent transparency approaches. Some documents would be made subject to sandbox treatment, while others, relating to similar decisions, would not. In the same way, the scope of stakeholders granted access to the sandbox would differ from case to case and someone would have to determine clearly who is a stakeholder and who is not. A clear definition of who can be a stakeholder and the professional secrecy obligations accompanying stakeholderhood would therefore have to be established in the framework setting up the institutional sandbox regime.

Despite those open questions, we submit that the sandbox approach outlined here could service as a means for the ECB to translate the BVerfG's critique in a sustainable and more transparency-oriented framework. It allows directly to counter the BVerfG's objections without fundamentally overhauling the confidentiality-oriented governance framework underlying ECB monetary policy. Although formally and at the outset maintaining the ECB's confidential decision-making approach, the potentially intensified *ex post* review over decisions that had to be taken on short notice would increase avenues to question the ECB's currently unquestionable expertise in monetary policymaking and, more generally, the confidentiality rationale that accompanies it. The future setup and potential functioning of those institutional sandboxes would therefore have to include safeguards to avoid the effectiveness of monetary policymaking being undermined. The addition of supplementary administrative layers and increased professional secrecy standards could be envisaged in that regard. At present, it remains to be seen whether, in response to the BVerfG, the institutional sandbox mechanism could be set up on a more permanent basis and what safeguards will have to be put in place to keep confidential decision-making play a central role in monetary policymaking. What is clear, however, is that the strict confidentiality-oriented policy focus will continue to be under scrutiny in the realm of monetary policymaking and may require a new balance between transparency and confidentiality.

IV.3. CONFIDENTIALITY: AN ERODING GOVERNANCE *MODUS*?

The developments outlined in this section demonstrate that the ECB's confidentiality-centred decision-making may be eroding, in the first place in the realm of prudential supervision but also and to a lesser extent in the realm of monetary policymaking.

In the realm of prudential supervision, the ECB operates on the assumption that decision-making is in principle confidential and that transparency through access to documents can be limited on grounds of such confidentiality. That interpretation is nevertheless dependent on prudential supervision tasks not being classified as administrative

tasks under art. 15(3) TFEU. This *Article* submitted that, absent judicial clarification, the administrative nature of prudential supervision procedures could lead the Court to require a wider access to documents regime for those activities. If that were to be accepted, merely referring to the confidentiality of ECB Supervisory Board meetings would no longer constitute a valid reason to refuse access to documents in that context. It may be useful for the ECB to take into account that option.

Although the pro-active, ad hoc interventionist nature of monetary policymaking serves as a justification to keep this domain largely confidential, the BVerfG *Weiss* judgment at the very least requires the setup of increased transparency sandboxes to be put in place. To comply with that judgment and avoid future problems, we advocated the setup of an institutionalised sandbox mechanism in this context. Although that mechanism does not as such do away with the principle of confidentiality in monetary policymaking, it brings some important nuances to it that require additional safeguards.

Although, at present confidentiality still stands as a valid legal principle, those potential or emerging cracks in the governance framework warrant attention at ECB level and demonstrate, at the very least, that unfettered reliance on confidential decision-making is becoming increasingly difficult as the EU banking and monetary union mature.

V. CONCLUSION

Despite the overall recognition of an EU law principle of transparency and access to documents, the ECB has managed to retain a decision-making framework focused on confidentiality. This *Article* highlighted how the ECB's remaining focus on confidentiality is increasingly becoming the exception within the EU banking and monetary unions. Other actors involved in the same policy sphere operate on the basis of transparency rather than confidentiality. When applying EU law, national banking supervision authorities, despite being subject to important professional secrecy obligations, operate on the basis of transparency and the potential access to each relevant document. In the same way, the newly created SRB has implemented a transparency-focused governance framework, which has been refined in the context of its Appeal Panel's activities. Even the Eurogroup, a body not part of the EU institutions, as the ECB originally was as well, adopted governance principles that essentially reflect a transparency-oriented decision-making approach. As a result, the ECB remains somewhat alone with its confidentiality-centred decision-making framework. Although inconsistent and giving rise to different access to documents standards, the specific ECB status has been deemed legal under EU law, at least in the framework of monetary policymaking.

At the same time, however, the *Article* highlighted two developments that show that the ECB's unfettered reliance on confidential decision-making faces increasing scrutiny. On the one hand, the extension of ECB confidentiality to its prudential supervision activities may be a step too far. Although the ECB itself maintains a coherent confidentiality focus, we argued that the nature of monetary policymaking and prudential supervision tasks are

completely different and may justify a different transparency approach. In addition, the fact that national prudential supervisors applying the same instruments of EU prudential supervision legislation operate under more transparent circumstances also calls for modifications being made at ECB level in that regard. It was submitted that a more extensive interpretation of the “administrative tasks” notion in art. 15 TFEU would no longer seem unimaginable in this regard, indirectly resulting in wider access to ECB prudential supervision documents. On the other hand, the German BVerfG’s judgment in *Weiss* highlighted that the ECB may have to think about ways to shed more light on some aspects of its monetary policy. Seeking to reflect upon a constructive way forward, the *Article* called for the institutionalisation of transparency sandboxes, but also cautioned against the risks they carry along. Given the need for clarity and modifications in both fields of ECB activity, it can no longer be denied that ECB confidential decision-making is at the very least coming to terms with increasing demands for transparency across the EU legal order.



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

THE *SUI GENERIS* FRAMEWORK FOR IMPLEMENTING THE LAW OF EMU: A CONSTITUTIONAL ASSESSMENT

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ABSTRACT: This *Article* compares the implementation of EMU law with the framework governing the implementation of EU law in general to determine whether that general framework has been complemented, adapted or transformed by the developments in the area of EMU Law. This *Article* finds that the legal framework governing the implementation of EMU law indeed deviates from the default framework. However, part of the *sui generis* framework for implementing EMU law is constitutionally mandated. On the other hand, it is less clear whether the ECB is entitled to supplement legislation or whether in fact it can only implement legislation. A second problematic aspect that this *Article* identifies is the significant role that the Council takes in implementing EMU law. Finally, it is in the area of EMU law that the Court identified a distinct type implementing power that is not covered by art. 291 TFEU or by other explicit legal bases in the Treaties that directly confer an executive power on the Council. The new type of power is not necessarily restricted to EMU law and can in principle be identified in other areas of EU law, showing the ramifications that the development of EMU law has on other areas of EU law.

KEYWORDS: implementing acts – delegated acts – comitology – SGP – enforcement – institutional balance.

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I. INTRODUCTION

A constitutionalist reading of the development of the law of the Economic and Monetary Union (EMU) suggests that the law in this area is in some way detached from other areas of EU law: the constitutional balance in this area has allegedly shifted away from the typical constitutional balance of the EU polity¹ or the typical “Community Method” has been replaced with a new “Union Method”.² This *Article*, which focuses on the issue of the implementation (in the broad sense) of EU law, will therefore start from the working hypothesis that the principles that apply to the implementation of the law of EMU also diverge from the general principles governing the implementation of EU law. In the first part, the latter general principles will concisely be set out. Next, the *Article's* central hypothesis will be tested by looking at a number of significant cases in the deepening of the EMU. Of course, if the working hypothesis is confirmed, this does not automatically mean that the framework for implementing the law of EU is legally problematic. The scope left under EU primary law for a *sui generis* implementation framework, tailored to or specific to the EMU, is a separate question, which this *Article* will treat accordingly. Any idiosyncrasies found in the implementation of the law of EMU will thus be assessed in order to conclude on the constitutional legitimacy of the *sui generis* (aspects of the) framework for implementing the law of EMU. The answer to the question of how the notion of implementation is different (or not) in the area of EMU will finally also tell us something about the EU legal order itself.

II. KEY FEATURES OF THE GENERAL FRAMEWORK OF IMPLEMENTING AND ADAPTING EU LAW

On paper, the Lisbon Treaty radically changed the legal *instrumentarium* available to the EU. In a nutshell, the Treaty first made a distinction between legislative and non-legislative acts. In the latter category, there are those non-legislative acts that are adopted directly based on the Treaties and those that are adopted based on secondary legislation. This secondary legislation is normally implemented by the Member States (as explicitly recognised in art. 291(1) TFEU) but if uniform conditions in implementation are required, the Commission or Council may be empowered to adopt implementing acts (art. 291(2) TFEU). A final type of non-legislative act then is the delegated act foreseen in art. 290 TFEU pursuant to which the Commission can amend or supplement formal legislative acts in relation to their non-essential elements.

Elaborating on this, the Lisbon Treaty first introduced the (ordinary and special) legislative procedure(s). As a result, in the EU Treaties there is now a distinction between those legal bases that refer to a legislative procedure and those which do not. If the legal basis

¹ M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) ModLRev 817.

² T Eijsbouts and J H Reestman, 'Editorial: In search of the Union Method' (2015) EuConst 425.

prescribes recourse to a legislative procedure, the act to be adopted will be a formal legislative act.³ If the legal basis does not formally prescribe recourse to a legislative procedure, the act to be adopted is not a legislative act in a formal sense even if it is adopted through a procedure that also requires Parliamentary consultation or even consent.⁴ Throughout the Treaties, provisions granting such an “executive law-making” function to either the Council or the Commission may be noted. However, whereas art. 289 TFEU makes clear that formal legislative acts may be adopted pursuant to the different legislative procedures, there is no general provision recalling the possibility for the Council and Commission to engage in executive law-making through the adoption of acts that are legislative in a material sense but not in the formal sense. Instead, that possibility will have to be inferred from each single legal basis providing in such a power.

Secondly, the Lisbon Treaty also created the separate categories of delegated and implementing acts in arts 290 and 291 TFEU. Pre-Lisbon, these two categories came under the general notion of “implementation” under art. 202 TEC and were governed by the comitology rules. Arts 290 and 291 TFEU on the other hand make a distinction between two different normative activities: amending and supplementing formal EU legislation on the one hand (art. 290 TFEU) and implementing binding EU acts on the other hand (art. 291 TFEU). Art. 290 TFEU allows the legislator to grant a “delegated” power to the Commission, albeit that the Commission cannot be empowered to amend or supplement the essential elements of legislation. Since the Council and/or Parliament delegate a power, which they normally exercise, they also retain control over the Commission and can withdraw their delegation or veto individual delegated acts which the Commission intends to adopt.

In contrast, art. 291 TFEU makes clear that the Member States are the default actors to implement EU law. However, if “uniform conditions in implementation” are required, the Commission or the Council shall be granted an implementing power. The difference in language with art. 202 TEC must be noted here: whereas granting an implementing power to the Commission under art. 211 art. 202 TEC was a decision entirely within the discretion of the Council (and Parliament), art. 291 TFEU has objectivised this test. Just like art. 202 TEC, art. 291 TFEU makes clear that in the choice between Commission and the Council, the former is the default EU actor to implement EU law. But again the language is stricter, whereas pre-Lisbon the “Council may also reserve the right, in specific cases, to exercise directly implementing powers itself”, art. 291 TFEU prescribes that “in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union” the Council may be empowered. The comitology system has thereby shrunk and is hence only applicable when the Commission adopts implementing acts under art. 291 TFEU. Differently from the situation pre-Lisbon, the instrument setting

³ Confirming as such, see joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631 paras 62-64.

⁴ Before the Court’s confirmation to the contrary AG Wathelet argued to the opposite in case C-104/16 *P Front Polisario v Council* ECLI:EU:C:2016:677, opinion of AG Wathelet, paras 151-161.

out the comitology procedures is now also adopted by the Council and Parliament, rather than by the Council on its own.

What was a radical reform on paper has, however, been largely undone by both the political institutions and the Court subsequent to the entry into force of the Lisbon Treaty. For a more elaborate discussion, reference is made to other works,⁵ but it may still be noted that the post-Lisbon “law of implementation” and the institutional balance in this area are much closer to the status quo pre-Lisbon than one would expect from a simple reading of arts 290 and 291 TFEU. Thus, the Court has largely undone the fundamental distinction between implementation and supplementation by confirming a discretion on the part of the legislator to choose between either of both.⁶ The Court also undermined the constitutional framework of arts 290 and 291 TFEU by declaring it an open system, for the legislature to elaborate upon, in *Short-selling* (cf. *infra*).⁷ The political institutions from their side have further undermined the distinction between delegated and implementing acts by de facto re-introducing a kind of comitology also in the adoption of delegated acts.⁸ Finally, the Commission itself has proposed to re-introduce a formal role for the Council when the Commission adopts implementing acts.⁹

III. *SUI GENERIS* ASPECTS OF THE FRAMEWORK GOVERNING THE IMPLEMENTATION OF THE LAW OF EMU

Before looking into the *sui generis* aspects of the implementation framework as it applies in the area of the EMU it is necessary to explicitly delimitate this area. Despite calls for a large conception of “EU” law which would also encompass *inter omnes* international agreements

⁵ M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) CMLRev 1501; C Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform' (2017) ELR 677.

⁶ Case C-427/12 *Commission v Parliament and Council* ECLI:EU:C:2014:170; case C-88/14 *European Commission v European Parliament and Council of the European Union* ECLI:EU:C:2015:499.

⁷ Case C-270/12 *United Kingdom v Council and Parliament* ECLI:EU:C:2014:18. See also M Simoncini, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2021) European Papers www.europeanpapers.eu 1485.

⁸ See the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts annexed to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making.

⁹ See Proposal COM(2017) 85 final from the Commission of 15 February 2017 for a Regulation of the European Parliament and of the Council amending Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 on laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Ironically, a consensus seems to exist between the Member States in Council that the Commission's proposal to give more powers to the Council would violate the institutional balance. See Presidency Progress Report Doc. 10127/18 from the Council of the European Union of 15 June 2018 on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 182/2011 cit.

concluded by Eurozone Member States,¹⁰ the law of EMU is conceived here as set out by Losada and Tuori in the *Introduction* to this *Special Section* (it corresponds to “EU law on the EMU” according to their categorisation).¹¹ Since the aim of this *Article* is to assess to what extent the general framework for implementing EU law applies to the specific EMU field, *inter se* (or even *inter omnes*) agreements or general EU law in the area of financial services are excluded from the scope of this research. Nevertheless, this *Article* will also briefly highlight developments in this area in order to present a realistic and broader picture of the constitutional transformation that may be witnessed in the field of EMU law.

Thus, while the implementation of international law instruments like the European Stability Mechanism, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the Agreement on the transfer and mutualisation of contributions to a Single Resolution Fund and the proposed dedicated Eurozone budget, fall outside the scope of this *Article*, it is important to highlight their existence. As Fabbrini has convincingly argued, the tendency of the EU Member States to deepen Eurozone integration through international law, rather than through the available legal bases in the EU Treaties, undermines the institutional balance.¹² Specifically for the question of implementation then: if it is accepted that the EU Treaties lay down a specific institutional balance for the implementation of EU law whereby certain prerogatives are granted to the EU institutions,¹³ these prerogatives are effectively undermined when EU Member States have recourse to international law to deepen Eurozone integration. This trend of integration through international law is by and large an EMU-phenomenon, since the only other prominent example is that of the Agreement on a Unified Patent Court.

As noted, the area of financial services does not come under the law of EMU either but an important development originating in that area has had important ramifications for the law of EMU nonetheless. As a result, it merits being pointed out here. Still, since the *Article* by Simoncini deals with EU agencies,¹⁴ the *Short-selling* ruling¹⁵ of the Court, which related to the powers conferred on the European Securities and Markets Authority (ESMA) need not be fully developed here. Instead, it suffices to note that on many points the Court’s reasoning in *Short-selling* is hardly convincing and this because the Court on the one hand

¹⁰ See T Eijsbouts and J H Reestman, ‘Editorial: In search of the Union Method’ cit. 3.

¹¹ F Losada and K Tuori, ‘Integrating Macroeconomics Into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe’ (2021) European Papers www.europeanpapers.eu 1367, 1370.

¹² F Fabbrini, ‘A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance’ (2016) *Cahiers de droit européen* 285.

¹³ For an argument to this effect, see M Chamon, ‘Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty’ cit.

¹⁴ M Simoncini, ‘The Delegation of Powers to EU Agencies’ cit.

¹⁵ *United Kingdom v Council and Parliament* cit.

continues to rely on *Meroni* while on the other hand it effectively denudes the original doctrine of its meaning.¹⁶ Specifically on the matter that is most relevant for our present discussion, the Court of Justice interpreted arts 290-291 TFEU as an open system, which the EU legislature could develop, e.g. by granting de facto implementing powers on a body not foreseen in either art. 290 or 291 TFEU. Indeed, the Court itself rightly noted that it was “called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature”.¹⁷ However, it did not subsequently answer that question explicitly. Instead, it questionably inferred from the possibility to challenge binding acts (of general application) of agencies that it should be possible to give concomitant powers to those agencies. Next it noted that the ESMA is vested “with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise”¹⁸ and concluded “that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU”.¹⁹ To answer why that conclusion may be drawn from its preceding findings, the Court relies on a circular reasoning: the contested power of the ESMA should not be seen in isolation but must be appreciated in its context which is one of close cooperation between national and EU authorities where both “must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions”.²⁰ In other words, the ESMA has certain powers because they are necessary and these powers could be legally conferred because they are necessary. Presumably then, this does result in any problem under arts 290 and 291 TFEU because under those latter two articles “the deployment of specific technical and professional expertise”²¹ is not required.

The Court thus allowed the legislature to confer an implementing power under art. 291 TFEU to a body not mentioned in art. 291 TFEU by denying it is an implementing power in the sense of that article to begin with and, crucially, without safeguarding in any way the prerogatives bestowed on the institutions by that provision, notably the Commission’s legitimate claim to be the default executive actor at EU level.²² This ruling

¹⁶ See M Chamon, ‘Granting Powers to EU Decentralised Agencies: Three Years Following *Short-selling*’ (2018) ERA Forum 597.

¹⁷ *United Kingdom v Council and Parliament* cit. para. 78.

¹⁸ *Ibid.* para. 82.

¹⁹ *Ibid.* para. 83.

²⁰ *Ibid.* para. 85.

²¹ *Ibid.* para. 82.

²² See C Blumann, ‘Un Nouveau Départ pour la Comitologie. Le Règlement n 182/2011 du 16 février 2011’ (2011) Cahiers de droit européen 26. However, Bianchi notes that pre-Lisbon the executive power was deemed to be held by the Commission, while the Lisbon Treaty clarified that it is in the first place held by the Member States and only exceptionally by the Commission. See D Bianchi, ‘La comitologie est morte!’

proved to be instrumental in the establishment of the Single Resolution Board (SRB), which, as part of the Banking Union, squarely falls in the law of EMU.²³ Of all the EU agencies, the SRB has the most far-reaching powers. This has been enabled by the *Short-selling* ruling, but the legislature arguably has not fully exploited the potential of *Short-selling*. Experiences with the SRB's functioning could thus provide a springboard to further agencification within and beyond EMU. In the words of the Parliament, *Short-selling* "indicated a potentially enhanced scope for activities of the European System of Financial Supervisors under Article 114 TFEU in comparison to the prevailing interpretation of the judgment in [...] *Meroni* at the time when the ESFS was created and therefore the Commission should assess its potential implications in the then forthcoming review of the ESFS".²⁴ For the moment, the Commission has not picked up on this suggestion, indicating again that the main limit to further agencification in the EU (or EMU) administration is a political rather than a legal one.

Turning to EMU law proper, several instances may be noted where the rules on the implementation of EMU law diverge from the general rules on the implementation of EU law. This *Article* will look at some of them: the implementing function which the European Central Bank (ECB) exercises within the Banking Union (section III.1), the enforcement function exercised by the Council in the Stability and Growth Pact (SGP) (section III.2) and the use that is made of the possibility to exceptionally entrust an implementing function under art. 291(2) TFEU to the Council (section III.3).

III.1. THE ECB'S IMPLEMENTING FUNCTION UNDER THE SSM

The Single Supervisory Mechanism (SSM) Regulation²⁵ grants an implementing function to the ECB since art. 4(3) of the Regulation provides that "[t]he ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation". Art. 6 of the Regulation deals with the cooperation between the ECB and the national authorities and provides in para. 7 that the "ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to

vive la comitologie! : premières réflexions sur l'exécution du droit de l'Union après le Traité de Lisbonne : l'exemple de la Politique Agricole Commune' (2012) RTDE 83.

²³ For a discussion on how the legislative negotiations on the SRB were influenced by the *Short-selling* case, see M Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' (2014) ELR 3.

²⁴ Resolution 2013/2166(INL) of the European Parliament of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review.

²⁵ Regulation (EU) 1024/2013 of the Council of 15 October 2013 on conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

organise the practical arrangements for the implementation of this Article”.²⁶ The power thus conferred on the ECB is an implementing power in the sense of the Court’s 2014 *Biocides* judgment,²⁷ but it is not conferred on either the Commission or the Council as prescribed by art. 291 TFEU. At first sight then the ECB finds itself in a similar position as the EU decentralised agencies but in fact, this implementing power is explicitly foreseen in EU primary law itself. The SSM Regulation is based on art. 127(6) TFEU while art. 132(1) TFEU provides that the ECB may adopt “regulations to the extent necessary to implement the tasks defined in [...] Article 25.2 of the Statute of the ESCB and of the ECB”. The latter article subsequently refers back to the instruments adopted pursuant to art. 127(6) TFEU. As a result, and from a constitutional perspective, the implementing power conferred on the ECB in the SSM regulation is something in between the executive competences, which the Council and Commission derive directly from the Treaties, and the power vested in these institutions under art. 291 TFEU. This odd constellation results from the unforeseen post-Lisbon development of the role of the ECB. Under the Lisbon Treaty the ECB is conceived as an executive actor with the ability to take some concrete decisions (also in the form of Regulations) within its concrete sphere of competence. However, by conferring banking supervision competences on the ECB, the legislator transformed it into a de facto legislative actor in the area. Hence, the provisions on implementation by the ECB seem to distort the original constitutional design of the EU and EMU.

So far, the Court of Justice has not been asked to rule on the limits to the ECB’s powers when it adopts implementing acts under art. 132(1) TFEU. It is therefore unclear what the limits are to this implementing power, *i.e.* which standard the Court would apply when the legality of such implementing measures is challenged. Will the Court apply the standard applicable under art. 291 TFEU, which would require the ECB to respect the essential general aims of the legislative act that it implements, but at the same time allowing it to adopt all the measures necessary or appropriate for the implementing of that act, provided that they are not contrary to it?²⁸ Will the Court opt for the *Meroni*-standard which it has developed for EU agencies in *Short-selling*, requiring the implementing power to be precisely delineated in that *i)* the conferral of powers is exceptional, *ii)* the ECB’s powers are embedded in decision-making procedures involving other actors, and *iii)* the

²⁶ This implementing power has been put into operation by the ECB when it adopted Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 on establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities.

²⁷ In this case, the Court defined the notion of implementation under art. 291(2) TFEU as “provid[ing] further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States”. See *European Commission v European Parliament and Council of the European Union* cit. para. 39.

²⁸ Case C-65/13 *Parliament v Commission* ECLI:EU:C:2014:2289 para. 44.

ECB acts pursuant to pre-defined criteria?²⁹ Or will the Court still apply some other threshold? As argued elsewhere, a sound litigation strategy can force the Court to take a position on this and requires parties contesting specific measures enforcing the SSM Regulation to not focus exclusively on those measures but also incidentally raise an exception of illegality against art. 6(7) of the SSM Regulation.³⁰

In constitutional terms, it would seem advisable for the Court to apply the more lenient standard of art. 291 TFEU. The possible argument that the Court already applied *Meroni* to the ECB and that *therefore* the *Short-selling* standard should apply to it, should be dismissed out of hand. While in *Tralli* the Court indeed applied *Meroni* to the ECB,³¹ the delegation at issue was wholly internal within the ECB (Governing Council to Executive Board) and the Court applied an *argumentum a fortiori*: internal delegations within one institution should not be scrutinized more strictly than (and at least as favourably as) external delegations (where one institution delegates its powers to a private body).³² Evidently, this provides little to no basis to argue that therefore, *Meroni* also applies to a conferral by the legislator of an implementing power to the ECB. Of course, should the ECB's implementing power be treated as an art. 291 TFEU power, the question of the ECB (illegally) supplementing legislation is bound to pop up. For the ECB, this would result in even more acute legal problems than for the Commission. After all, the Treaties clearly foresee both implementation and supplementation by the Commission, albeit that the former is regulated under art. 291 TFEU while the latter is governed by art. 290 TFEU. *Biocides*,³³ *Visa Reciprocity*³⁴ and *Eures Network*³⁵ illustrate the institutional importance which choosing one over the other has and the importance of qualifying a specific rulemaking activity as either implementation or supplementation.³⁶ For the ECB then, the demarcation line between implementation and supplementation would be even more relevant because it raises an issue of competence rather than procedure, the ECB only being competent to implement but (unlike the Commission) not to supplement legislation.

²⁹ Thus applying *mutatis mutandis* the general rules that may be inferred from *Short-selling*. See M Chamon, 'Granting powers to EU decentralised agencies, three years following Short-selling' cit. 600.

³⁰ See by analogy M Chamon, 'Limits to Delegation under Article 290 TFEU: The Specificity and Essentiality Requirements Put to the Test' (2018) Maastricht Journal of European and Comparative Law 243.

³¹ Case C-301/02 P *Tralli v ECB* ECLI:EU:C:2005:306.

³² M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 223.

³³ *European Commission v European Parliament and Council of the European Union* cit.

³⁴ *Ibid.*

³⁵ *Parliament v Commission* cit.

³⁶ In this regard, Zdobnõh argues that both arts 290 and 291 TFEU actually deal with the same kind of power or normative activity and that the sole difference between them lies in the control mechanisms which are deemed required. See D Zdobnõh, 'Competition between Articles 290 and 291 TFEU: What are these two Articles about' in E Tauschinsky and W Weiss (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar 2018) 60.

III.2. ENFORCEMENT AS A SEPARATE EXECUTIVE FUNCTION FROM IMPLEMENTATION UNDER ART. 291 TFEU

One of the policy responses to the euro crisis has been to strengthen the SGP through the adoption of the Six Pack.³⁷ This resulted in more effective enforcement in both the preventive and corrective arms of the SGP, through Regulations 1173/2011 and 1177/2011. While the latter simply streamlines the enforcement and sanctioning under art. 126 TFEU, the former created new enforcement and sanctioning mechanisms. It thus provides that if the Council either finds that a Member State has not followed up on a Council recommendation under art. 121(4) TFEU, or if it finds an instance of non-compliance under art. 126(6) or (8) TFEU, it may respectively impose an interest-bearing deposit, a non-interest-bearing deposit and a fine upon recommendation from the Commission. In addition, fines may also be imposed in case a Member State has manipulated the statistics it sends to Eurostat. The procedure by which the Council acts is in itself remarkable. While the Commission in its legislative proposal had foreseen a procedure whereby the Council acts on the proposal of the Commission,³⁸ in the final regulation the Council does so upon the Commission's recommendation. This allows a circumvention of the Community Method as reflected in art. 293(1) TFEU.³⁹ Of course, the fact that the Council is empowered to adopt sanctioning measures *vis-à-vis* Member States rather than the Commission would appear to constitute an example of the exception under art. 291(2) TFEU, which needs to be duly reasoned. While this aspect will be returned to later, it suffices to note here that recital 25 of the preamble to Regulation 1173/2011 indeed contains a (concise) justification for the exceptional implementing power of the Council.⁴⁰

In a judgment of 2017 however, the Court has indirectly cast doubt on whether such a justification is necessary in the first place. In this respect, it may be noted that after Regulation 1173/2011 entered into force, the Council adopted "sanctioning" decisions on

³⁷ See F Martucci, 'La longue marche vers le cadre budgétaire intégré de la Zone Euro' (2018) *Revue de l'Union Européenne* 157; C Antpöhler, 'Emergenz der europäischen Wirtschaftsregierung – Das Six Pack als Zeichen supranationaler Leistungsfähigkeit' (2012) *ZaöRV/HJIL* 353.

³⁸ See e.g. the changes from "proposals" to "recommendations" in the original proposal of the Commission in Proposal COM(2010) 524 final for a Regulation from the European Parliament and from the Council of 29 September 2010 on the effective enforcement of budgetary surveillance in the euro area, resulting in 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.

³⁹ On the importance of this provision in upholding the community method, see M Chamon, 'Upholding the "Community Method": Limits to the Commission's Power to Withdraw Legislative Proposals – Council v Commission (C-409/13)' (2015) *ELR* 900.

⁴⁰ Recital 25 of Regulation (EU) 1173/2011 reads as follows: "The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Articles 121 and 126 TFEU and Regulations (EC) 1466/97 and (EC) 1467/97".

four occasions. Thus in 2016 the Council adopted two implementing decisions in relation to Spain and Portugal after a finding, under art. 126(8) TFEU that these two countries had not taken effective measures to tackle an excessive deficit. Normally this would result in the imposition of a fine under art. 6 of Regulation 1173/2011, but the Commission recommended that no fine be imposed and the Council acted upon these recommendations.⁴¹ In 2015, the Council adopted a Decision,⁴² later requalified as an Implementing Decision,⁴³ imposing a fine on Spain for manipulating statistics. In 2018, the Council adopted an Implementing Decision imposing a similar fine on Austria.⁴⁴ By (continuing to) qualify(ing) these decisions as implementing acts, it is clear that the Council itself assumes it is exercising an implementing function under art. 291 TFEU. However, when Spain challenged the fine imposed on it in 2015 the Court ruled differently. It did so when it had to confirm its own jurisdiction to hear the case: art. 51 of the Court's Statute provides that the General Court is competent to hear direct actions against acts adopted by the Council under art. 291 TFEU. As a result, if the decision contested by Spain indeed was an implementing act, the General Court would have been competent to hear the case. Yet, the Court accepted jurisdiction itself and this ultimately because it read art. 291(2) TFEU not in isolation but in context with art. 291(1) TFEU.⁴⁵ As a result, the Court, while acknowledging that the Council exercised an implementing power in the general sense,⁴⁶ found that the Council could not have exercised an art. 291 TFEU implementing power, since "*Article 291(2) TFEU relates solely to legally binding acts of the European Union which lend themselves in principle to implementation by the Member States*".⁴⁷ Since Member States cannot be expected to fine themselves, the Council's power to fine Member States cannot be an art. 291 TFEU implementing power.

Because the Court only had to deal with this issue to determine its own jurisdiction, it did not have to be crystal clear on where that "new" implementing power then did reside, but it seemed to suggest that since reliance on correct statistics "is essential for the discharge of the responsibilities which Articles 121 and 126 TFEU confer on the Council",⁴⁸

⁴¹ See Implementing Decision (EU) 2017/2350 of the Council of 9 August 2016 on imposing a fine on Portugal for failure to take effective action to address an excessive deficit and Implementing Decision (EU) 2017/2351 of the Council of 9 August 2016 on imposing a fine on Spain for failure to take effective action to address an excessive deficit.

⁴² See Decision (EU) 2015/1289 of the Council of 13 July 2015 on imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia.

⁴³ See Corrigendum to Council Decision (EU) 2015/1289 of July 2015 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia.

⁴⁴ See Implementing Decision (EU) of the Council 2018/818 of 28 May 2018 on imposing a fine on Austria for the manipulation of debt data in Land Salzburg.

⁴⁵ Case C-521/15 *Spain v Council* ECLI:EU:C:2017:982 para. 45.

⁴⁶ *Ibid.* para. 44.

⁴⁷ *Ibid.* para. 48 emphasis added.

⁴⁸ *Ibid.* para. 53.

this implementing power may implicitly reside in arts 121 and 126 TFEU. This would mean that there is a fourth type of implementing power. Just like the implementing power in *Short-selling*, its discovery results from the EU's response to the financial or euro crises without it being a priori confined to this area. After all, the deciding factor here was that Member States could not enforce EU law against themselves, a reasoning that may apply in any area of EU law. Indeed, large parts of EU law are not to be enforced against private parties but against Member States. The typical example are the rules on state aid, which are clearly embedded in the TFEU itself. In other areas, such as the SGP, they are embedded in secondary legislation. For instance, in the administration of the payments under the Common Agricultural Policy (CAP), as a form of sanctioning the Commission may exclude payments from Union financing if Member States have insufficiently acted to ensure compliance with the CAP. Today, these decisions are taken as implementing decisions pursuant to the advisory comitology procedure⁴⁹ but it is questionable whether these are decisions that could actually be taken by the Member States themselves (under art. 291(1) TFEU) as required by *Spain v Council*.

III.3. THE EXCEPTION OF COUNCIL IMPLEMENTATION UNDER ART. 291(2) TFEU

In quantitative terms, the most significant implementing power exercised by the Council under art. 291(2) TFEU relates to the implementation of the common VAT rules under Directive 2006/112. A second group of implementing decisions relates to psychoactive substances and is taken by the Council pursuant to a pre-Lisbon third pillar legal basis.⁵⁰ More recently, the Council has also started to adopt implementing measures following the migration crisis to which the EU has been confronted,⁵¹ and has been conferred further implementing powers in the area of border control and migration.⁵² To ease pressure on the frontline states the Council, for the first time, also exercised its executive law-

⁴⁹ See arts 52 and 54 of the Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) 352/78, (EC) 165/94, (EC) 2799/98, (EC) 814/2000, (EC) 1290/2005 and (EC) 485/2008.

⁵⁰ Following a challenge by the European Parliament, the Court upheld the legality of this implementing power in light of Protocol 36 to the Lisbon Treaty (on transitional provisions). See joined cases C-317/13 and C-679/13 *Parliament v Council* ECLI:EU:C:2015:223. See also M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' cit. 1535.

⁵¹ See e.g. Implementing Decision (EU) 2017/246 of the Council of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. This implementing power was already granted to the Council under the pre-migration crisis Schengen Borders Code (SBC) but has only recently been exercised for the first time. Remarkably, while art. 29 refers to a recommendation to be adopted by the Council, the Council adopted an 'Implementing Decision setting out a Recommendation'.

⁵² While the Commission proposed to exercise this power itself, the new Frontex Regulation leaves it to the Council to determine whether there is a "situation at the external border requiring urgent action". Cf. art. 19 of the Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September

making power under art. 78(3) TFEU.⁵³ Finally then, also the euro-crisis resulted in the activation of the Council's exceptional implementing function under art. 291(2) TFEU.

The non-legislative European Financial Stabilisation Mechanism (EFSM) Regulation provided a first illustration of an exceptional implementing function being granted to the Council.⁵⁴ In line with the proposal of the Commission,⁵⁵ the regulation indeed provides that a decision on granting a loan to a eurozone Member State be taken by the Council.⁵⁶ A second important example to note is the Council's power under the Two Pack to adopt macroeconomic adjustment programmes for those Eurozone countries that have requested financial assistance from the ESM.⁵⁷ This programme will then replace the economic partnership programme, which the Member State concerned will have adopted under the excessive deficit procedure in which it would typically already have found itself.⁵⁸ A third implementing power has been granted to the Council in the Single Supervisory Mechanism (SSM) Regulation, since the Chair and Vice-Chair of the Supervisory

2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC with the Commission's proposed art. 18 in European Commission, Proposal COM(2015) 671 final for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC.

⁵³ See e.g. Decision (EU) 2015/1601 of the Council of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece. It may be noted here that in this Decision, the Council also conferred a further implementing power (under art. 291 TFEU) on itself rather than to the Commission, as proposed by the latter (cf. art. 4 of Council Decision 2015/1601 with art. 4 of the Proposal COM(2015) 451 final of the Commission of 9 September 2015 for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary. See also Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30 per cent of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

⁵⁴ See Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European Financial Stabilisation Mechanism. Thus, here again the Council relied on a primary law executive power to confer implementing powers to itself.

⁵⁵ See art. 4 of Communication COM(2010) 2010 final from the Commission of 3 March 2010 on Europe 2020: A strategy for smart, sustainable and inclusive growth.

⁵⁶ See art. 3 of the European Financial Stabilisation Mechanism (EFSM) Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European financial stabilisation mechanism.

⁵⁷ See art. 7 of the 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. The Commission also proposed this implementing power in Proposal COM(2011) 819 final of the Commission of 23 September 2011 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.

⁵⁸ See art. 9 of the 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.

Board are formally appointed by the Council pursuant to implementing acts.⁵⁹ A fourth implementing power may be found in the Single Resolution Mechanism (SRM) Regulation. In the original proposal of the Commission, the *ex-ante* contributions payable by Eurozone banks to feed the Single Resolution Fund would be calculated based on a methodology worked out by the Commission in delegated acts.⁶⁰ In the final SRM Regulation, however, this methodology is prescribed in Council implementing acts.⁶¹ The Council also exercised this power when it adopted Regulation 2015/81.⁶² Finally, in response to the Covid-19 pandemic, the Council has been granted further implementing powers. For instance, under the Recovery and Resilience Facility, the Council, through implementing acts, approves the national plans based on the Commission's assessment and the Council may suspend commitments to ensure coherence with economic governance under the SGP.⁶³ In the Commission's original proposal it was already foreseen that the suspension would be decided upon by the Council but the approval of the national plans would have been decided upon by the Commission.⁶⁴ The common denominator in these cases of course is that, to a varying degree, the decisions to be taken are of significant political and economic importance. It would suggest that apart from the essential elements being reserved to the legislature, there is a further distinction between significant (but not essential) elements that come under the natural authority of the Council and less significant elements of implementation that may be left to the Commission (or the Member States

⁵⁹ See art. 26(3) of the Regulation 1024/2013 cit. In the Commission's original proposal (see Proposal COM(2012) 511 final from the Commission for a Regulation of the European Parliament and of the Council of 29 October 2013 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), the Chair and Vice Chair were elected by the ECB Governing Council, from the members of the Executive Board and the Governing Council respectively.

⁶⁰ See art. 66 of the Proposal COM(2013) 520 final from the Commission for a Regulation of the European Parliament and of the Council of 10 July 2013 on 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 Bank Resolution Fund and amending Regulation (EU) 1093/2010 of the European Parliament and of the Council.

⁶¹ See art. 70(7) of the Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 on 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) 1093/2010.

⁶² Implementing Regulation (EU) 2015/81 of the Council of 19 December 2014 on specifying uniform conditions of application of Regulation (EU) 806/2014 cit. with regard to *ex ante* contributions to the Single Resolution Fund.

⁶³ See arts 20(1) and 10(3) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 on establishing the Recovery and Resilience Facility.

⁶⁴ See arts 9 and 17 of the Proposal COM(2020) 408 final of the Commission for a Regulation of the European Parliament and of the Council of 28 May 2020 on establishing a Recovery and Resilience Facility.

or EU agencies).⁶⁵ Of course, so far, such a distinction is not formally recognised in the EU Treaties or by the Court.

IV. A CONSTITUTIONAL ASSESSMENT

Having identified several atypical cases of “implementation” in the area of EMU, the question becomes in how far these idiosyncrasies are defensible from a constitutional perspective. Evidently this question has to be addressed not simply in the light of the EU Treaties but also in light of the Court’s post-Lisbon jurisprudence on arts 290 and 291 TFEU, regardless how questionable some of these clarifications may have been.⁶⁶

IV.1. THE ECB’S IMPLEMENTING FUNCTION UNDER THE SSM

Starting with the ECB’s implementing function, it was noted above that this has an unquestionable legal basis in primary law itself but that at least two pertinent constitutional questions remain, *i.e.* which standard should be applied to assessing the exercise of an implementing power by the ECB and whether the ECB should be denied the competence to supplement (rather than implement) EU legislation. The second issue borrows from the distinction introduced by arts 290 and 291 TFEU and is only relevant if this distinction can be applied *mutatis mutandis* to the ECB. So far, however, the Court has not provided much further clarity on how we can distinguish implementation from supplementation (under arts 290 and 291 TFEU). As a result, there is no proper standard to assess the ECB’s implementing decisions against. On the first question, it has been argued above, in light of the sound constitutional basis of the ECB, that the same generous standard as applies to the Commission’s implementation function under art. 291(2) TFEU should be relied upon.

Opportunities to test these questions have arisen but so far have not been seized. For instance, when the ECB determined that Landeskreditbank Baden-Württemberg was a significant entity that should come under the ECB’s supervision. That bank subsequently argued that given the “particular circumstances” as referred to in art. 6(4) of the SSM Regulation it should be exempted from direct ECB supervision. Since the Council had not further clarified the notion of “particular circumstances”, the ECB had done so itself in arts 70 and 71 of the SSM Framework Regulation.⁶⁷ When the Landeskreditbank challenged the

⁶⁵ For an argument that there may be a distinction between the material type of decisions which the Commission could adopt and those which the EU agencies could adopt, see M Chamon, ‘Beyond Delegated and Implementing Acts: Where do EU Agencies Fit in the Article 290 and 291 Scheme?’ in E Tauschinsky and W Weiss (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law – Walking a Labyrinth* (Edward Elgar 2018) 188.

⁶⁶ For a critical analysis of the Court’s post-Lisbon jurisprudence on arts 290 and 291 TFEU, see M Chamon, ‘Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty’ cit.

⁶⁷ See Regulation (EU) 468/2014 cit.

ECB's decision before the General Court, the latter noted that the Council had "confer[ed] on the ECB exclusive competence for determining the content of the concept of 'particular circumstances' within the meaning of Article 6(4), second subparagraph, of that same regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation".⁶⁸ The applicant however had only argued that the ECB had misapplied the SSM Regulation and its own SSM Framework Regulation when adopting the contested decision. As noted above, it could also have incidentally questioned the legality of arts 70 and 71 of the SSM Framework Regulation in light of the SSM Regulation (the ECB having overstepped its implementation mandate) and the illegality of the SSM Regulation itself (the Council having conferred a legislative power on the ECB rather than a permitted implementing power).⁶⁹ Concretely one could for instance argue that the ECB by determining what "particular circumstances" are, has supplemented the SSM Regulation whereas it is only empowered to implement the Regulation. Alternatively, one could argue that the Council in art. 6 of the SSM Regulation could not have validly conferred a supplementing power on the ECB. However, if the power to clarify the notion of "particular circumstances" is qualified as an implementing power to which the generous *Eures Network* standard of art. 291(2) TFEU is applied *mutatis mutandis*, it would seem difficult to conclude that the ECB has overstepped its implementation mandate.

IV.2. IMPLEMENTATION BY THE COUNCIL

The increased role of the Council in the implementation (in the broadest sense) of EMU law also raises constitutional questions. A first one results from *Spain v Council*, where the Court suggested that some "implementation" powers conferred in secondary legislation may not come under art. 291 TFEU. Another is the question whether the rule and exception foreseen in art. 291(2) TFEU has been respected.

a) False implementation.

The potential ramifications of *Spain v Council* are as of yet unclear. The Court held that some implementation cannot be qualified as implementation in the sense of art. 291 TFEU. But, does that mean that art. 291(4) TFEU also precludes such acts from figuring the prefix "implementing"? Clearly, the Council thinks not.⁷⁰ Further, since art. 291 TFEU does not apply, neither the Commission nor the Council would be the default EU actors to exercise these implementing powers and neither would the justification requirement to confer powers on the Council apply. Could the legislature confer this implementing power on a body like an EU agency (subject to it respecting the *Short-selling* doctrine)? At first sight, this would not appear to be possible if the implementing power finds its (im-

⁶⁸ Case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337 para. 63.

⁶⁹ See M Chamon, 'Limits to Delegation under Article 290 TFEU' cit.

⁷⁰ As noted above, the Council adopted a further implementing act *vis-à-vis* Austria following the ruling in *Spain v Council* cit.

plied) legal basis in arts 121 and 126 TFEU, since these provisions only refer to the (European) Council, Commission, Parliament and Economic and Financial Committee. Then again, the lack of a reference to agencies (in art. 291 TFEU) was not an obstacle for the Court in *Short-selling* either.

One might be tempted to dismiss these “problems” as inexistent in practice and as merely resulting from an oddity in EU procedural law.⁷¹ That is not the view taken here, however. The Court in *Spain v Council* clearly relied on a distinct interpretation of art. 291 TFEU, the relevance of which cannot be confined to the division of jurisdiction between the Court and the General Court. As it is, the Council has adopted further acts qualified as “implementing” acts for which it is doubtful that they could have been properly adopted by the Member States and for which it is therefore doubtful whether they come under art. 291 TFEU. The appointment of the Chair and Vice Chair of the SSM Supervisory Board is one such decision,⁷² since *a fortiori* the appointment of an EU official is not something that a Member State can decide itself. Perhaps more significantly, the same seems to apply to the decision to grant a loan from the EFSM and the decisions adopting the macroeconomic adjustment programmes (MAPs) under the Two Pack. The fact that these replace the economic partnership programmes (EPPs) which are adopted by the individual Member States themselves should not immediately lead us to conclude that the adoption of MAPs does come under art. 291 TFEU. After all, the MAPs are qualitatively different from the EPPs. The latter are basically informational replies to the Commission’s recommendations, setting out what a Member State is (planning to) do(ing) in terms of its economic policy. The MAPs on the other hand are binding instructions, spelling out what economic reforms a Eurozone Member States is required to undertake by virtue of EU law. Whether or not this comes under either art. 291 TFEU or under an implied “implementing” power is constitutionally significant. While the Court has not required a justification in *Short-selling* to confer powers on an EU agency rather than the Commission or Council, the ruling may still be read in that way. The result of this would be that “implementing” powers that do not come under art. 291 TFEU could be conferred on any kind of body without needing a special justification, since there is no default actor to adopt such implementing acts to begin with. Even if such powers are conferred on the Council, the requirement of justification under art. 291(2) TFEU would still not apply. This would allow a further fragmentation of the EU executive process, in absence of any guiding framework.

b) Implementation in duly justified cases.

⁷¹ Buchet for instance argues that the importance of this case is rather limited. See A Buchet, 'La réforme des pouvoirs conférés à la commission européenne, entre métamorphose et réminiscence' (2018) Cahiers de droit européen 226.

⁷² See e.g. Implementing Decision (EU) 2018/1958 of the Council of 6 December 2018 on the appointment of the Chair of the ECB Supervisory Board.

Art. 202 TEC provided that the Council could reserve an implementing power to itself in “specific cases” which, in the Court’s case law, also needed to be properly substantiated.⁷³ The only relevant (pre-Lisbon) judgment of the Court however makes clear that it does not put the threshold very high for the Council to reserve powers to itself. In the, admittedly specific, case of the implementation of border security legislation during the transitional phase following the entry into force of the Amsterdam Treaty, the Court found the “general and laconic considerations” on the “enhanced role of the Member States and the sensitivity of the areas involved” sufficiently precise to allow it to review this choice⁷⁴ and subsequently held that the Council could reasonably take the view that a specific case (in the sense of art. 202 TEC) was at issue.⁷⁵

This case law suggests that the Court will only set aside the choice of the Council to reserve itself implementing powers if that choice is manifestly inappropriate or if no justification is given. Arguably however, the bar for the Council to reserve powers to itself has also been raised by the Lisbon Treaty. Unlike art. 202 TEC, art. 291 TFEU now refers to “*duly justified* specific cases”,⁷⁶ which could be seen as a stricter standard unless one takes the view that it simply codifies the second comitology decision and the Court’s pre-Lisbon jurisprudence.⁷⁷ According to Blumann however, under the Lisbon framework it should be more difficult to reserve implementing powers to the Council.⁷⁸ The Comitology Regulation may also be read in this light. While in the pre-Lisbon *Commission v Council* case the Court still accepted a general argument on the sensitivity of the area concerned to confer implementing powers on the Commission, the current Comitology Regulation (and this differently from the Comitology Decision) provides that when adopting implementing acts in “particularly sensitive sectors”, the Commission will take special care not to go against any predominant opinion in the Appeal Committee.⁷⁹ This underscores the new reality that the simple fact that implementing acts are to be adopted in “particularly sensitive sectors” is not sufficient for the Council to reserve powers to itself.

⁷³ See case C-16/88 *Commission v Council* ECLI:EU:C:1989:397 para. 10; case C-257/01 *Commission v Council* ECLI:EU:C:2005:25 para. 50.

⁷⁴ *Ibid.* para. 53.

⁷⁵ *Ibid.* para. 59.

⁷⁶ In French, German, Italian and Dutch, the Treaties also refer to “des cas spécifiques dûment justifiés”, “entsprechend begründeten Sonderfällen”, “in casi specifici debitamente motivati”, “naar behoren gemotiveerde specifieke gevallen”.

⁷⁷ In his opinion in *Commission v Council*, AG Léger also noted that the Constitutional Treaty (now art. 291 TFEU) provided for conditions “a little more specific” than those in the second Comitology Decision. See case C-257/01 *Commission v Council* ECLI:EU:C:2004:226, opinion of AG Léger, para. 43.

⁷⁸ C Blumann, ‘Un Nouveau Départ pour la Comitologie. Le Règlement n 182/2011 du 16 février 2011’ cit.

⁷⁹ See recital 14 of the Comitology Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 on laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

So far, however, the Court has not been requested to apply this (new?) standard. It is far from clear therefore how instances of the Council's exceptional implementing function under art. 291 TFEU, like granting EFSM loans, the adoption of the MAPs, the methodology for calculating ex-ante contributions for the Single Resolution Fund, and finally some of the post-Covid-19 economic recovery measures should be assessed.

The fact that it is the Council that decides on granting EFSM loans is motivated as follows under the EFSM Regulation: "Given their particular financial implications, the decisions to grant Union financial assistance pursuant to this Regulation require the exercise of implementing powers, which should be conferred on the Council". In relation to the MAPs, Regulation 472/2013 provides that the power to adopt them should be conferred on the Council since it is "of particular relevance to the policy of economic coordination of Member States, which, pursuant to art. 121 TFEU, is to take place within the Council".⁸⁰ On the Council's power to define the methodology for ex-ante contributions, the SRM Regulation provides that "[t]he Council should, within the framework of the delegated acts adopted under Directive 2014/59/EU, adopt implementing acts to specify the application of the methodology for the calculation of individual contributions to the Fund, as well as the technical modalities for computing the flat contribution and the risk-adjusted contribution".⁸¹ Finally, when it comes to the approval of the Member States' recovery and resilience plans and the possible suspension of commitments to ensure coherence with sound economic governance, Regulation 2021/241 on the Recovery and Resilience Facility provides respectively that "[t]he Council should approve the assessment of the recovery and resilience plans by means of an implementing decision"⁸² and that "in view of the importance of the financial effects of the measures imposed [*i.e.* the suspension of commitments], implementing powers should be conferred on the Council".⁸³

Undoubtedly these "justifications" may be qualified as rather "general and laconic", although this does not exclude that, read in their context, they may amount to duly justified substantiations in the sense of art. 291(2) TFEU. If we take a conservative stance, whereby the threshold to reserve implementing powers to the Council under Lisbon rules is the same (or at least not lower) than the threshold pre-Lisbon, the justifications given in the EFSM and Two Pack regulations would indeed seem sufficient. Given the possible impact on the EU budget and the Council's role in establishing the budget, a role for that institution in the decision on granting EFSM loans indeed seems appropriate or at least does not seem manifestly ill-conceived. Again, given the role of the Council in the coordination of the Member States' economic policies, it is not manifestly inappropriate to grant the Council an implementing power to adopt MAPs. Even if a higher threshold is applied,

⁸⁰ See recital 18 of the Regulation's preamble.

⁸¹ See recital 114 of the Regulation (EU) 806/2014 *cit.*

⁸² See recital 45 of Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

⁸³ *Ibid.* recital 29.

because for instance the Comitology Regulation makes clear that the Commission may also be empowered to adopt implementing measures in “particularly sensitive sectors”, it seems doubtful that the Council manifestly erred in reserving to itself an implementing power, since in the legislature’s justification there is no reference to the sensitivity of the area concerned but only (implicitly) to the traditional dominant role of the Council in budgetary and economic coordination affairs. The same may finally be said as to the suspension of commitments under the Recovery and Resilience Facility Regulation. The situation is different however for the Council’s implementing power to determine the methodology for the calculation of ex-ante contributions under the SRM Regulation and for the approval of national plans under Recovery and Resilience Facility. The only relevant recitals to those Regulations simply postulate that the Council should establish the methodology and should approve the plans but without justifying why this ought to be so. The complete absence of justification then amounts to a manifest violation of the duty to provide a statement of reasons under art. 296 TFEU.

In light of the previous subsection, an important caveat should still be stressed here: if these five cases, which the legislature and the Council seem to assume come under art. 291 TFEU, are actually not governed by art. 291 TFEU, following *Spain v Council*, the duty of motivation that rests on the legislature pursuant to art. 291(2) TFEU might also not apply. As a result, such *sui generis* implementing powers could be reserved to the Council without requiring any special justification at all. Whether this is so of course depends on the (procedural) requirements which the Court would impose on the exercise of the *sui generis* implementing powers, which it has discovered in *Spain v Council*. In any event, the standard under art. 296 TFEU should be met, but it would further seem advisable, from a rule of law and legal certainty perspective, to apply art. 291(2) TFEU by analogy.

c) Covid-19 a catalyst for further constitutional modification?

After this *Article* was provisionally finalized, the EU institutions adopted a plethora of measures to tackle the Covid-19 pandemic. Given these measures’ economic and political significance, they present strong intergovernmental features. Time and space do not allow a fully-fledged analysis of these measures. Still, it may be noted that in addition to the features of the Recovery and Resilience Facility Regulation discussed previously another remarkable aspect of this Regulation relates to the procedure for authorizing payments. This type of decision squarely falls within the Commission’s budgetary powers under the general Financial Regulation, as also reflected in the Commission’s original proposal in which it foresaw that payments would be made after a positive assessment of whether the goals of the national recovery and resilience plans had been achieved.⁸⁴ Under the final Regulation it is still the Commission taking the final decision but in accordance with art. 24(4), the Economic and Financial Committee also gives an opinion which the Commission must take into account in its assessment. What is more, recital 52 of the

⁸⁴ See art. 19 of the Proposal COM(2020) 408 final cit.

Regulation (but only this recital and not art. 24) even provides in a referral to the European Council if one or more Member States in the Economic and Financial Committee are of the opinion that another Member State did not achieve its targets. The recital thereby provides that the procedure on authorization is suspended as long as the European Council has not exhaustively discussed the matter. While this set up has been qualified as justified in light of the Member States' liability for the EU's financial situation and because this was (politically) the only viable solution to convince Member States such as the Netherlands,⁸⁵ this *de facto* modification of the Financial Regulation and the drafting technique of creating a referral to the European Council through a legislative act's recitals rather than in its main provisions are legally questionable and should not be replicated or generalised in the post-Covid-19 era.

V. CONCLUSION

Has the deepening of the EMU resulted in the complementation, adaption or transformation of the law governing the implementation of EU legislation? Answering this question first requires delimitating the notion of the "law of EMU". In this *Article*, the law of the EMU is conceived strictly as being composed only of the body of EMU law that is proper EU law. The *inter se* and *inter omnes* international agreements concluded by Eurozone Member States were therefore not taken into account, even if they are part of the deepening of the EMU. It is clear that in the implementation of such agreements, the Member States can devise *ad hoc* arrangements which do not necessarily align with the default arrangements that apply under EU law and may indeed even undermine those default arrangements.

Focusing on EU law proper it may be noted that the implementation of EMU law indeed deviates from the default framework. However, the latter itself is not as clear-cut and simple as generally assumed and cannot be reduced to arts 290 and 291 TFEU either. Part of the *sui generis* framework for implementing EMU law is then constitutionally mandated and as such beyond reproach. This is especially so for the ECB's role in the SSM. Still a lingering issue here is whether the ECB is entitled to supplement legislation or whether in fact it can only implement legislation. This issue is obfuscated by the fact that under the Court's general jurisprudence both (very different) normative activities are blurred. However, while the Commission can both supplement and implement EU law (the distinction only being relevant to determine the modalities to exercise the competence), the ECB *prima facie* can only implement EU law (the distinction acquiring greater relevance since it would determine not the exercise but the existence of competence).

A second problematic aspect to the implementation of EMU law is that the Council is taking up more implementing powers, similar to the development in the area of migration following the 2015 migration crisis. It is following the deepening of EMU law that the

⁸⁵ See D Fromage, 'Towards Increasing Unity and Continuing Executive Predominance Within the E(M)U Post-COVID?' (2020) LIEI 385 and 395-396.

Court also identified a separate type of implementing power that is not covered by art. 291 TFEU or by the legal bases in the Treaties that directly confer an executive power on the Council. While not *a priori* restricted to the law of EMU, the latter has indirectly still “revealed” this separate type of power and has thus contributed to the adaptation of the EU law on implementation. The ramifications of this judicial discovery are still unclear. It could facilitate a further pluralisation of the EU executive as it could mean that the legislature has greater discretion in choosing the actor most appropriate to exercise certain *sui generis* implementing powers. Because of the sensitivity of the issues concerned, the Council has also been increasingly empowered under secondary legislation pursuant to art. 291 TFEU. While it is unclear whether post-Lisbon a stricter threshold applies for the Council to reserve implementing powers under art. 291(2) TFEU, one could argue that the mere fact that an area is (politically) sensitive is in itself insufficient for the Council to retain (or reclaim) implementing powers. At least in the SRM Regulation, an example may be found of the Council reserving implementing powers to itself (arguably for political reasons) without even meeting the rather lax pre-Lisbon standard. If these developments go unchecked, the law of implementing EMU law may de facto further develop into a field of law separate from the general framework for implementing EU law, thus transforming the law of implementation of EU legislation. At the time this *Article* was finalized, the dust was yet to settle on the plethora of EU measures adopted to tackle the economic fallout of the Covid-19 pandemic, yet the latter at least has the potential to serve as a further catalyst for such transformation.



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

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THE DELEGATION OF POWERS TO EU AGENCIES AFTER THE FINANCIAL CRISIS

MARTA SIMONCINI*

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ABSTRACT: The financial crisis has set new challenges for European integration, including the revision of priorities, principles and mechanisms of micro-prudential supervision of financial markets. Amongst the significant institutional reforms, the intensification of controls on financial markets has been pursued through the establishment of the European Supervisory Authorities in the financial markets (ESAs). This *Article* aims to analyse the role that these Authorities have been playing in shaping the EU legal order after the financial crisis. As a result of the EMU-related regulation aimed at enhancing EU financial stability after the crisis, the ESAs institutionalise administrative cooperation in micro-prudential supervision. The combination of agencification and crisis management is not new to the development of European integration nor specific to the case of financial markets. Nevertheless, the ESAs represent a peculiar regulatory experience, which share many characteristics of EU agencies, yet move towards an embryonic model of independent regulators. Compared to other EU agencies, in fact, they enjoy wider powers and a much more autonomous status from the Commission. They have acquired highly relevant competences that enhance their role in the internal market regulation. In addition, the CJEU engaged in a partial revision of the interpretative boundaries of the Meroni doctrine concerning the non-delegation of regulatory powers on agencies, allowing the ESAs to exercise some substantive regulatory prerogatives. This *Article* investigates how these competences affect the EU model of legality, showing to what extent the delegation of powers has changed as a result of the crisis.

KEYWORDS: European Supervisory Authorities in the financial markets – delegation – crisis – Meroni doctrine – rulemaking – soft law.

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I. INTRODUCTION

The financial crisis has set new challenges for European integration, including the revision of priorities, principles and mechanisms of micro-prudential supervision of financial markets. By creating “real and serious risks” to financial stability and market integrity, the crisis showed the need to restore “a stable and reliable financial system” as “an absolute prerequisite to preserving trust and coherence in the internal market (...) in the field of financial services”.¹ These regulatory goals have been pursued through institutional reforms in the governance of financial markets. Amongst the most significant institutional reforms, the group of experts led by de Larosi re proposed to enhance EU micro-prudential supervision in the financial markets through the establishment of three supranational authorities leading control and harmonisation: the so-called European Supervisory Authorities in the financial markets (ESAs).² The three authorities in question are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). They respectively cover the regulation of banking, securities and markets, and insurance and pensions with the aim of ensuring a consistent and coherent mechanism of financial supervision at the EU level. This *Article* aims to explore what role these authorities have been playing in shaping EU legal order after the financial crisis.

The establishment of the ESAs, in fact, represents a key change in the operation of European financial markets, showing unprecedented developments in the allocation of executive powers beyond EU institutions. They substituted the previous cooperation through committees of national supervisors – under the so-called Lamfalussy process³ – with supranational agencies leading supervision and harmonisation of financial markets. Because of the crisis, the stabilisation of micro-prudential supervision in the European Monetary Union (EMU) could not be achieved any longer with the loose coordination of national regulators⁴ and the move from comitology to the agency model has been a key change to

¹ See recital 7 of the 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 n. 716/2009/EC and repealing Commission Decision 2009/78/EC; recital 6 of the 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 n. 716/2009/EC and repealing Commission Decision 2009/79/EC; and recital 7 of the Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision n. 716/2009/EC and repealing Commission Decision 2009/77/EC.

² The High Level Group on Financial Supervision in the EU chaired, Report (25 February 2009) ec.europa.eu.

³ Committee of Wise Men on the Regulation of European Securities Markets, Report (15 February 2001) ESMA www.esma.europa.eu. See P Weisemann, *European Agencies and Risk Governance in EU Financial Market Law* (Routledge 2016) 86, 95.

⁴ M Bo ina Bero , *Agencies in European Banking: A Critical Perspective* (Palgrave MacMillan 2018) 19, 23-24 and 47-49.

strengthen the effectiveness of enforcement. In a nutshell, the agencification process upgraded the functioning of micro-prudential supervision, enhancing the uniformity and consistency of financial regulation. The system of committees providing non-binding advice on technical matters to the Commission did not demonstrate operational powers to commit the Member States to enforce effective information sharing and exchange of best supervisory practices.⁵ The institutionalisation of cooperation through agencies made the exercise of enforcement powers more autonomous from individual national regulators as well as from the Commission.⁶ The ESAs became a useful tool in times of crisis, as they contributed to enhancing the credibility of the regulatory system.⁷ Although the establishment of EU agencies as a means for crisis management is not new for the development of European integration,⁸ the establishment of the ESAs affected the very model of EU regulatory agencies and their enforcement tasks. They brought the so-called *agencification* process to the next level, by developing new distinctive features in the field of financial market regulation. The crisis-led reform accelerated the conferral of additional powers on the ESAs compared to the powers generally allocated to other EU agencies, including the Single Resolution Board under the Banking Union. The crisis scenario drove the political momentum for the stronger empowerment of the ESAs: it changed the ordinary structures of institutional interests and created those unpredictable conditions for engaging in significant (institutional and regulatory) reforms aimed at restoring the credibility of the Union.⁹

The critical momentum supported the creation of a specific model of supervisory authorities, which represent a hybrid organisational model that moves towards an embryonic independence from the Commission, yet share many characteristics of EU agencies.¹⁰ In particular, they have been bestowed with quasi-regulatory powers that have the

⁵ See N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014) 875-878 and 955-956.

⁶ S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) LIEI 419, 438-440; S Lavrijssen and L Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies"' (2009) LIEI 23, 53-54.

⁷ See J Pelkmans, 'Subsidiarity Between Law and Economics' (Bruges Research Papers in Law 1/2005).

⁸ A significant precedent can be found in the establishment of the European Food Safety Authority (EFSA), which aimed at rebuilding consumer confidence after the spread of BSE disease in Europe. See E Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) *Journal of Consumer Policy* 227; D Byrne, 'The Genesis of EFSA and the First 10 Years of EU Food Law' in A Alemanno and S Gabbi (eds), *Foundations of EU Law and Policy: Ten Years of the European Food Safety Authority* (Routledge 2014) 17.

⁹ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Hart Publishing 2018) 51. On the establishment of EU agencies as a means to enhance the credibility of EU policies, see G Majone, 'The Credibility Crisis of Community Regulation' (2000) *JComMarSt* 273, 289; S Krapohl, 'Credible Commitment in Non-Independent Regulatory Agencies: a Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs' (2004) *ELJ* 518, 523; M Busuioc, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 25-27.

¹⁰ See E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) *ELJ* 93, 94; C Franchini, 'Le fasi e i caratteri del processo evolutivo dell'organizzazione amministrativa europea' (2017) *Rivista italiana di diritto pubblico comunitario* 375, 383.

potential to develop the EU administrative action beyond the sector specific case of financial regulation. Their powers cover subsidiary and direct supervision as well as the participation in the delegated rulemaking of the Commission and the issue of guidelines and recommendations aimed at harmonising enforcement practices.¹¹ Notwithstanding their formal legal force, all these powers proactively contribute to regulation.

Against this backdrop, the issue of the delegation of powers to the ESAs is key to understanding the role of the ESAs in the micro-prudential supervision of financial markets, but it is also crucial to figure out whether and how the EU model of legality might have changed after the crisis. In other words, behind the case of the ESAs and their specific policy domain, the legality for administrative action and the justification of administrative powers is at stake.

The ESAs operate to adjust the regulatory behaviour of the Member States and the conducts of private parties to the public interest protected under EU law and regulation.¹² However, their intervention in the national jurisdiction and in the private sphere is not pursued through the traditional instruments at the disposal of the national administrations, but through a set of softer enforcement instruments which span from standardisation practices to some selected adjudication of powers.

This raises the question of the extent to which EU agencies can exercise regulatory powers within the EU legal framework. The answer to this question concerns not only the ESAs but potentially all EU agencies, where the same kind of powers would be conferred on them. The establishment of the ESAs hence raised significant questions about the whole functioning and organisation of the EU administrative space, and particularly about the nature, scope and legitimacy of EU executive powers.

This *Article* thus engages in the search of the main changes that the model of the ESAs generates for the EU legal order. The *Article* is organised as follows. Firstly, the powers of the ESAs are critically discussed. Section II analyses the issue of delegation of powers to EU agencies, showing how the Court of Justice (CJEU) in the so-called *ESMA short-selling* case changed the traditional interpretation of the limits to delegation. Section III discusses the quasi-regulatory powers of the ESAs and how they shape financial markets' regulation, pointing out how the ESAs play a key regulatory role beyond and despite the non-delegation doctrine. Specific attention is paid to the participation of the ESAs in the executive rulemaking of the Commission (section III.1) and to the autonomous adoption of soft law by the ESAs (section III.2).

¹¹ For an extended analysis of these powers see M Simoncini, 'Legal Boundaries of European Supervisory Authorities (ESAs) in the Financial Markets. Tensions in the Development of True Regulatory Agencies' (2015) *Yearbook of European Law* 319, 323-328; M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 66-73.

¹² On the notion of regulation see A La Spina and G Majone, *Lo Stato regolatore* (Il Mulino 2000) 24-28, who emphasise that regulation means pursuing the relevant public interest through conditional rules that modify private alternatives. The regulatory activity therefore consists of the definition and the implementation of conditional rules.

Against this backdrop, section IV analyses how all these powers changed the legal framework, promoting administrative integration by EU agencies in the post-crisis scenario. Section V concludes and emphasises the general implications that the growth of ESAs in the field of financial regulation has for the development of EU administrative law.

II. THE ISSUE OF DELEGATION UNDER THE SYSTEM OF THE TREATIES

Administrative powers require justification to be compatible with the principles of representative democracy and of legality. While the compatibility with the democratic principle can be achieved only indirectly through accountability instruments, compliance with the principle of legality is ensured by setting explicit limits on administrative action.

The proliferation of agencies represents a key challenge for the enforcement of these principles in the EU. In particular, the development of the so-called EU regulatory agencies has been problematic, as they “are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector”.¹³ Unlike EU executive agencies, they do not simply outsource functions of the Commission while remaining under its supervision and responsibility.¹⁴ EU regulatory agencies delocalise some authority from the Commission and act autonomously in sector-specific fields. They essentially infuse the regulatory process with some technical expertise, which is expected to neutralise regulatory conflicts and mediate the interests at stake.¹⁵ As a result, there is a relevant issue as to the compatibility of their action with the system of the Treaties.

The principles developed by the CJEU in the *Meroni*¹⁶ and *Romano*¹⁷ cases illustrate the test to preserve legality as set in the Treaties and exclude any undemocratic conferral of regulatory tasks on bodies that have no democratic legitimation or a solid legal basis in the Treaties. In a nutshell, through the so-called Meroni doctrine, the CJEU applied the non-delegation doctrine to the domain of EU agencies.

Non-delegation is the theory according to which constitutional bodies cannot delegate their constitutionally protected powers to other bodies, abdicating their public function. In EU law, the case law of the CJEU developed this doctrine through the principle of institutional balance, aimed at ensuring the balance amongst public powers in the EU legal order: in the absence of the principle of separation of powers – as it exists in individual Member States – this principle allowed the distinction of institutional powers as conferred by the

¹³ See Communication COM(2002) 718 from the Commission of 11 December 2002 The operating framework for the European Regulatory Agencies 4.

¹⁴ See Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

¹⁵ See M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* cit. 49-50.

¹⁶ Joined cases 9/56 and 10/56 *Meroni v High Authority* ECLI:EU:C:1958:7.

¹⁷ Case C-98/80 *Romano* ECLI:EU:C:1981:104.

Treaties. As a result, the non-delegation doctrine concerns all the EU institutions and ensures that no institution interferes in the exercise of powers by other institutions. On the one hand, in order not to seize undue powers, secondary law adopted by the competent EU institutions cannot amend or change the decision-making procedures established in the Treaties. On the other hand, in order not to abdicate their mandate, the conferred EU institutions should not transfer their competence on policy choices to other entities.¹⁸

When applying this doctrine to the powers of EU agencies, the CJEU clarified the criteria that shall guide any lawful delegation. Two complementary limits apply to the scope of EU agencies' action. Firstly, EU agencies' action cannot interfere with the powers that are lawfully allocated to EU institutions under the Treaties. Secondly, EU institutions shall not transfer their responsibility onto EU agencies, because this would impinge on the equilibrium of powers designed in the Treaties and, as a consequence, on the delegation made by the Member States to EU institutions according to the principle of conferral.

The Meroni doctrine thus holds that delegation cannot concern "discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy", because it "brings about an actual transfer of responsibility".¹⁹ Delegation shall thus ensure that only "clearly defined executive powers" retained by EU institutions are allocated to EU agencies explicitly and only if necessary for the implementation of an administrative task.²⁰ In other words, delegation shall ensure compliance with the principles of conferral, legal certainty and proportionality.²¹ In addition, administrative and judicial controls shall apply to ensure the reviewability of the administrative action.²² In *Romano*, the CJEU emphasised that under the existing conditions for administrative and judicial controls, EU agencies could only provide recommendatory acts, not generally binding on national authorities.²³

To preserve the rule of the Treaties and avoid any uncontrolled proliferation of administrative functions, the Meroni doctrine has legally frozen the development of rule-making powers by EU agencies. Under the EU polity, EU agencies only took the role of specialised, technical advisors to EU institutions and national authorities. Their cooperative role facilitated the harmonisation of best practices, but they could not impinge on

¹⁸ See M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* cit. 19-25.

¹⁹ *Meroni v High Authority* cit. 173.

²⁰ *Ibid.* 171-173.

²¹ On the relevance of the principle of proportionality in delegation, see T Tridimas, 'Financial Supervision and Agency Power: Reflections on ESMA' in N Nic Shuibhne and LW Gormley (eds) *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012) 55, 60. On the "*effet utile*" of the establishment of an agency for the pursuit of the objectives provided in the legal basis on which it is founded see also K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' (1993) ELR 42.

²² *Meroni v High Authority* cit. 171-173.

²³ *Romano* cit. para. 20.

the Member States' regulatory autonomy. The pragmatic involvement of EU agencies in the internal market regulation, however, has progressively stretched the factual implementation of the constitutional principle of non-delegation.

The diffusion of EU agencies and the need for their specialised tasks to enhance internal market integration have pragmatically eroded the theoretical rigidity of the principle and EU agencies entered the domain of regulatory powers by the back door.²⁴ This occurred through a set of substantive and formal circumstances that enhanced the role of EU agencies and their regulatory impact in different sectors. From a substantive standpoint, EU legislation has required EU agencies to adopt some complex technical assessments that cannot be easily bypassed or ignored by national regulators. From a formal standpoint, EU legislation has set some legal constraints to disregard EU agencies' recommendations and opinions, by requiring EU institutions and the Member States to give reasons for their deviation and to bear the costs of non-compliance with EU agencies' evaluations.

The tension between the constitutional constraints set in the consolidated Meroni doctrine and the institutional capacity of EU agencies to contribute to shaping sector-specific regulation reached a potential breaking point with the extended powers of the ESAs. Not by chance after sixty years of stillness, the CJEU was asked to return to its *Meroni* and *Romano* rulings, and decided to revisit them in the light of the changed framework of EU law under the Lisbon Treaty. In the *ESMA short-selling* case, the Court admitted that ESMA's complex technical assessments in the supervision of the short-selling market enjoy a circumscribed margin of discretion, which is compatible with the system of the Treaties insofar as legislation channels these powers and the Treaties expressly (yet, indirectly) ensure the judicial review of EU agencies' powers.²⁵

This latest development of the Meroni doctrine shows that the original concerns over the justification and control of EU agencies' acts are still relevant, and only the different legal framework of the Treaties allowed the interpretative "mellowing" of the consolidated Meroni doctrine.²⁶ Compared to the European Coal and Steel Community (ECSC), the Lisbon Treaty strongly enhanced the democratic legitimacy of EU institutions. In addition, the Lisbon Treaty included EU agencies within the actors that can legitimately exercise some (administrative) powers within the framework of Treaties. On these grounds, the CJEU could engage in a partial revision of the interpretative boundaries of the Meroni doctrine, allowing the ESAs to participate in the exercise of some substantive regulatory prerogatives. The definition of constitutional limits to administrative delegation rooted in

²⁴ See M Simoncini, 'The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency' (2015) EPL 309.

²⁵ Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18 paras 44-45 and 79-80.

²⁶ J Pelkmans and M Simoncini, 'Mellowing Meroni: How ESMA Can Help Build the Single Market' (CEPS Commentary 1/2014).

Meroni and *Romano* is still regarded as good law, but the constitutional compatibility has been entrenched in the changed constitutional system provided by the Lisbon Treaty.

In other words, in the *ESMA short-selling* case, the CJEU identified a series of updated subjective and objective criteria, which framed the capacity of ESMA to temporarily prohibit or restrict certain financial activities of short selling that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.²⁷ Firstly, as the Treaties now identify EU agencies as actors in the EU polity, CJEU inferred a subjective qualification of ESMA as “a European Union entity, created by EU legislature”.²⁸ This subjective criterion is a remarkable starting point for the delegation of administrative powers and sets a clear-cut difference with both the *Meroni* case – where the Brussels’ agencies in question were bodies governed by Belgian private law and were not envisaged in the Treaty establishing the Coal and Steel Community – and the *Romano* case, where the Administrative Commission on Social Security for Migrant Workers was not envisaged nor its acts challengeable in courts under the European Economic Community Treaty. Although the effects of the subjective criterion remain implicit in the CJEU’s reasoning, the qualified identity of EU agencies as agents of the EU polity appears to be a distinctive feature for the constitutional compatibility of delegation with the principle of institutional balance emerging in the Treaties.²⁹

In addition, objective criteria make delegation compatible with the Treaties. ESMA’s power fits within the “clearly defined executive powers” that can be delegated, insofar as ESMA’s margin of discretion does not exceed “the bounds of the regulatory framework established by the ESMA Regulation” and it “is circumscribed by various conditions and criteria”,³⁰ such as the existence of a concrete risk to the financial stability and the lack of national intervention, or the possibility to adopt only temporary and precise measures that do not create further risks in the financial markets. Additional administrative limits also emerge from the adoption of such measures in cooperation with EU bodies and national authorities.³¹ The CJEU construed the compatibility of some discretion with the non-delegation doctrine based on its anchoring in a series of legal and institutional conditions that shall frame and direct administrative powers. The ruling clearly shows that the emergence of a democratically legitimated legislature is key to ensuring control over the exercise of administrative powers. This put the principle of legality at the core of administrative action, being its necessary premise and setting the boundaries for such action.

The different institutional framework and the existence of legislative and administrative guarantees on the exercise of such power entrench administrative powers and sustain

²⁷ Art. 28 of the Regulation (EU) 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

²⁸ *United Kingdom v Parliament and Council* cit. para. 43.

²⁹ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 36 and 43-44.

³⁰ *United Kingdom v Parliament and Council* cit. paras 44-45.

³¹ *Ibid.* para. 50.

a much more sophisticated interpretation of the Meroni doctrine. When applying the criteria for lawful delegation to ESMA, the CJEU upheld their validity, but did not detect any shift of responsibility in the conferred power. The *ESMA short-selling* case intended to reconcile the democratic concerns on the delegation of powers to administrative bodies with the recognition that nowadays administrative action by specialised bodies is necessary to discharge public functions. Hence, “delegation constitutes an inevitable aspect of modern administrative law, as those who in constitutional terms are nominally entrusted with the exercise of a particular public function are often not in a position, for a variety of reasons, to discharge their responsibilities fully without supplementary action by others”.³²

The 2019 reform of the ESAs not only accepted the interpretation of the CJEU, but it also extended the power of the ESAs under art. 9(5) of the founding Regulations to “temporarily prohibit or restrict the marketing, distribution or sale of certain financial products, instruments or activities that have the potential to cause significant financial damage to customers or consumer”.³³ When providing a wider definition of the financial services that can be temporarily prohibited or restricted, this amendment included another substantive situation in its scope of application; that is, the protection of consumers, which under the reform becomes another relevant competence of the ESAs.

The validity of the CJEU’s approach to delegation has also been indirectly confirmed by the German Constitutional Court in a recent case on the compatibility of the institutional system of the Banking Union with the German Constitution and its democratic principle as protected under art. 38 *Grundgesetz* (GG).³⁴ The German Constitutional Court considered that although administrative actors do not directly respond to the democratic principle as such, they can be compatible with the legal system designed in the TFEU.³⁵ In particular, the stretch of the principle of people’s sovereignty is justified by “factual reasons”, which are the need to enhance the effectiveness of the supervision and the need to protect the SSM and SRM from undue political influence.

³² HCH Hofmann, GC Rowe and AH Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 222-223.

³³ See art 9(5) of the Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) n. 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) n. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) n. 1095/2010, Regulation (EU) n. 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds.

³⁴ German Federal Constitutional Court judgment of 30 July 2019 2 BvR 1685/14; 2 BvR 2631/14.

³⁵ *Ibid.* para. 138.

III. RULE-SHAPING BY EU AGENCIES IN THE FINANCIAL MARKETS

The *ESMA short-selling* case solved the issue of delegation by proving that under the Treaties, the ESAs can be considered accountable bodies that pursue leading administrative functions aimed at the stability and harmonisation of financial markets and since 2019 also consumer protection. Yet, formal delegation does not exhaust the reach of the ESAs' administrative action. Alongside the revision of the explicit limits to formal delegation, the development of quasi-regulatory powers demonstrates how the growth of administrative action by the ESAs contributes to changing the EU model of legality. More specifically, the ESAs have critical *rule-shaping* powers that emerge (i) in their strategic participation in the executive rulemaking of the Commission, which alter the system designed under arts 290 and 291 TFEU and (ii) in the autonomous adoption of soft law measures, which substantively enhance the harmonisation and the stability of financial markets. As the following sub-sections illustrate, the way the ESAs perform this rule-shaping function is peculiar to them and represents one of their distinctive marks compared to EU agencies operating in different sectors.

III.1. PARTICIPATION IN THE EXECUTIVE RULEMAKING OF THE COMMISSION

The ESAs assist the European Commission in the draft of regulatory technical standards under art. 290 TFEU and implementing technical standards under art. 291 TFEU.³⁶ These executive rulemaking acts aim to establish single rulebooks harmonising prudential rules for financial markets. As Busuioc emphasised, this is an exceptional procedure which changes the procedure for the adoption of delegated acts by the Commission as envisaged in the Treaties.³⁷

The ESAs, in fact, have the initiative of the rulemaking process and only in exceptional circumstances may the Commission adopt technical standards without a draft from the relevant Authority.³⁸ To counter-balance the enhanced role of the ESAs, the 2019 reform also strengthened the role of the European Parliament and the Council in the procedure, by ensuring that they are constantly kept informed on the negotiation between the Commission and the relevant ESA.³⁹ If the Commission decides not to endorse a draft regulatory technical standard or to endorse it in part or with amendments, it shall give reasons and send back the draft to the competent authority.⁴⁰ The

³⁶ Arts 10-14 of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit. and art. 15 of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

³⁷ M Busuioc, 'Rule-making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) ELJ 111, 116-117.

³⁸ Arts 10(1) and (3) and 15(1) and (3) of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

³⁹ *Ibid.* art. 10(1) and (2).

⁴⁰ *Ibid.* recitals 23 and 24.

competent authority may amend and then resubmit the draft as a formal opinion to the Commission and the Commission may adopt the amendments considered consistent with its remarks or reject the technical standard.

The Commission may amend draft regulatory technical standards “only in very restricted and extraordinary circumstances, since the authority is the actor in close contact with and knowing best the daily functioning of financial markets”; otherwise it should “rely, as a rule,” on them because of the technical expertise of the competent ESA.⁴¹ This means that technical standards shall not involve strategic decisions or policy choices, but only technical issues.⁴² As recital 23 emphasises, amendments should concern incompatibility with i) EU law, ii) the proportionality principle and iii) fundamental principles of the internal market for financial services as reflected in the *acquis* of Union financial services legislation.⁴³ This shall ensure that ESAs’ drafts are consistent with the principle of legality, but also compatible with substantive EU financial law. This means that the Commission is entitled to control the legitimacy of ESAs’ drafts as well as their merit.

In addition, in the case of non-endorsement or amendment of draft regulatory technical standards, “where appropriate”, a kind of conciliation procedure may take place before the competent committee of the European Parliament or of the Council: one of these institutions may invite the responsible Commissioner, together with the chairperson of the authority, “to present and explain their differences” in an “ad hoc meeting”.⁴⁴ By elevating the discussion from the executive to the legislative branch, conciliation aims to preserve the centrality of the ESAs despite their formal status of EU agencies in comparison to the Commission.⁴⁵ At the same time, this procedure highlights the role of the legislative branch, which can decide to take the lead – through its competent committees – and oversee the executive rulemaking process.

This means that even though formally the ESAs do not have the final decision-making power and the Commission still plays an active role in the procedure, in practice EU legislation aims to confer on the ESAs the “factual ownership of the procedure”.⁴⁶ The consultative power of EU agencies to advise the Commission is taken to the next level: legal

⁴¹ *Ibid.* See also P Schammo, ‘The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers’ (2011) CMLRev 1879, 1883.

⁴² As pointed out by AG Jääskinen in the withdrawn case on the cap on bankers’ bonuses, the impossibility to take policy decisions confirms the limits set by the Meroni doctrine, but does not prevent sector-specific legislation from extending the EBA’s powers beyond the limits of art. 10 of the Regulation (EU) 1093/2010. See case C-507/13 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:2394, opinion of AG Jääskinen, para 58.

⁴³ Recital 23 of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁴⁴ *Ibid.* art. 14(2).

⁴⁵ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 71-72.

⁴⁶ *Ibid.* 80. See also P Weisemann, *European Agencies and Risk Governance* cit. 126-127, who particularly described the power of the ESAs in the procedure as “higher than the committees’ opinions in the advisory procedure and lower than the committees’ opinions in the examination procedure”.

requirements binding the Commission's dissent shape the executive rulemaking process so to put the ESAs in a privileged position in the definition of the rules. This is definitely specific to the case of the ESAs as key players in the supervision of financial markets.

III.2. HARMONISATION THROUGH SOFT LAW

In line with the *Romano* ruling, the ESAs can adopt guidelines and recommendations that do not have legally binding force. However, these acts still produce indirect legal effects through the effective combination of some legal requirements and reputational driving mechanisms. These acts that generally go under the label of soft law aim at establishing some rules of conduct that work as rebuttable presumptions of compliance with the relevant EU legislation.⁴⁷ These acts shall remain within the boundaries established by the relevant legislation, but they cannot merely refer or replicate such legislation.⁴⁸ They need to explain and figure out how the enforcement of the law can be effectively fulfilled. By acting independently, the ESAs thus issue their soft law acts to the competent national authorities and financial institutions with the aim of establishing consistent, efficient and effective supervisory practices and ensuring the common, uniform and consistent application of EU law.⁴⁹ Implementation of soft law is pursued in the absence of legally binding force, but other legal requirements and incentives should push the recipients to comply with the rules of conduct. Compliance is, in fact, fundamental for the establishment of a single rulebook about supervisory convergent practices in the EU financial markets and non-compliance should therefore be limited and possibly avoided in light of the supervisory convergence goal.

The ESAs pursue the goal of compliance through the so-called "comply or explain" mechanism, which requires the recipients who do not wish to comply to give the reasons for their non-compliance. This mechanism creates a double constraint. Firstly, it establishes a legal obligation to motivate non-compliance. However, the duty to give reasons cannot be used to pursue further legal action as traditionally happens, but it triggers a reputational mechanism that aims to isolate the rebels by exposing them to the "naming and shaming" on an international level, which may only be supplemented on a case-by-case basis by the publication of the reasons for non-compliance.⁵⁰ As Chiti emphasised, no coercive measure

⁴⁷ On the notion of soft law see F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) ModLRev 32; F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer 1994) 197, 197-198; L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112.

⁴⁸ Art. 16(1) and (2)(a) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁴⁹ *Ibid.* art. 16.

⁵⁰ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 72-73.

sanctions non-compliance and the institutional dialogue between the ESAs and the disagreeing national authorities is not legally structured.⁵¹ The ESAs check and direct the regulatory conducts of national authorities and the economic behaviour of sector operators through soft law powers, which rely on the trust in the ESAs as expert bodies and on the costs of non-compliance to ensure their effectiveness. However, as van Gestel and van Golen observed, “the threat that the EU legislature will impose binding measures in case of continued non-compliance” is “the big stick behind the door”.⁵² The ESAs shall in fact report to the European Parliament, the Council, the European Commission, the Court of Auditors and the European Economic and Social Committee on supervisory convergence and shall explain how they intend to ensure compliance. This obligation, however, has been formally relaxed in the 2019 reform, which is now less demanding on the content of the annual report on the implementation of the issued guidelines and recommendations.⁵³ Conversely, the 2017 Commission’s proposal of reform required to give reasons for the adoption of soft law, including summarising the feedback from public consultations.⁵⁴ Nevertheless, these sets of powers show the central role that the ESAs play in the regulation of the financial sector. Although the non-delegation principle does not allow the ESAs to exercise full rulemaking powers, they have been conferred specific rule-shaping powers, where the scope goes beyond the traditional feature of the Commission’s delegated powers and beyond the legally binding character of administrative action. This is due to the circumstances of economic integration and the crisis context that accelerated the need for the recognition of specialised administrative actors in the harmonisation of the sector. By enhancing the centrality of the ESAs in the search of financial stability, market integrity and, more recently, consumer protection, these rule-shaping powers innovate the traditional spectrum of EU

⁵¹ See E Chiti, ‘In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum’ (2015) CYELS 311, 325-326.

⁵² R van Gestel and T van Golen, ‘Enforcement by the New European Supervisory Agencies: Quis Custodiet Ipsos Custodes?’ in K Purnhagen and O Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer 2014) 757, 766-767.

⁵³ Art. 16(4) of the Regulation 1093/2010/EU cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁵⁴ Arts 1(7)(c), 2(7)(c) and 3(7)(c) of the Proposal for a Regulation COM(2017) 536 of European Commission of 20 September 2017, Amending Regulation (EU) n. 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) n. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) n. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) n. 345/2013 on European venture capital funds; Regulation (EU) n. 346/2013 on European social entrepreneurship funds; Regulation (EU) n. 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

agencies' administrative powers, sidestepping to some extent the formal issue of delegation. As Weisemann effectively pointed out, this regulatory approach still needs to be interpreted: it can either be seen as an "entirely new" approach to regulation based on "persuasion and information", or as "a new (soft) look" approach to command-and-control, or even as "something in between".⁵⁵ The search of an effective characterisation of this approach can disclose wider scenarios about the potential and the limits that shall apply to soft law.

IV. LEGALITY AND DELEGATION AFTER THE FINANCIAL CRISIS

The powers of the ESAs significantly intend to enhance administrative action in the field of financial regulation. The judicial revision of the Meroni doctrine together with the legislative design of significant rule-shaping powers have affected the principle of legality, raising relevant questions concerning the role of EU agencies and the guarantees for their action.

The financial crisis accelerated trends that were already present in EU agencies' action. Two issues emerged in particular. Firstly, as regards formal delegation under the Meroni doctrine, after the *ESMA short-selling* case EU agencies can legitimately make complex technical assessments and adopt decisions that involve some margin of discretion. This case extended the powers of EU agencies if subordinated to EU legislation and controlled through accountability instruments. Secondly, as informal delegation is concerned, EU agencies may perform a critical rule-shaping role, which cannot be captured by hierarchical command structures.

The quasi-regulatory powers of the ESAs put them at the centre of the regulatory process. Yet, this reform occurred in the absence of a coherent theoretical framework for administrative powers. Like other EU agencies, the ESAs were asked to operate under an unfinished administrative law system. The nature, the scope and the legitimacy of ESAs' powers do not find a strong conceptualisation under EU administrative law.⁵⁶ Their case raises a wider question concerning the justification of administrative powers with regulatory impact and their tenability under the principle of legality and the democratic principle. A few problematic issues emerge.

Firstly, with regard to the delegation of powers under the Meroni doctrine, the problem is that EU law has not strongly conceptualised the notion of discretion that EU agencies can exercise. Unlike national administrative laws, EU law has considered EU agencies as technical instruments for the implementation of policies. Traditionally they aimed to infuse scientific information in the regulatory process, but their supposed neutrality is a "fallacy".⁵⁷ However, this approach hid their regulatory vocation and trapped the development of EU administrative law in the dichotomy between political powers to make policy choices and neutral technical powers to implement such policies. By qualifying the lawful enforcement

⁵⁵ P Weisemann, *European Agencies and Risk Governance* cit. 148.

⁵⁶ See E Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?' (2016) EJL 576.

⁵⁷ See P Weisemann, *European Agencies and Risk Governance* cit. 11-16.

by EU agencies as technical in nature, the Meroni doctrine neutralised any aspects of discretion that may be involved in any administrative action. As I extensively argued elsewhere, however, this approach created false expectations about the substantive reach of EU agencies' powers.⁵⁸ Both practice and the findings of *ESMA short-selling* case, instead, demonstrate that a grey area exists between implementation and policy-making, where technical options are not free from some consideration of the interests at stake, even if only to identify the best technical solution. This is especially peculiar to complex technical assessments, which may require the evaluation of facts and interests in light of the objectives, priorities and criteria set in the relevant legislation as well as in light of the specific expertise.⁵⁹ Although this is a general issue for expert administrative action under EU law, the wider *rule-shaping* powers conferred on the ESAs made the problem so explicit and relevant that the CJEU could not ignore it anymore in its application of the Meroni doctrine.

The existence of such margin of choice is going to become even more relevant under the 2019 reform of the ESAs. The amended art. 8 of the founding regulations in fact expands their tasks – including consumer protection – and requires taking into account technological innovation, environmental, social and governance factors in the implementation of such tasks.⁶⁰ This means that the ESAs' action should marginally balance different public and private interests. The legal qualification of the boundaries applicable to such margin of choice hence becomes key to identifying the legitimate balance among the different and possibly conflicting variables.

Under national administrative laws, notwithstanding relevant variations, the active capability of public administrations to make choices bounded by the law is generally recognised as administrative discretion.⁶¹ Under EU law, instead, the CJEU has mainly identified in discretion the limit to judicial review.⁶² Where some discretion is recognised, only the application of the proportionality test with different intensity has allowed the CJEU to control the legitimate exercise of discretion. As Mendes has pointed out, this “negative” approach does not sufficiently emphasise how value judgments enshrined in legal norms

⁵⁸ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 99-107.

⁵⁹ Case T-187/06 *Schröder v CPVO* ECLI:EU:T:2008:511 para. 73, confirmed on appeal in case C-38/09 P *Schröder v CPVO* ECLI:EU:C:2010:196; joined cases T-133/08, T-134/08, T-177/08 and T-242/09 *Schröder v OCVV - Hansson (LEMON SYMPHONY)* ECLI:EU:T:2012:430 para. 154, as confirmed on appeal in case C-546/12 P *Schröder v CPVO* ECLI:EU:C:2015:332 para. 56; case T-102/13 *Heli-Flight v EASA* ECLI:EU:T:2014:1064 para. 74; case C-61/15 P *Heli-Flight v EASA* ECLI:EU:C:2016:59 paras 101-102.

⁶⁰ Art. 8 of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁶¹ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 94-95.

⁶² R Caranta, 'On Discretion' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 185; see also J Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) *ModLRev* 443, 461; J Mendes, 'Law and Administrative Discretion in the EU: Value of Comparative Perspective' (April 2016) Yale Law School www.law.yale.edu 19-21.

should guide and limit discretion “beyond the judicial paradigm” and it prevents placing the relation between discretion and law at the core of EU law.⁶³ This has also prevented EU administrative law from characterising the specific nature of administrative discretion and to effectively circumscribe the scope of EU agencies’ powers. The result is that the distinction between legislative and administrative acts is not structurally founded on the limitation of administrative action through the principle of legality, but on the allegedly factual dichotomy between political and technical issues. If this dichotomy was supposed to clarify responsibilities between the legislative and the administrative branches, it instead blurred them.⁶⁴ Conversely, the introduction of a normative characterisation of the discretion that administrations can exercise would allow the recognition that EU agencies’ action does not need to be neutral to interests to be legitimate, but it rather needs to comply with the principle of legality.

In the *ESMA short-selling* case, the CJEU positively identified the margin of discretion conferred on ESMA by the relevant legislation, but it failed to characterise it as administrative discretion, which can be understood as the margin of appreciation of possible options in light of the legal rule that needs to be implemented.⁶⁵ The difficulty to embrace the conceptual categorisation of EU agencies’ powers brought to the definition of some pragmatic criteria checking the accountability of ESMA’s action.

Despite the lack of theoretically informed categories, the ruling designed an open system of executive powers at the EU level. Advocate General Jääskinen recognised that ESMA’s powers represent “a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other”.⁶⁶ EU agencies’ powers gained an autonomous space of intervention beyond the delegated powers of the Commission under arts 290 and 291 TFEU. The Court bluntly excluded the encroachment of these Agency’s powers with the Commission’s delegated powers.⁶⁷ Yet, the Court did not engage in an explanation of the distinctive scope of all these powers compared to the powers of the Commission, but simply affirmed them. This may not come as a surprise, given the same difficulty of the CJEU to distinguish between delegated and implementing acts of the Commission itself.⁶⁸

⁶³ See J Mendes, ‘Bounded Discretion in EU Law’ cit. 461-463; J Mendes, ‘Law and Administrative Discretion in the EU’ cit. 24-26.

⁶⁴ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 93.

⁶⁵ *Ibid.* 94.

⁶⁶ Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2013:562, opinion of AG Jääskinen, cit. para. 86. This development of agencies “as an intermediate approach between the extremes of *administration communautaire directe* and *administration communautaire indirecte*” was already recognised by K Lenaerts, ‘Regulating the Regulatory Process’ cit. 46.

⁶⁷ *United Kingdom v Parliament and Council* cit. paras 83-86.

⁶⁸ Among others, see P Craig, ‘Delegated Acts, Implementing Acts and the New Comitology Regulation’ (2011) ELR 671; CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford University Press 2016).

As Robert Schütze pointed out, “the judicial minimalism on the legislative choice between arts 290 and 291 is to be regretted”.⁶⁹ The same may apply to the case of EU agencies, because the search of accountability criteria made by the CJEU does not create an autonomous test for the legitimacy of EU agencies’ powers, yet it can effectively influence future legislative choices about the allocation of powers to EU agencies beyond their specific regulatory domains. In the absence of clear cut provisions in the Treaties concerning executive powers and in the even more problematic absence of a solid political consensus about the nature, the scope and the legitimacy of administrative powers, any judicial interpretation will be an attempt to balance institutional competences and their powers as effectively as possible.

Another relevant issue concerns the rule-shaping powers of the ESAs. They were in fact framed within this unfinished administrative law system and contributed to diversifying both the institutional sources of authority and their acts. In practice, they helped to enforce financial regulation by trusting experts with a specialist grasp on sector-specific problems. In the law, however, this informal approach generates problems of legal certainty about the source of authority and the legal effects of the acts. Soft law helped to avoid the *Romano* constraint of the non-binding force of EU agencies’ acts, whereas it did not affect the effectiveness of acts. Trust mechanisms do not need to rely on legally binding force, but they make the implementation of the regulatory framework more sophisticated and composite.

The level playing field informally created through the soft law makes the definition of the rules of conduct extremely relevant as their content is factually able to affect the national competent authorities as well as private operators. This means that the procedure for the adoption of soft law matters, because who participates and when can determine the content of the rules of conduct. Hence, the formalisation of the rules for the adoption of soft law becomes a necessary condition for their legitimacy. However, the 2019 reform of the ESAs did not embrace the reinforcement of procedural guarantees envisaged by the 2017 Commission’s proposal for the adoption of guidelines and introduced only minimal changes to the 2010 framework.

For instance, the 2019 reform maintained the appropriateness requirement for the launch of open public consultation and the consultation of the stakeholders group established in every authority but introduced a duty to give reasons for the lack of such consultations.⁷⁰ Conversely, the Commission’s proposal pointed towards making these consultations the rule “save in exceptional circumstances”.⁷¹ In addition, the 2019 reform allowed any natural or legal person to send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence when issuing

⁶⁹ R Schütze, *European Union Law* (Cambridge University Press 2015) 320.

⁷⁰ Art. 16(2) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁷¹ Arts 1(7)(b), 2(7)(b) and 3(7)(b) of the Proposal for a Regulation COM(2017) 536 cit.

guidelines and opinions, provided that the action is of direct and individual concern to that person.⁷² The Commission's proposal, instead, specifically recognised the initiative of the two thirds of the members of the stakeholder group to send a reasoned advice to the Commission if they believe that the Authority has exceeded its competence by issuing certain guidelines or recommendations. In that case, the Commission should have heard justification from the Authority and then assessed the breach of competence. Where the breach was identified, the Commission might have adopted an implementing decision requiring the authority to withdraw the guidelines or recommendations concerned.⁷³

Although the 2019 reform made only marginal changes in the controls over the adoption of soft law, these few examples demonstrate that the gap between the softness of the rules and their regulatory impact can effectively be filled out procedurally, through the definition of requirements and legal guarantees that ensure legitimacy and accountability.

V. ADMINISTRATIVE INTEGRATION BEYOND THE ESAs

The financial crisis made the ESAs key actors in the pursuit of internal market integration and stability. Their establishment and functioning contributed to accelerating nuanced changes in the EU legal order. Three main tendencies can be identified: the expansion of delegation, the intensification of soft law and the widened relevance of EU agencies in the implementation of policies. All these issues represent trends that were already present in the EU legal order, but in the financial sector they were reinforced and legally accepted.

After the *ESMA short-selling* case, in fact, delegation has come to legitimately include some margins of discretion that do not reach the status of political discretion, which still cannot be delegated. This is implicitly leading towards the abandonment of the rigid characterisation of technical powers as neutral, discretion-free powers. In addition, uniform supervision of financial markets throughout the EU has been pursued through the development of soft rules of conduct. The structural relevance of their effects disregards their non-binding legal character. Yet, law is progressively searching for legal guarantees and requirements in the use of these informal tools to ensure the legitimacy of their effect and the accountability of their source of authority.

The system of the ESAs also acquired key relevance in the definition of the Commission's delegated acts, changing the mechanism for their adoption as defined in the Treaties. As seen, the ESAs play a leading role in the adoption of the Commission's regulatory technical standards and implementing technical standards. They limit and guide the decision-making of the Commission, playing an irreplaceable role in the adoption of these rules.

These tendencies show that EU executive powers are growing in both their reach and the actors that perform them. Financial markets have emerged as a significant field for their

⁷² Art. 60(a) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁷³ Arts 1(7)(d), 2(7)(d) and 3(7)(d) of the Proposal for a Regulation COM(2017) 536 cit.

enforcement because the enrichment of EU administrative tasks derives from the need to ensure uniform market conditions. In other words, the crisis played a key role in fostering the need for stability and integrity of financial markets that functionally requires control on the whole functioning of the relevant market. This regulatory goal has been achieved through the establishment of specialised administrations which can effectively supervise financial markets because of their expertise: the ESAs. Although their powers remain limited, the crisis accelerated the recognition that they need to operate autonomously from the Commission and the national authorities to deliver results. The crisis thus led to the recognition that multiple administrations are necessary to govern financial markets.

The dynamics occurring in the financial sector, however, can apply beyond sector-specificities. Another crisis in another sector or the spill-over of regulatory instruments across sectors may transplant the changes that occurred in the financial sectors in other fields. The emerging legal mechanisms emphasise the centrality of administrative law in the governance of EU integration. Yet, the Treaties do not regulate these administrative developments and provide only a few minimum rules about the entrenchment of administrative action by EU agencies. This means that legal guarantees and legal requirements need to be searched in the relevant legislation.

The 2019 reform of the ESAs pointed in this direction. The growth of administrative responsibilities and tasks, in fact, require stronger accountability and control mechanisms of the ESAs. Beyond sector-specific rules, however, the adoption of a general law on the administrative proceedings would help ensure a general framework for a fair and impartial administrative action and provide the standards of administrative action. By setting clear thresholds to make administrative tasks compatible with the EU legal order, such reform would strengthen the EU model of legality.



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

THE EMU RATIONALE FOR CAPITAL MARKETS UNION

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TABLE OF CONTENTS: I. Introduction. – II. Objectives in documents. – III. Legislative momentum. – IV. Legislative process and content. – V. Conclusion.

ABSTRACT: Capital Markets Union (CMU) is a plan towards a single market for capital in the EU. While the plan is not limited to the euro area, some of its stated objectives are aimed at supporting EMU, especially by financial stability through private risk-sharing. The present *Article* seeks to specify and clarify these EMU objectives. It points out their expressions in official documents, discusses their role in creating legislative momentum for CMU and its individual initiatives, and observes them in the legislative process and content of selected initiatives. The research results include an explanation of the significance of EMU objectives as arguments in debates and decision-making concerning CMU as well as an assessment of their justificatory force.

KEYWORDS: Capital Markets Union – Economic and Monetary Union – internal market – financial markets – financial stability – private risk-sharing.

I. INTRODUCTION

Capital Markets Union (CMU) is a multi-initiative plan, currently in progress, to integrate capital markets in the EU into a single market for capital.¹ Having first been outlined in the Juncker Commission's Investment Plan in 2014,² CMU was opened for consultation

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¹ See European Commission, *What Is the Capital Markets Union? General Information on the Objectives of the Capital Markets Union* ec.europa.eu.

² Communication COM(2014) 903 final from the Commission of 26 November 2014 on an Investment Plan for Europe, 14-15.



with a Green Paper and launched with a comprehensive Action Plan in 2015.³ According to the 2015 Action Plan, CMU aims at unlocking investment from the EU and elsewhere in the world and better channelling it to projects across the EU. In other words, CMU is about mobilisation and allocation of financial resources. CMU also aims at improving financial stability, deepening financial integration, and increasing competition. With its focus on market-based financing, CMU is expected to diversify funding sources for businesses, complementing the European bank-oriented tradition, and to provide new opportunities for savers and investors.⁴

The 2015 Action Plan includes altogether 33 individual legislative or non-legislative (assessments, reviews, reports, consultations etc.) initiatives. Some initiatives cater for start-ups and non-listed companies, others for companies entering and raising capital in public markets. Some initiatives focus on long-term, infrastructure and sustainable investment, others on retail and institutional investment. Finally, some initiatives promise to support the wider economy by leveraging banking capacity, while others seek to facilitate cross-border investment.⁵ In a Mid-Term Review published in 2017, the Commission noted having “delivered more than half the measures” of the 2015 Action Plan.⁶ At the same time, the list of initiatives was updated and broadened, taking into account, among other things, the looming Brexit, the proliferation of financial technology (FinTech), and sustainability challenges.⁷

CMU builds on the concept of mutual recognition, but its legislative initiatives go beyond that. The legal basis is typically found in art. 114 TFEU, which establishes competence for “measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.⁸

Opinions vary on the results of CMU so far. On the one hand, initiatives have resulted in major pieces of new EU legislation. Examples include the Prospectus Regulation,⁹

³ Green Paper COM(2015) 63 final from the Commission of 18 February 2015 on Building a Capital Markets Union; Communication COM(2015) 468 final from the Commission of 30 September 2015 on the Action Plan on Building a Capital Markets Union.

⁴ Communication COM(2015) 468 final cit. 3.

⁵ *Ibid.* 29-30.

⁶ Communication COM(2017) 292 final from the Commission of 8 June 2017 on the Mid-Term Review of the Capital Markets Union Action Plan, 4 (emphasis omitted).

⁷ *Ibid.* 8-9, 19-22.

⁸ See D Valiante, ‘CMU and the Deepening of Financial Integration’ in D Busch, E Avgouleas and G Ferrarini (eds), *Capital Markets Union in Europe* (Oxford University Press 2018) 12-13.

⁹ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. According to recital 7, the Regulation combines the aims of ensuring investor protection and market efficiency and enhancing the internal market for capital.

which replaced the earlier Prospectus Directive,¹⁰ and the Securitisation Regulation,¹¹ accompanied by related amendments to prudential requirements for credit institutions and investment firms.¹² On the other hand, CMU has even been called “failed” because part of the legal reforms planned have not been completed and because reliance on bank lending seems to have increased in the EU recently, which implies that expectations of diversified funding sources have not been met.¹³ Indeed, the completion of CMU is delayed from the initially planned 2019, while its capability to transform European finance may have been somewhat exaggerated from the start.¹⁴

Then again, CMU appears to have become an open-ended plan, so that it can be revised with new objectives and initiatives from time to time. Revisions were recently proposed by the Next CMU High-Level Expert Group,¹⁵ at the request of the German, French and Dutch finance ministers, and the High-Level Forum on the Capital Markets Union,¹⁶ at the request of the Commission. Influenced by the latter’s final report and stakeholder views on it, the Commission adopted a new CMU Action Plan in 2020.¹⁷ The 2020 Action Plan introduces 16 new initiatives, grouped under three broader objectives. One objective proposes more accessible financing to European companies as a way to “support a green, digital, inclusive and resilient economic recovery”. Post-Covid-19 economic recovery is

¹⁰ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.

¹¹ Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) n. 1060/2009 and (EU) n. 648/2012. Recital 2 notes the Commission’s “intention to restart high-quality securitisation markets, without repeating the mistakes made before the 2008 financial crisis”.

¹² Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) n. 575/2013 on prudential requirements for credit institutions and investment firms.

¹³ P Jenkins, ‘Can the EU’s Failed Capital Markets Union Be Revived?’ (4 November 2019) Financial Times www.ft.com. Jenkins refers to the Association for Financial Markets in Europe (AFME), according to which 88 per cent of European companies’ new funding in 2018 came from banks. Only 12 per cent came from capital markets, dropping from the average 14 per cent in 2013-2017.

¹⁴ See generally JN Gordon and K Judge, ‘The Origins of a Capital Markets Union in the United States’ in F Allen, E Faia, M Haliassos and K Langenbucher (eds), *Capital Markets Union and Beyond* (The MIT Press 2019) 89 ff. Gordon and Judge explain that while a “financial system is a product of rules [...] the relationship among law, financial system design, and financial development is complex and iterative”. And further: “Law’s greatest impact is often indirect and context dependent; its repressions can be more important than its explicit permissions. Law matters, but not necessarily in the ways lawmakers intend”.

¹⁵ Next CMU High-Level Group, Report to Ministers and presented to the Finnish Presidency: Savings and Sustainable Investment Union, October 2019 nextcmu.eu.

¹⁶ High-Level Forum on the Capital Markets Union, ‘Final Report: A New Vision for Europe’s Capital Markets’ (10 June 2020) ec.europa.eu.

¹⁷ Communication COM(2020) 590 final from the Commission of 24 September 2020 on a Capital Markets Union for people and businesses – new action plan.

particularly emphasised. The other two objectives focus on improving the safety of saving and investing long-term for individuals in Europe and integrating national capital markets into a “genuine” single market, respectively.¹⁸

The present *Article* takes a general view of CMU and examines its motivational and justificatory basis. The focus is on motives and justifications that have been present in CMU from the beginning and can be called its “EMU rationale”. Indeed, CMU has been and is still being attributed with objectives of supporting the Economic and Monetary Union (EMU), even though CMU, its initiatives and legislation resulting from them are not limited to the euro area but, as a rule, concern the whole EU. However, the expressions of these EMU objectives tend to be unspecified and unclear in terms of their concrete implications. This *Article* seeks to specify and clarify them, thereby explicating the EMU rationale for CMU.

As discussed in several parts of the *Article*, EMU objectives embrace the role of private risk-sharing in promotion of financial stability. Private risk-sharing can be understood as the capacity of integrated financial and capital markets to absorb country-specific economic shocks. This may be the effect of internationally diversified investment portfolios, which generate income independent of the performance of the domestic economy, or the effect of international lending compensating for domestic shortages in credit supply.¹⁹

The *Article* proceeds as follows. Section II points out expressions of EMU objectives in official CMU documents, mainly in those by the Commission. The reason for the particular relevance of Commission documents is the Commission’s role as “the *primum mobile* in the making of CMU”.²⁰ Section III discusses the role of EMU objectives in creating legislative momentum for CMU and its initiatives in the context of conflicting Member State interests as well as of supranational policymaking. Section IV traces EMU objectives, and complications in that respect, in the legislative process and content of selected initiatives. In this way, sections III and IV seek a partial answer to the special section’s question of how EMU may have affected the EU legal order. Section V concludes the *Article*.

II. OBJECTIVES IN DOCUMENTS

Official CMU documents often suggest that EMU objectives are central to CMU as a whole, but they usually refer to these objectives as though in passing. The 2015 Green Paper

¹⁸ *Ibid.* 1, 6–14.

¹⁹ J Cimadomo, O Furtuna and M Giuliodori, ‘Private and Public Risk Sharing in the Euro Area’ (ECB Working Paper Series 2148/2018) 2.

²⁰ See L Quaglia and D Howarth, ‘The Policy Narratives of European Capital Markets Union’ (2018) *Journal of European Public Policy* 990, 991. Quaglia and Howarth note, in contrast, that “the Commission was a marginal actor during the sovereign debt crisis [...] and in the construction of Banking Union” (references omitted). On the relationship between CMU and Banking Union, see D Busch, E Avgouleas and G Ferrarini, ‘Capital Markets Union After Brexit’ in D Busch, E Avgouleas and G Ferrarini (eds), *Capital Markets Union in Europe* cit. 4–5.

simply states that “well integrated capital markets will contribute to the resilience of the Economic and Monetary Union”.²¹ The 2015 Action Plan, almost as plainly, envisions CMU as “buttressing Economic and Monetary Union by supporting economic convergence and helping to absorb economic shocks in the euro area, as set out in the report of the Five Presidents on Completing Economic and Monetary Union”.²²

The Five Presidents’ Report is somewhat more elaborate. It states that a well-functioning CMU “will strengthen cross-border risk-sharing through deepening integration of bond and equity markets, the latter of which is a key shock absorber”. “Truly integrated capital markets would”, so the argument continues, “also provide a buffer against systemic shocks in the financial sector and strengthen private sector risk-sharing across countries”. This then “reduces the amount of risk-sharing that needs to be achieved through financial [*sic*: what is meant is probably ‘fiscal’] means (public risk-sharing)”.²³ The Report mentions two ways in which increased cross-border investment flows may strengthen private sector risk-sharing, namely a “capital market channel” and a “credit market channel”. The capital market channel refers to desirable effects of geographically diversified portfolios of financial assets. Returns of such portfolios are expected to be of lower volatility and correlate less with domestic income. The credit market channel suggests that cross-border investment flows improve the situation of a country hit by an economic shock. This is so because they enable residents of that country to offset the shock by lending or borrowing.²⁴

While the Five Presidents’ Report emphasises the benefits of integration of capital markets and removal of national barriers, it also notes that these developments may bring about new risks to financial stability. Accordingly, the Report recognises “a need to expand and strengthen the available tools to manage financial players’ systemic risks prudently (macro-prudential toolkit) and to strengthen the supervisory framework to ensure the solidity of all financial actors”. The Report sees “a single European capital markets supervisor” as an ultimate goal.²⁵

²¹ Green Paper COM(2015) 63 final cit. 5. The Green Paper also notes that improved effectiveness of markets could result in, among other things, “a more efficient distribution of risk and better risk-sharing” and that further integration of capital markets, especially equity markets, “would enhance the shock-absorption capacity of the European economy and allow more investment without increasing levels of indebtedness”. However, the Green Paper does not seem to link these effects to EMU in particular. *Ibid.* 9.

²² Communication COM(2015) 468 final cit. 3. In another passage, the Action Plan suggests that the improved ability to “share the impact of shocks” could concern Member States in general, but “especially those inside the euro area”.

²³ European Commission, ‘Completing Europe’s Economic and Monetary Union, Report by: Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz’ (22 June 2015) ec.europa.eu 12. The report proposes private risk-sharing through integrated financial and capital markets as a short-term solution and enhancing public risk-sharing through a fiscal stabilisation mechanism for the euro area as a medium-term goal. *Ibid.* 4.

²⁴ *Ibid.* 12. For a more detailed account of risk-sharing and the potential impact of capital market integration on it, see D Valiante, ‘CMU and the Deepening of Financial Integration’ cit. 13-19.

²⁵ European Commission, ‘Completing Europe’s Economic and Monetary Union’ cit. 12.

The above references to EMU objectives may strike as overly general and lacking evidence. However, a Staff Working Document accompanying the 2015 Action Plan shows that they are backed by economic literature.²⁶ The cited literature identifies capital markets and bank credit markets as potentially important in cushioning economic shocks,²⁷ finds that risk-sharing in the euro area is underdeveloped and was ineffective in the financial crisis,²⁸ and links together financial integration, risk-sharing, and higher economic growth.²⁹

The 2017 Mid-Term Review repeats some of the EMU objectives stated in earlier documents, including that on the absorption of economic shocks in the euro area.³⁰ In addition, it refers to a Commission Reflection Paper on the Deepening of the Economic and Monetary Union, which regards CMU as “an opportunity to strengthen our single currency”.³¹ The Reflection Paper emphasises financial stability through private risk-sharing, but also discusses the eventuality of Brexit: “The prospect of Europe’s largest financial centre leaving the single market makes the task of building the CMU more challenging, but all the more vital”. Like the Five Presidents’ Report, the Reflection Paper calls for more integrated supervision of the financial sector. However, the Reflection Paper stresses that regulatory reform is only one part of creating “a new financial eco-system that is truly integrated and less dependent on bank financing”. What is also needed is “the full involvement of all parties, including corporates, investors and supervisors”.³²

EMU objectives are no less prominent in recent CMU documents. For example, in a 2019 Communication on progress on CMU, the Commission emphasises that “private risk-sharing mechanisms play a particularly important role in cushioning country-specific shocks in the Economic and Monetary Union and contribute to risk-reduction in the financial sector”. In addition, the Commission connects CMU to strengthening “the international role of the euro”.³³ The 2020 Action Plan repeats the main message as follows: “Finally, the CMU is essential for building resilience against future asymmetric shocks affecting only a few Member States. By laying down strong foundations for better and more

²⁶ Commission Staff Working Document SWD(2015) 183 final of 30 September 2015, Economic Analysis, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union, 11-12.

²⁷ Y Demyanyk, C Ostergaard and BE Sørensen, ‘Risk Sharing and Portfolio Allocation in EMU’ (2008) Economic Papers ec.europa.eu.

²⁸ N Anderson, M Brooke, M Hume and M Kürtösiová, ‘A European Capital Markets Union: Implications for Growth and Stability’ (2015) Financial Stability Papers www.bankofengland.co.uk.

²⁹ M Obstfeld, ‘Risk-Taking, Global Diversification, and Growth’ (1994) *The American Economic Review* 1310.

³⁰ Communication COM(2017) 292 final cit. 2-3.

³¹ *Ibid.* 3, 8. Reflection Paper COM(2017) 291 final from the Commission of 31 May 2017 on the Deepening of the Economic and Monetary Union, 23 (emphasis omitted).

³² Reflection Paper COM(2017) 291 final cit. 23.

³³ See Communication COM(2019) 136 final from the Commission of 15 March 2019 on Capital Markets Union: progress on building a single market for capital for a strong Economic and Monetary Union, 1 (emphasis omitted).

geographically spread private risk sharing, the CMU supports the functioning of the Banking Union and the Economic and Monetary Union”.³⁴

III. LEGISLATIVE MOMENTUM

As shown in the previous section, the Commission has consistently referred to EMU objectives in its CMU documents. The most prominent of these objectives relate to promotion of financial stability through private risk-sharing, albeit that the documents are not very explicit about why it should be regarded as particularly important for euro area Member States, as opposed to Member States in general. The following discussion assesses the significance of EMU objectives as arguments in debates and decision-making regarding CMU. This is expected to shed light on their role in creating momentum for legislative action.

Assessing the significance of EMU objectives requires context, no matter how persuasive one considers their content as such. Their contextualisation should start with the recognition that CMU, like legislative projects generally, can be assumed to create winners and losers, or at least to benefit some actors more than others. The relevant actors can be private parties as well as states.

Related to this, Lucia Quaglia, David Howarth and Moritz Liebe have studied connections between national preferences on CMU and the variants of financial capitalism across EU Member States. They worked on two hypotheses and found evidence for both. The first and main hypothesis was that “Member States with large non-bank-based financial sectors” were the keenest promoters of CMU and, more generally, supporters of financial sector liberalisation in the EU. The second hypothesis was that “Member States with more open banking systems – and thus lower levels of banking nationalism” – typically supported liberalisation and diversification measures of CMU.³⁵

A comparison of, for example, UK and German positions in early discussions and negotiations on CMU illustrate these regularities. Quaglia, Howarth and Liebe show that the UK government and the City of London supported CMU enthusiastically, whereas the German government was more cautious and expressed reservations. The UK was expected to be the main winner of CMU due to new European business opportunities for its diverse financial sector, with considerable capacity in wholesale finance, private equity and hedge funds.³⁶ Germany, for its part, apparently had less to benefit from CMU, given

³⁴ Communication COM(2020) 590 final cit. 4 (emphasis omitted).

³⁵ L Quaglia, D Howarth and M Liebe, ‘The Political Economy of European Capital Markets Union’ (2016) JComMarSt 185, 187-192. According to Quaglia, Howarth and Liebe, the two hypotheses “largely hold with a couple of partial exceptions”. Generally on bank-based and market-based finance in the EU, see N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014) 13-19. Moloney also discusses the explanatory power of “Varieties of Capitalism” analysis.

³⁶ L Quaglia, D Howarth and M Liebe, ‘The Political Economy of European Capital Markets Union’ cit. 192-193. The attitude of the UK was shared by other Member States with developed and diverse financial sectors,

its stronger reliance on bank credit, less developed alternative finance, and closed banking system, with savings banks and cooperatives playing a central role in financing SMEs. National policy preferences behind these financial sector features could be threatened by CMU and increased market access. Another more cautious Member State was France. Quaglia, Howarth and Liebe consider this a kind of surprise, given France's more developed financial sector, but they explain it by a policy of national champions in banking and a lower foreign presence than in any other financial system in the EU.³⁷

In another study, Quaglia and Howarth argue that the Commission has strategically employed different policy narratives on CMU in different Member State and financial industry contexts so as to gather political support for it. According to Quaglia and Howarth, the aim has been to present CMU as "a positive-sum game, rather than a zero-sum game with potential winners and losers".³⁸ They identify potential winners and losers, both in kinds of financial firms and in Member States and appear to suggest that the Commission's communications and policy narratives were based on similar observations. Potential winners in financial firms included non-banks, larger universal banks capable of "non-traditional banking activities", such as securitisation, and insurance companies. Conversely, traditional and smaller banks with less engagement in capital markets were among the potential losers. Indeed, CMU explicitly aimed at increasing funding alternatives to non-financial firms beyond bank credit. Of course, international players were more likely to be potential winners and domestically oriented players potential losers. Expected advantages and disadvantages of CMU to national financial sectors also appeared to divide Member States into potential winners and losers. This influenced the positions of Member State governments on CMU.³⁹

Somewhat simplified, the first policy narrative was presented to potential winners and the second policy narrative to potential losers, or those with less to win. Quaglia and Howarth introduce the two as follows:

"The Commission articulated the first narrative which focused upon boosting the size, the competitiveness and the openness of EU capital markets. With this narrative, the Commission mainly targeted the UK, the City of London, large cross-border universal banks and other international financial players. The Commission's second narrative concerned the provision of (non-bank) funding to the real economy, which mainly targeted Continental

including Ireland, the Netherlands, Sweden and Luxembourg. Quaglia, Howarth and Liebe note that the second hypothesis is contradicted by the very low presence of foreign banks in the Netherlands and Sweden.

³⁷ *Ibid.* 193-194.

³⁸ L Quaglia and D Howarth, 'The Policy Narratives of European Capital Markets Union' cit. 990 ff. However, Quaglia and Howarth admit that their evidence "does not prove definitely the existence of strategic motives on the part of Commission officials". *Ibid.* 1003.

³⁹ *Ibid.* 995-998.

countries and notably countries in the EU periphery, as well as domestically oriented banks and smaller capital markets".⁴⁰

The first policy narrative also included an external dimension, envisioning the potential of CMU to increase the global competitiveness of the EU. In contrast, the second policy narrative appears far more locally oriented. Provision of non-bank funding to SMEs and infrastructure projects was emphasised, but carefully presented as complementary to bank funding so as to avoid opposition of banks.⁴¹

How should EMU objectives be assessed against the background of "winners", "losers", and the two policy narratives? One remarkable point is that the objective of financial stability through private risk-sharing has the appearance of being generally acceptable and almost unquestionable. Potential winners and potential losers alike, be they private parties or states, should benefit from improved stability brought about by increased shock absorption capacity. What is more, those stability improvements would result from potential winners exploiting their new European business opportunities opened by CMU. Thus presented, the objective suggests a positive-sum game and may play a significant role in creating legislative momentum for CMU.

Proposing such a role for the objective of financial stability through private risk-sharing is not just guesswork. Suffice it here to quote the following observations by Benjamin Braun and Marina Hübner: "Crucially, the discourse of private risk sharing has been received positively in Germany, EMU's largest creditor country. The German government conceives of CMU as the lowest common denominator for short-term EMU-internal risk sharing, a fact that has contributed to Germany's support for CMU. This view has repeatedly been expressed by the German Council of Economic Experts, an influential advisory body to the German government, and by the Bundesbank".⁴²

A question yet to be addressed is why CMU should be regarded as particularly important for EMU, although it is not limited to the euro area. Here, Braun and Hübner propose an elaborate answer. They explain CMU as an attempt to address a "structural capacity gap" in the governance structure of EMU as it currently stands. This gap refers to severe limitations at both national and supranational levels on macroeconomic stabilisation, which is understood as levelling the business cycle, preserving economic growth and employment, and alleviating the impact of output shocks on consumption. At national level, limitations result from "the full centralization of monetary policy, the partial

⁴⁰ *Ibid.* 998. Quaglia and Howarth have divided Commission speeches, interviews and articles on CMU presented in different Member State contexts between September 2014 and September 2016 into the following focus categories: "Only on financial sector opportunities/competitiveness", "Principally on financial sector opportunities/competitiveness", "Equal focus", "Principally on SMEs and/or infrastructure funding" and "Only on SMEs and/or infrastructure funding". *Ibid.* 1000-1001.

⁴¹ *Ibid.* 998-1003.

⁴² B Braun and M Hübner, 'Fiscal Fault, Financial Fix? Capital Markets Union and the Quest for Macroeconomic Stabilization in the Euro Area' (2018) *Competition & Change* 117, 129 (references omitted).

but consolidation-oriented centralization of fiscal policy, and the neutralization of labour market policy in creditor countries". At supranational level, then, the EU has failed to develop tools for macroeconomic steering.⁴³

Braun and Hübner start their account from mid-2012, when the threat of an uncontrolled breakup of the euro area had receded, following Mario Draghi's "whatever it takes" speech. At the same time, reform ambitions had weakened. This weakening is visible in discussions of the need for stronger public risk-sharing, where "Germany, supported by the other creditor countries, feared that increased fiscal leeway at the European level would establish a permanent transfer system from the North to the South, plagued with moral hazard problems". As the political reality did not allow creation of a fiscal union, policy makers and central bankers, along with private interest organisations, started to look for other options. It is in this context that Braun and Hübner examine the emergence of CMU as "a financial fix for EMU's fiscal faults", focusing on two processes in which important parts of the CMU agenda were set.⁴⁴

The first process framed securitisation and market-based finance more generally as "a budget-neutral instrument for the new European growth agenda".⁴⁵ Securitisation is a financing technique which generally involves pooling together of credit claims or receivables and then refinancing the pool by selling it to a specially established company or other entity. This entity, in turn, finances the purchase by issuing debt securities backed by the pool, to be bought by investors in capital markets.⁴⁶ Although an unlikely candidate for a solution in view of its part in the run-up to the global financial crisis, securitisation became seen as an opportunity to address two issues, namely the need to deleverage banks and the scarcity of credit for SMEs.⁴⁷

The second agenda-setting process identified financial market integration as a way to bring about private risk-sharing, in the sense discussed in section II above. Public risk sharing, which would have required national budgets to be at least partially centralised, was out of reach. Braun and Hübner trace the theory behind private risk-sharing to the mid-1990s and the then dominant "neoclassical worldview".⁴⁸

Braun and Hübner note that the structural capacity gap of macroeconomic stabilisation has damaged EMU output legitimacy, especially in the euro area periphery countries

⁴³ *Ibid.* 117-118, 121.

⁴⁴ *Ibid.* 123, 128.

⁴⁵ *Ibid.* 120, 123-124, 127.

⁴⁶ See Association for Financial Markets in Europe (AFME), 'High-quality Securitisation for Europe: The Market at a Crossroads' (9 June 2014) AFME Finance for Europe www.afme.eu.

⁴⁷ B Braun and M Hübner, 'Fiscal Fault, Financial Fix?' cit. 124, 126-127. See E Engelen and A Glasmacher, 'The Waiting Game: How Securitization Became the Solution for the Growth Problem of the Eurozone' (2018) *Competition & Change* 165 ff.

⁴⁸ B Braun and M Hübner, 'Fiscal Fault, Financial Fix?' cit. 127-129. Braun and Hübner mention as "particularly influential" P Asdrubali, BE Sørensen and O Yosha, 'Channels of Interstate Risk Sharing: United States 1963-1990' (1996) *The Quarterly Journal of Economics* 1081.

that have suffered most from recessions, unemployment and the decline of real wages.⁴⁹ They emphasise that their analysis does not imply full commitment on the part of the Commission to “the theory that CMU will actually solve the problem of macroeconomic stabilization”, or belief in private finance as the “first-best solution” to that problem. However, they consider it shown that policymakers have made major efforts to validate the narrative of CMU as a macroeconomic stabiliser.⁵⁰

To sum up, the above discussion suggests two overlapping reasons why EMU objectives, especially those related to financial stability through private risk-sharing, appear as weighty considerations and are likely to contribute to legislative momentum for CMU and its initiatives. First, financial stability through private risk-sharing can be presented as a generally acceptable objective in that it promises to benefit actors regardless of whether they are otherwise expected to be on the “winning” or “losing” side of CMU. Second, increased market-based finance and financial market integration can be presented as substitutes for the macroeconomic stabilisation capacity that EMU is lacking due to its current governance structure. While the macroeconomic stabiliser narrative may leave doubts, it is backed by the Commission and some economic theory.

The weight of EMU objectives may have increased as a result of Brexit, as anticipated by the 2017 Reflection Paper on the Deepening of the Economic and Monetary Union.⁵¹ In this vein, Wolf-Georg Ringe even argues that Brexit has changed the purpose and motivation behind CMU. He plausibly suggests that one significant initial purpose was a political bid to convince the City of London and the British public of the benefits of European integration and to vote remain in the Brexit referendum. Since this purpose failed (other than in winning over the City), he sees a case for redefining and re-explaining CMU “in an entirely new context”, as “measures to strengthen the architecture of the eurozone”. This strengthening would be based on private risk-sharing.⁵²

Moreover, the weight of EMU objectives is unlikely to decrease due to the public risk-sharing elements in the Covid-19 recovery instrument, Next Generation EU, which was

⁴⁹ B Braun and M Hübner, ‘Fiscal Fault, Financial Fix?’ cit. 118, 124.

⁵⁰ *Ibid.* 119, 131. For recent economic analysis of risk-sharing in the context of EMU, see J Cimadomo, O Furtuna and M Giuliadori, ‘Private and Public Risk Sharing in the Euro Area’ cit.

⁵¹ Reflection Paper COM(2017) 291 final cit. 23. See Section II above.

⁵² W-G Ringe, ‘The Politics of Capital Markets Union: From Brexit to Eurozone’ in F Allen, E Faia, M Haliassos and K Langenbucher (eds), *Capital Markets Union and Beyond* cit. 341 ff. Ringe suggests a timeline that differs from what has been discussed in this Article. He writes that “different from the original plans, the *CMU Mid-Term Review* for the first time mentioned that the CMU initiative could also ‘strengthen ... Economic and Monetary Union (EMU) by supporting economic and social convergence and helping absorb economic shocks in the euro area’”. However, he also notes that the “same idea was floated in the famous 2015 *Five Presidents Report*”. *Ibid.* 347. As discussed in Section II above, EMU and shock absorption are mentioned in the 2015 Action Plan and other documents of that time, rather than being Brexit-related reorientation. See also B Cœuré, ‘Capital Markets Union in Europe: An Ambitious but Essential Objective’ in A Dombret and PS Kenadjian (eds), *The European Capital Markets Union: A Viable Concept and a Real Goal?* (De Gruyter 2015) 6. Cœuré argues that “a genuine capital markets union is in fact essential for the good functioning of a monetary union”.

agreed on by the Council on 21 July 2020. While Next Generation EU “establishes a joint funding model to support government spending and reform” and directs “sizeable net financial support for those euro area countries that face the biggest economic and fiscal challenges after the pandemic”, this is meant to happen only once.⁵³ The institutional rhetoric supporting CMU and its EMU objectives seems even strengthened in the context of Covid-19, as exemplified by the following excerpt from a speech by European Central Bank (ECB) Vice-President Luis de Guindos:

“First, while we should be realistic that some measures will take longer to yield noticeable benefits than others, a more developed CMU is key to funding the post-COVID-19 recovery, as private funding from the capital markets will complement public funding and bank funding – both under pressure from the pandemic. This will also help limit the risk of growing asymmetries among euro area countries in the recovery from the COVID-19 shock. [...] Second, CMU would improve and diversify funding conditions, creating prospects for jobs and growth, including for a more sustainable and digitalised economy”.⁵⁴

IV. LEGISLATIVE PROCESS AND CONTENT

In 2015, the then Commissioner for Financial Stability, Financial Services and Capital Markets Union, Jonathan Hill, stated that the “direction” needed for CMU was “to build a single market for capital from the bottom up, identifying barriers and knocking them down one by one”.⁵⁵ Accordingly, CMU has grown into a broad variety of legislative initiatives, ranging from various aspects of financial regulation to private law and private international law.⁵⁶ This section considers the role of EMU objectives in the legislative process and content of selected initiatives and of CMU more generally.

EMU objectives appear differently in different legislative initiatives of CMU. For example, this can be seen in a comparison between two key pieces of CMU, namely the

⁵³ A Giovannini, S Hauptmeier, N Leiner-Killinger and V Valenta, ‘The Fiscal Implications of the EU’s Recovery Package’ (2020) ECB Economic Bulletin, issue 6, 81-82. However, Giovannini, Hauptmeier, Leiner-Killinger and Valenta note that the fiscal innovation of Next Generation EU, “while a one-off, could also imply lessons for Economic and Monetary Union, which still lacks a permanent fiscal capacity at supranational level for macroeconomic stabilisation in deep crises”. *Ibid.* 84.

⁵⁴ L de Guindos, ‘Keynote speech of 12 November 2020 at the CIRS Annual International Conference 2020 on Major Trends in Financial Regulation’ (12 November 2020) www.ecb.europa.eu. See also Communication COM(2020) 590 final cit. 2-4, 7-8.

⁵⁵ European Commission, Press release IP/15/4433 - *Unlocking Funding for Europe’s Growth*. *European Commission consults on Capital Markets Union* (2015).

⁵⁶ On “general laws” and the CMU agenda, with particular focus on company law and corporate governance, see E Ferran, ‘A Legal Framework for Financial Market Integration: Resetting the Agenda Beyond the Sectoral Single Rulebook’ in F Allen, E Faia, M Haliassos and K Langenbucher (eds), *Capital Markets Union and Beyond* cit. 45 ff.

Commission Proposals for a Prospectus Regulation and a Securitisation Regulation.⁵⁷ Both Regulations (and Proposals) are based on art. 114 TFEU, that is, the “general” internal market legal basis.

The Commission Proposal for a Prospectus Regulation connects the initiative to EMU by first describing how the prospectus reform complements CMU objectives and then stating as follows: “A more diversified funding mix will also deliver additional benefits: it will support financial stability and reduce the dependence of the business sector and wider economy on bank lending. For this reason, Capital Markets Union is also an important part of the work on the completion of the European Economic and Monetary Union”.⁵⁸ In contrast, the Commission Proposal for a Securitisation Regulation makes no explicit reference to EMU.⁵⁹ This difference may reflect the idea, expressed in the Five Presidents’ Report discussed in section II above, that while integration of both bond and equity markets strengthens cross-border risk-sharing, it is equity markets that function as “a key shock absorber”.⁶⁰

Arguably, EMU objectives are less connected with individual initiatives of CMU than with CMU as a whole. This would entail that EMU objectives can be used as a wholesale justification for initiatives, even if the relationship of particular initiatives with, say, shock absorption is vague or distant. In other words, the justification would primarily concern the CMU agenda itself, and would concern individual initiatives only secondarily and largely owing to their place on the agenda.

This could help to explain the revival of efforts to develop uniform conflict rules (that is, private international law rules determining the applicable substantive law) on assignments of claims in the EU, most recently as part of CMU.⁶¹ The need for a legislative solution at the EU level stems from diverging Member State conflict rules on third-party effects of

⁵⁷ Commission Proposal COM(2015) 583 final of 30 November 2015 for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading; Commission Proposal COM(2015) 472 final of 30 September 2015 for a Regulation of the European Parliament and of the Council laying down common rules on securitisation and creating a European framework for simple, transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) n. 1060/2009 and (EU) n. 648/2012.

⁵⁸ Proposal for a Regulation COM(2015) 583 final cit. 4.

⁵⁹ Proposal for a Regulation COM(2015) 472 final cit.

⁶⁰ European Commission, ‘Completing Europe’s Economic and Monetary Union’ cit. 12. See CM Buch and F Bremus, ‘Capital Markets Union and Cross-Border Risk Sharing’ in F Allen, E Faia, M Haliassos and K Langenbucher (eds), *Capital Markets Union and Beyond* cit. 30-31, 42. Buch and Bremus argue that “the share of equity in the overall mix of finance plays an important role for risk sharing and for the financing of innovation”.

⁶¹ Commission Proposal COM(2018) 96 final of 12 March 2018 for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims. See H Labonté, ‘Third-Party Effects of the Assignment of Claims: New Momentum from the Commission’s Capital Markets Union Action Plan and the Commission’s 2018 Proposal’ (2018) *Journal of Private International Law* 319, 321-323.

assignments of claims.⁶² These divergences weaken the legal certainty of assignments of claims and the predictability of commercial and financial transactions based on them, given that substantive rules on third-party effects of assignments of claims also vary between Member States. Indeed, the third-party effects of an assignment of claims may vary depending on the Member State (or other jurisdiction) whose courts may eventually have to adjudicate on those effects. The EU is not entirely without conflict rules on assignments of claims, for they are dealt with in art. 14 of the Rome I Regulation.⁶³ However, art. 14 is silent as to the law applicable to third-party effects. Conflict rules on third-party effects were omitted from the article because the negotiating Member States failed to agree on the most suitable rules (or, more technically, connecting factors) for that purpose.⁶⁴

The search for uniform conflict rules on third-party effects has remained on the agenda pursuant to the “review clause” of art. 27(2) of the Rome I Regulation, but in a rather dormant state. Only recently, in the context of CMU, has this search turned into an actual legislative initiative.⁶⁵ The recent Commission Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims strongly emphasises the importance of assignments on capital markets.⁶⁶ This connection seems to have been far less prominent in drafting and negotiating the Rome I Regulation, although for example securitisation was discussed then as well.⁶⁷ Moreover, the recent Commission Proposal contains a special rule for claims arising from financial instruments and for the securitisation context.⁶⁸

The legal basis of this Commission Proposal is art. 81(2)(c) TFEU, which establishes competence for “measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: [...] the compatibility of the rules applicable in the Member States concerning conflict of laws and jurisdiction”. The Rome I Regulation, in

⁶² The notion of third-party effects includes, for example, the question of effectiveness of an assignment of claims against the assignor's creditors (other than the assignee) or a competing assignee.

⁶³ Regulation (EC) n. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). See Communication COM(2015) 468 final cit. 23, 30.

⁶⁴ For an account of this failure, see PMM van der Grinten, ‘Article 14 Rome I: A Political Perspective’ in R Westrik and J van der Weide (eds), *Party Autonomy in International Property Law* (Sellier European Law Publishers 2011) 145 ff.

⁶⁵ See Report COM(2016) 626 final from the Commission of 29 September 2016 on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person, 3. This report fulfils the Commission's reporting obligation set in art. 27(2) of the Rome I Regulation more than six years late. Interestingly, the Commission explains that adoption of the report “was postponed in order to await the political opportunity to follow its publication by a legislative proposal, which is now undertaken in the Action Plan on a Capital Markets Union”.

⁶⁶ Proposal for a Regulation COM(2018) 96 final cit. 1-12. See Report COM(2016) 626 final cit. 2, 4-6.

⁶⁷ Commission Proposal COM(2005) 650 final of 15 December 2005 for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) 8, 19; PMM van der Grinten, ‘Article 14 Rome I’ cit. 159; J Perkins, ‘A Question of Priorities: Choice of Law and Proprietary Aspects of the Assignment of Debts’ (2008) *Law and Financial Markets Review* 238, 239-242.

⁶⁸ Proposal for a Regulation COM(2018) 96 final cit. 27, 31 (recitals 27 and 28, art. 4(2) and (3)). Cf. Proposal for a Regulation COM(2005) 650 final cit. 8, 19 (art. 13(3)).

turn, found its legal basis in the same article's predecessor, art. 65(b) TEC. All in all, it can be argued that recent efforts share some of the more general legislative momentum of CMU. Since EMU objectives contribute to that momentum as a wholesale justification, they also lend support to this particular initiative.

EMU objectives may thus increase the likelihood that legislative initiatives will succeed, but is their functioning as a wholesale justification for CMU merely positive? This should be discussed initiative by initiative, but caution seems advisable even at a general level. The reason is easy to grasp if the objective of financial stability through private risk-sharing – the core of EMU objectives – is observed in a temporal context. As Braun and Hübner note, the theory behind private risk-sharing was developed in the mid-1990s, in a “less financialized time period” than ours.⁶⁹ Therefore, employing the theory today may lead to overlooking the risks caused by integration of financial markets as such.⁷⁰

Indeed, financial stability concerns have arisen, and have been addressed to some extent, in legislative processes for individual initiatives of CMU. The making of the Securitisation Regulation provides an example. In its Proposal for a Securitisation Regulation, the Commission embarked on “creating a sustainable market for securitisation, without repeating the mistakes made before the crisis”. The Commission's concerns included preventing the recurrence of originate-to-distribute models where “lenders grant credits applying poor and weak underwriting policies as they know in advance that related risks are eventually sold to third parties”.⁷¹ The main feature of the proposed (and later adopted) Regulation to “restart markets on a more sustainable basis” was to identify simple, transparent and standardised (STS) securitisations, so that these can be made eligible for more risk-sensitive prudential requirements.⁷²

However, the co-legislators disagreed on sufficient safeguards for financial stability, which resulted in several delays. In terms of content, the legislative process culminated in the interinstitutional compromise of 30 May 2017. This compromise added further safeguards in the Regulation text, including a ban on re-securitisations (albeit with limited exceptions), broadened powers to competent authorities, and the explicit task of macro-

⁶⁹ B Braun and M Hübner, ‘Fiscal Fault, Financial Fix?’ cit. 128.

⁷⁰ See *ibid.*; W Schelkle, ‘From Divorce to a Union of Unions: Too Much of a Good Thing’ (Proceedings of OeNB Workshops n. 21, 2015) 42. See generally R Portes, ‘Interconnectedness: Shadow Banking and Capital Markets Union’ in F Allen, E Faia, M Haliassos and K Langenbucher (eds), *Capital Markets Union and Beyond* cit. 331 ff. Portes writes: “A fundamental issue in evaluating financial integration is the balance between its benefits – more efficient allocation of capital, risk sharing – and the potential dangers posed by interconnectedness. When we think in systemic terms of the buildup of financial stress and vulnerability, our concerns arise from interconnectedness”.

⁷¹ Proposal for a Regulation COM(2015) 472 final cit. 2, 23 (recital 19).

⁷² *Ibid.* 3-5. Cf. E Engelen and A Glasmacher, ‘The Waiting Game’ cit. 172-175. Engelen and Glasmacher argue that “labelling any securitization as ‘simple’, ‘transparent’ and ‘standardized’ is misleading since it glosses over the fact that securitization is inevitably complex”.

prudential oversight of the EU securitisation market assigned to the European Systemic Risk Board (ESRB).⁷³

While compromises like this inevitably leave open questions as to the optimal balancing of enabling features and safeguards, or opportunities and threats, it is important that legislative processes involve real possibilities for balancing. Then again, one may ask whether such “pointillistic” balancing in connection with individual initiatives addresses financial stability concerns sufficiently in the broader CMU framework.⁷⁴ This is a matter for further discussion, but the analysis here suggests one general point with respect to the EMU rationale for CMU. That is, EMU objectives are incomplete and even paradoxical as justifications for CMU and its initiatives insofar as those objectives seek to promote financial stability but at the same time fail to address the causes of financial instability they entail. Therefore, the justificatory force of EMU objectives should not be exaggerated.

V. CONCLUSION

The purpose of this *Article* has been to specify and clarify EMU objectives in CMU and its initiatives. These are objectives that emphasise CMU’s importance for EMU, although CMU, its initiatives and legislation resulting from them are not limited to the euro area. EMU objectives call for attention because their expressions are often unspecific and unclear in terms of their concrete implications.

A review of these expressions in (mainly) Commission documents on CMU revealed that the most prominent EMU objectives relate to promotion of financial stability through private risk-sharing. The *Article* then turned to assessing the significance of EMU objectives in creating momentum for legislative action. A brief review of political economy literature suggested two overlapping reasons why they are likely to appear as weighty considerations in that respect. First, financial stability through private risk-sharing can be presented as a generally acceptable objective in that it promises to benefit private parties and states regardless of whether those actors are otherwise expected to “win” or “lose” as a result of CMU. Second, CMU appears to substitute for the macroeconomic stabilisation capacity that EMU is lacking due to its current governance structure. It was also noted that the weight of EMU objectives may have increased as a result of Brexit, and that it is

⁷³ A Delivorias, ‘Common rules and new framework for securitisation’ (January 2018) Briefing: EU Legislation in Progress www.europarl.europa.eu 6-8. This briefing explains that re-securitisations are transactions where “a pool of securities, issued in earlier securitisations, is bought by an originator and securitised again (usually in the form of a collateralised debt obligation)” and that the “main products of re-securitisation are CDOs of ABSs and CDOs of CDOs (CDO²)”. *Ibid.* 2.

⁷⁴ See V Bavoso, ‘Market-Based Finance, Debt and Systemic Risk: A Critique of the EU Capital Markets Union’ (2018) Accounting, Economics, and Law: A Convivium 1. Bavoso argues (mainly in sections 4-6) that the CMU framework fails to address stability risks associated with market-based finance and its debt creation effects, especially excessive risk-taking and leverage. He calls for an institutional structure, including a strong supervisor, to match these risks.

unlikely to decrease despite the public risk-sharing elements of the Covid-19 recovery instrument, Next Generation EU.

Finally, the *Article* went on to observe the operation of EMU objectives, and complications in that respect, in the legislative process and content of selected initiatives. Most attention was paid to the Securitisation Regulation and recently revived efforts to develop uniform conflict rules on third-party effects of assignments of claims. Two general points arose from these observations. First, EMU objectives appear to be less connected with individual initiatives of CMU than with CMU as a whole. Accordingly, EMU objectives can be used as a wholesale justification for initiatives, even if the relationship of particular initiatives with private risk-sharing is vague or distant. Second, EMU objectives may promote financial stability but at the same time entail causes of financial instability, that is, risks resulting from integration of financial markets as such. Unless these concerns are sufficiently addressed in legislative processes of individual initiatives and, if needed, in the broader CMU framework, EMU objectives remain incomplete and paradoxical as justifications for CMU and its initiatives.



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