The Economic and Monetary Union:

Constitutional and Institutional Aspects of the Economic Governance within the EU

The XXVI FIDE Congress in Copenhagen, 2014
Congress Publications Vol. 1

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Die Wirtschafts- und Währungsunion:

Konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung innerhalb der EU

L'Union économique et monétaire :

Les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UE

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One of the social events took place in the main building pictured on the cover.

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Introduction

Ulla Neergaard and Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen and Grith Skovgaard Ølykke[1]

From 1978 to 2014

From 28-31 May 2014 the XXVIth FIDE Congress will take place in Copenhagen. Thus, it will be the second time that Copenhagen has the pleasure to host a FIDE Congress. 36 years earlier, in 1978, one took place for the first time in Copenhagen.[2] The president of FIDE at that time, Professor Ole Lando, said the following in his opening speech:

'When you get gr[e]y hairs you tend to look back to your childhood and early youth more often than you did earlier. You often remind yourself of how you looked upon the world then. You also remember how the grown-ups of that time looked upon it. Forty years ago those who had grey hairs and compared Europe with the Europe of their youth were generally very gloomy in their outlook. Whereas in 1898 Europe had seemed set on a course of peaceful progress, in 1938 many people prophesied war, tyranny and poverty, and they were right. In 1939 we had war. During the war most of us experienced tyranny, and when the war ended in 1945 we lived in misery and poverty. Yet, only ten years after the war six European countries, two of which had been at war with the other four, created an Economic Community. Their aim was to establish a closer union among the European people, to further economic and social progress, to improve living conditions, and to maintain and strengthen freedom and peace. When in 1955 it was thus proposed to establish a Common Market, the people of Europe still remembered the war, and were willing to accept

1. Professor, Dr. Ulla Neergaard, University of Copenhagen, President of the Danish Association for European Law, President for FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, University of Copenhagen, Secretary General for FIDE 2013-14; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Professor, Dr.jur., Dr. Jens Hartig Danielsen, University of Aarhus; and Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard and Catherine Jacqueson have had the overall responsibility for all three volumes, whereas Jens Hartig Danielsen has been primarily involved in Volume 1; Nina Holst-Christensen in Volume 2; and Grith Skovgaard Ølykke in Volume 3.
2. The topics then dealt with were: 1. 'Equal Treatment of Public and Private Enterprise'; and 2. 'Due Process in the Administrative Procedure'.

measures which could guarantee peace and freedom. Peace and freedom were in the minds both of those who had visions of a brotherhood of European nations and of those who wanted to secure prosperity by creating a wider market for trade and industry. During the years which have passed since then, the fears of tyranny and war have faded. The organization known as the European Communities is no longer seen as a preserver of peace and liberty. The prosperity which so many had hoped for has come and has gone away again. Today the former enthusiasm for a united Europe has evaporated.'[3]

Again, almost four decades have passed by, and one can again look back anew in the same manner as Professor Ole Lando did. As we all know, so much has happened. The European Union of today has experienced many successes such as the profound enlargement; the enactment of the Charter of Fundamental Rights; the broadening of democracy and important values; the strengthening of free trade; the relative prosperity; the establishment of Union citizenship; and the improved degree of security and peace. However, one could still say that the enthusiasm for a united Europe has to some extent evaporated, and that crisis and challenges at several different levels are deeply felt. The FIDE Congress of 2014 will explore many layers thereof with outset taken in the selection of significant and important themes, which to some degree become clear from reading the present volume and its 'sisters'.

FIDE – an Unusual European Organisation

FIDE (*i.e. Fédération Internationale pour le Droit Européen/International Federation of European Law*) focuses on research and analysis of European Union law and EU institutions, as well as their interaction with the legal systems for the Member States. It unites the national associations for European law of most of the EU Member States and candidate countries, as well as Norway and Switzerland. At present, there are 29 member associations – each situated in different countries – who all work voluntarily for the spreading of knowledge of the EU.

FIDE was established already in 1961, and is by many seen as having been a very important actor in the original establishment of EU law as a legal discipline.[4] Even today, despite the establishment of many other channels for

3. See Ole Lando: 'Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978', in 'FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979', p. 6.
4. See for discussions Morten Rasmussen *e.g.*: 'Establishing a Constitutional Practice: The Role of the European Law Associations', in Wolfram Kaiser and Jan-Henrik Meyer (Eds): '*Societal Actors in European Integration. Polity-Building and Policy-*

dealing with EU law, FIDE's most important activity consists in the organisation of the biennial FIDE Congresses and the related publications are viewed by many as still having an extraordinary design, significance and influence.[5]

The XXVI FIDE Congress and Its Main Themes

The main topics of the XXVI FIDE Congress have been selected a couple of years in advance after several 'hearings' of relevant actors all over Europe and are the following:

- General Topic 1 – The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU;[6]
- General Topic 2 – Union Citizenship: Development, Impact and Challenges;[7]
- General Topic 3 – Public Procurement Law: Limitations, Opportunities and Paradoxes;[8] and
- Saturday's General Topic – In the Era of Legal Pluralism: The Relationship between the EU, National and International Courts, and the Interplay of the Multiple Sources of Law.[9]

Making, 1958-1992', Palgrave Macmillan, 2013, pp. 173-197; and Alexandre Bernier: 'Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970', in 'Contemporary European History', 2012, pp. 399-415.

5. See further Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181.
6. Appointed as 'General Rapporteur' is: Professor Fabian Amtenbrink; and as 'Institutional Rapporteur': Jean-Paul Keppenne, Legal Service, European Commission.
7. Appointed as 'Joint General Rapporteurs' are: Professor Niamh Nic Shibhne & Professor Jo Shaw; and as 'Institutional Rapporteur': Michal Meduna, DG Justice, European Commission.
8. Appointed as 'General Rapporteur' is: Professor Roberto Caranta; and as 'Institutional Rapporteur': Adrián Tokár, Legal Service, European Commission.
9. The treatment of this topic has not followed the 'system' of 'questionnaires', 'General Rapporteurs', 'Institutional Rapporteurs', and 'National Rapporteurs'. Instead a panel discussion of leading court presidents and judges from both the international and the national courts, as well as academics has been organised. Although the 'Saturday's General Topic' thus is not the direct focus of the present publications, it may for the sake of completeness be mentioned that this topic might on the surface seem a bit theoretical, but in actual fact it is of great and also concrete importance in the daily

The selected topics all have in common that they are very central and important for the understanding of the challenges facing Europe these years, and for the development of European law. With the selection it is ensured that both constitutional and institutional elements are dealt with. It is also made certain that one of the most significant founding stones of the EU, namely the internal market, is touched upon. In addition, the importance of the EU to the individuals, namely the Union citizens themselves, is given heavy weight. We therefore hope that both practitioners, officials, academics, civil society, and so on, will all find a huge interest in the topics selected.

Everyone is likely to agree that the first topic on economic governance constitutes a very natural and unavoidable choice. Indeed, the Economic and Monetary Union was created more than twenty years ago and is heavily challenged in this tumultuous time of financial and economic crisis. Although improvements of the economic situation in Europe have recently occurred, nothing is yet completely stabilised, and in any event there is real need for a legal analysis of the developments which have taken place. It is thus time to assess the legal status of EU economic governance, and the issue of constitutional asymmetry in respect of economic and monetary issues. Other issues to be dealt with are: what are the legal consequences of possible divergences from EU law; what is the role of the Court of Justice of the European Union; what are the prospects for the future; is an ever closer Fiscal Union a question of balancing national sovereignty and the Euro's fundamental governance structures; is there a need for Treaty changes in order to introduce Eurobonds; and to what extent may tax law be harmonised.

Union citizenship is equally topical and challenging. What is the reality of Union citizenship in the Member States more than two decades after the insertion of Union citizenship in the Treaty? The intention is to enhance the understanding of how the rights attached to Union citizenship have been implemented and respected by the national authorities. It is also to address the interesting issue for the citizens of whether Union citizenship might backfire and negatively affect the 'acquired' rights of the workers. Union citizenship

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legal work of many lawyers, and others. It focuses more specifically on how EU law has to operate in a multi-level legal order and thereby on the interrelationship of courts and the phenomenon of a plurality of sources of law. According to the conception of legal pluralism, hierarchies no longer exist in the same manner as in the traditional nation state. Also, it is part of this conception that one has to accept that the present state of affairs to some degree contains elements of complexity and unpredictability, and that there is a need for compromises. As part of the search for compromise, some may prefer to leave forever open the issue of supremacy.

is also interesting from the perspective of the Union's legitimacy and it is worth considering how far-reaching the sense of solidarity of the Member States and their citizens is towards other Member States and their citizens. In addition, delicate issues such as family reunification, expulsion, and the particular case of third country nationals might be of relevance.

The third general topic, which concerns public procurement law, touches upon an area of law which has a huge practical importance in most Member States. It is linked to public spending and thus to some degree to the financial and economic crisis. Public procurement regulation is increasingly relevant for many lawyers, undertakings, and public authorities. Very timely, the public procurement directives have been under revision for the last couple of years, and the FIDE Congress offers the possibility of discussing in which direction the proposed changes go and analyse their implications. The same is true in respect of the remedies directive. In times of economic crisis the issue of public-private partnerships and the financing of services of general economic interest is crucial and at times a rather controversial issue. This may also be true in respect to the environmental and social protection, which increasingly figures as considerations in this area.

Altogether, the XXVIth FIDE Congress and this volume, together with its two 'sisters', propose to take the temperature of EU law at both the level of the EU and at the national level with the outset taken in three topical and essential legal areas. Thereby, they hopefully constitute a goldmine for comparative and EU lawyers.

A Collaboration of Great Minds of EUropean Law[10]

In order to lift discussions and analysis even further, in conformity with the traditions of FIDE detailed comparative studies have been provided. Therefore – long time in advance of the actual congress – for each of the three topics, a 'questionnaire' has been carefully prepared by the 'General Rapporteur(s)' responsible of the topic. Based on these 'questionnaires', national

10. This headline is inspired from the slogan of the XXVIth FIDE Congress, which again is inspired from the headline of the following article: Julia Laffranque: 'FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law', Juridica International, 2011, pp. 173-181. This use as the slogan has been permitted by Julia Laffranque. A slight change was made so that the slogan became: 'FIDE – Uniting Great Minds of EUropean Law'. The purpose was to stress the relationship between EU law and European law.

analyses were elaborated by national experts appointed by the national associations of FIDE.

All these reports have subsequently been published in this collection, along with the 'general reports' prepared by the 'General Rapporteurs' supplemented by so-called 'institutional reports' prepared by representatives of the EU institutions.[11] As FIDE and its congresses – based on long tradition – function on a trilingual basis, these are elaborated either in English, French, or German.[12]

Words of Gratitude

A project such as the organisation of an event like the FIDE Congress and the present publications could not have been possible without the help of many! Therefore, on behalf of the Danish Association for European Law (DFE), which is the Danish member association of FIDE (since 1973), we wish to express our gratitude to everyone whom we have met on our way, some having helped perhaps a little, others a great deal – some having helped at a more practical level, others financially.[13] FIDE and its congresses can only live on the basis of almost endless voluntary forces. We owe our thanks to all. No one mentioned, no one forgotten, it is often said in Danish when one wants to express one's gratitude, however being in fear of not being forgiven, if someone is unintendedly forgotten. Nevertheless, we dare to try to express our ex-

11. The analyses and results regarding Topic 1 are presented in Volume 1; of Topic 2 in Volume 2; and of Topic 3 in Volume 3. Those oral presentations received as papers, etc., are intended to be published on the website www.fide2014.eu.
12. That is also the reason why *e.g.* the 'questionnaires' and this introductory chapter exist in all three languages.
13. DFE was the seventh Member State association to become a member of FIDE, and thereby the first the join the 'original six' in the context of FIDE. The Board of Directors of DFE consists for the time being of: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Law Firm; Professor, Dr.jur., Dr. Jens Hartig Danielsen, School of Law, Aarhus University; Commissioner in EU Law and Human Rights, Nina Holst-Christensen, Ministry of Justice; Head of Division, Christian Thorning, Ministry of Foreign Affairs; Justice Lene Pagter Kristensen, Supreme Court; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Law Firm; and Associate Professor, Dr. Grith Skovgaard Ølykke, Law Department, Copenhagen Business School. Until 14 November 2013, the Ministry of Foreign Affairs was instead of Christian Thorning 'represented' by Vibeke Pasternak Jørgensen, who stepped out due to a promotion.

plicit thanks to the following, and hope for forgiveness if anyone has been left out unintendedly.[14]

Warm and sincere tributes to His Royal Highness, the Crown Prince Frederik of Denmark, who had kindly accepted to be the Patron of the Congress as his mother HM the Queen did in relation to the FIDE Congress in 1978 in Copenhagen.

In 2009, at a meeting in the Steering Group (also known as the 'Comité Directeur' or the executive committee) of FIDE in Madrid, it entrusted to the DFE not only the Presidency of FIDE, but also the organisation of the FIDE Congress to take place in 2014. It was eventually decided by DFE to invite the Faculty of Law at the University of Copenhagen to be involved in the organisation for practical reasons and in order to ensure a high academic standard. Luckily, the Dean at that time, Henrik Dam, was very enthusiastic about the idea, and decided to support the forthcoming congress in various ways. It is clearly our wish to offer the most sincere thanks to him from DFE and FIDE for this decision and his continuous support. In that connection, our gratitude is also due to the more administrative team at the Faculty of Law helping the event come true, in particular project coordinator Tina Futtrup Borg, but also all her many helpers, as well as Head of Communications Birgitte Faber. At the Faculty of Law special mention should also be made of the PhD school and those persons who organised a PhD course on European Union Law in connection with the Congress (in particular Associate Professor Constanze Semmelmann and Associate Professor Clement Petersen).[15]

Also to be mentioned with great appreciation is the help provided by Secretary Jette Nim Larsen, Horten Law Firm, who in particular has given her precious administrative support with regard to all matters of concern to the Steering Group of FIDE. In addition, DIS Congress Service has been our professional partner, and from this company in particular Marianne Sjødahl and Peder Andersen have been invaluable. Chief editor Vivi Antonsen from DJØF Publishing, which is behind the present publications, has as always been efficient and patient, and indeed she deserves our deeply felt acknowledgement. Regarding the volume concerning 'General Topic 3' thanks to stud.HA-jur., Mette Marie Lamm Larsen should be expressed.

14. Since this 'Introduction' was written and turned in for publication, more help might have been received, and we are of course also grateful to all these at the present stage unknown supporters, *etc.*

15. To our knowledge, this is the first time such a course has been organised in relation to a FIDE Congress, and may among others be looked upon as an attempt to support the coming generations of researchers' interest and involvement in FIDE.

Furthermore, a sincere tribute to our supporters, foundations, and partners, should be paid. In particular, we are more than grateful to the following:

– The European courts (in particular President Vassilios Skouris; Vice-President Koen Lenaerts; Judge Lars Bay Larsen; and the many interpreters) and other European institutions;
– The Danish Ministry of Foreign Affairs (in particular Head of Division Vibeke Pasternak Jørgensen and Head of Division Christian Thorning);
– The Danish Supreme Court (in particular President Børge Dahl and Justice Lene Pagter Kristensen);
– The contributors Knud Højgaards Fond; Professor Dr.jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; and EURECO at the University of Copenhagen.
– The premium partner Kammeradvokaten, Law Firm Poul Smith (in particular partner Peter Biering);
– The congress supporter Horten Law Firm (in particular partner Andreas Christensen);
– The congress supporter Copenhagen Business School
– The congress supporter DJØF Publishing;
– Partner Per Magid, Bruun & Hjejle Law Firm;
– The congress exhibitioners; and
– The City of Copenhagen.

We also owe our special gratitude to the many members of the FIDE Steering Group who have so kindly been helpful in answering our many questions regarding FIDE traditions, expectations, *etc.* In particular, the associations of the following countries have provided extraordinary help: Austria (in particular Professor Heribert Köck), Estonia (in particular Judge Julia Laffranque), Germany (in particular Professor Peter-Christian Müller-Graff), and Spain (in particular Advocate Luis Ortiz Blanco).

Last, but not least, of course the XXVIth FIDE Congress and the present volumes could never have come to life without our enthusiastic, hardworking, flexible, and dedicated 'General Rapporteurs', *i.e.* Professor Fabian Amtenbrink, Professor Niamh Nic Shuibhne, Professor Jo Shaw, and Professor Roberto Caranta. In addition, the 'Institutional Rapporteurs', *i.e.* Jean-Paul Keppenne, Michal Meduna, and Adrián Tokár, have met the challenge with a similar positive spirit, which is equally highly appreciated. All national rapporteurs have made it possible to get a fairly full picture of the law and practice as this stands today in most of the Member States of the European

Union, and a huge tribute should consequently be paid to them for their tremendous and valuable contributions. Although lastly mentioned, not least important are the excellent speakers, moderators, and participants, whose work will undoubtedly contribute to the Congress becoming an excellent event as ever.

To sum up, what everyone has done and will do deserves the highest praise, and we are indeed grateful to all. It has been an honour and a pleasure – but also a challenge – to organise the XXVIth FIDE Congress and bring the present volumes to life. It is our belief that FIDE and its congresses even after having reached the age of more than half a century still have a lot to offer us all, which the present volumes hopefully can help document to some degree. We hope that both will continue to live and successfully develop themselves for many years to come.

Introduction

Ulla Neergaard et Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen et Grith Skovgaard Ølykke[1]

De 1978 à 2014

Le XXVIe congrès de la FIDE se tiendra du 28 au 31 mai 2014 à Copenhague. Ce sera la deuxième fois que Copenhague aura le plaisir d'accueillir un congrès de la FIDE. La première fois remonte à 1978, il y a 36 ans.[2] Le Professeur Ole Lando, Président de la FIDE à cette époque, tenait alors ces propos dans son discours d'ouverture :

« Quand vous commencez à avoir des cheveux blancs, vous avez tendance à vous retourner plus souvent vers votre enfance et votre jeunesse. Vous vous rappelez de votre façon de voir le monde à ce moment-là. Vous vous souvenez aussi comment les grandes personnes voyaient le monde à cette époque. Il y a quarante ans, ceux qui avaient des cheveux blancs étaient généralement très pessimistes à l'égard de l'Europe, par comparaison avec l'Europe de leur jeunesse. Alors qu'en 1898, l'Europe semblait être lancée sur la voie d'un progrès pacifique, en 1938, nombreux sont ceux qui prédirent la guerre, la tyrannie et la pauvreté, et à juste titre. En 1939, la guerre éclata. Pendant la guerre, la plupart d'entre nous ont subi la tyrannie, et en 1945, à la fin de la guerre, nous vivions dans la misère et la pauvreté. Pourtant, seulement dix ans après, six pays européens, dont deux avaient été en guerre contre les quatre autres, créèrent une Communauté économique. Ils avaient pour objectif de renforcer les liens entre les peuples européens, afin de favoriser le progrès éco-

1. Professeur, Dr Ulla Neergaard, Université de Copenhague, Présidente de l'Association danoise pour le droit européen, Présidente de la FIDE 2013-14 ; Maître de conférences, Dr Catherine Jacqueson, Université de Copenhague, Secrétaire générale de la FIDE 2013-14 ; Commissaire au droit de l'UE et aux droits de l'homme, Nina Holst-Christensen, Ministère de la Justice ; Professeur, Dr et Dr.jur, Jens Hartig Danielsen, Université d'Aarhus ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard et Catherine Jacqueson ont supervisé les trois volumes ; Jens Hartig Danielsen a contribué principalement au Volume 1, Nina Holst-Christensen au Volume 2 et Grith Skovgaard Ølykke au Volume 3.
2. Les sujets abordés étaient les suivants : 1. « L'égalité de traitement des entreprises publiques et privées » et 2. « Les garanties légales dans la procédure administrative ».

nomique et social, d'améliorer les conditions de vie et de maintenir et consolider la liberté et la paix. Lorsqu'en 1955 la création d'un Marché commun fut proposée, les peuples d'Europe se souvenaient encore de la guerre et étaient prêts à accepter des mesures susceptibles de garantir la paix et la liberté. La paix et la liberté étaient dans les esprits de ceux qui rêvaient de fraternité entre les pays européens et également de ceux qui souhaitaient garantir la prospérité en créant un marché élargi pour le commerce et l'industrie. Depuis, les craintes liées à la tyrannie et à la guerre se sont dissipées. Les organisations appelées Communautés européennes ne sont plus considérées comme destinées à préserver la paix et la liberté. La prospérité tant espérée est arrivée et a disparu à nouveau. Aujourd'hui, l'enthousiasme exprimé par le passé en faveur d'une Europe unie s'est évaporé. »[3]

Alors que près de quarante ans ont passé, nous pouvons à notre tour nous tourner vers le passé tout comme le Professeur Ole Lando. Comme nous le savons tous, il s'est passé tant de choses. L'Union européenne a connu de nombreux succès : un profond élargissement, la promulgation de la Charte des droits fondamentaux, l'élargissement de la démocratie et des valeurs essentielles, le renforcement du libre-échange, une relative prospérité, la création de la citoyenneté européenne et un plus haut degré de sécurité et de paix. Néanmoins, force est de constater que l'enthousiasme exprimé en faveur d'une Europe unie s'est dans une certaine mesure évaporé, et que la crise et les défis rencontrés à plusieurs niveaux sont durement ressentis. Le Congrès 2014 de la FIDE en explorera de nombreux aspects au travers d'une sélection de thèmes significatifs et importants, ce qui apparaît clairement à la lecture du présent volume et de ses « acolytes ».

La FIDE : une organisation européenne hors du commun

La FIDE (*Fédération Internationale pour le Droit Européen*) s'intéresse à la recherche et à l'analyse du droit de l'Union européenne et des institutions de l'UE, ainsi qu'à leurs interactions avec les systèmes juridiques des Etats membres. Elle réunit les associations nationales pour le droit européen de la plupart des Etats membres de l'UE et des pays candidats, ainsi que de la Norvège et de la Suisse. À l'heure actuelle, il existe 29 associations membres (toutes situées dans un pays différent). Toutes œuvrent bénévolement à la diffusion du savoir dans l'UE.

3. Ole Lando (traduit de l'anglais), « Europe: From quantity to quality. Speech delivered on the occasion of the opening of the Congress on June 22 1978 », dans « FIDE. Eighth Congress 22-24 June 1978. Adresses Summing up of discussions. Volume 1. Copenhagen 1979 », p. 6.

La FIDE a été créée en 1961 et beaucoup considèrent qu'elle a joué un rôle très important dans la création initiale du droit de l'UE en tant que discipline juridique.[4] Aujourd'hui encore, malgré la mise en place de nombreuses autres organisations consacrées au droit communautaire, la conception, l'importance et l'influence extraordinaires des congrès biennaux de la FIDE et de ses publications connexes (l'activité la plus importante de la FIDE) sont toujours largement reconnues.[5]

Le XXVIe Congrès de la FIDE et ses thèmes principaux

Les thèmes principaux du XXVIe Congrès de la FIDE ont été choisis plusieurs années à l'avance, après avoir consulté à plusieurs reprises les acteurs concernés dans toute l'Europe. Ces thèmes sont les suivants :

- Thème général 1 : L'Union économique et monétaire : les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UE ;[6]
- Thème général 2 : La citoyenneté de l'Union : développement, impact et défis ;[7]
- Thème général 3 : Le droit des marchés publics : restrictions, possibilités et paradoxes ;[8] et
- Thème général du samedi : À l'ère du pluralisme juridique : relations entre les cours nationales, internationales et celles de l'UE et les interactions entre les multiples sources de droit.[9]

4. Voir à ce sujet Morten Rasmussen, p. ex. : « Establishing a Constitutional Practice: The Role of the European Law Associations », dans Wolfram Kaiser et Jan-Henrik Meyer (éd.) : « *Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992* », Palgrave Macmillan, 2013, p. 173-197 ; et Alexandre Bernier : « Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970 », dans « Contemporary European History », 2012, p. 399-415.
5. Voir également Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, pp. 173-181.
6. Sont nommés « Rapporteur général » : Professeur Fabian Amtenbrink ; et « Rapporteur institutionnel » : Jean-Paul Keppenne, Service juridique, Commission européenne.
7. Sont nommées « Co-rapporteures générales » : Professeur Niamh Nic Shibhne et Professeur Jo Shaw ; et « Rapporteur institutionnel » : Michal Meduna, DG Justice, Commission européenne.
8. Sont nommés « Rapporteur général » : Professeur Roberto Caranta ; et « Rapporteur institutionnel » : Adrián Tokár, Service juridique, Commission européenne.

Les thèmes choisis sont tous très importants pour la compréhension des défis auxquels l'Europe est actuellement confrontée et pour le développement du droit européen. Cette sélection permet d'aborder aussi bien les aspects constitutionnels qu'institutionnels. Par ailleurs, l'une des pierres fondatrices les plus importantes de l'UE, à savoir le marché intérieur, n'est pas oubliée. D'autre part, le choix des thèmes souligne l'importance de l'UE pour les individus, c'est-à-dire les citoyens de l'Union eux-mêmes. Nous espérons donc qu'il satisfera aussi bien les praticiens, les fonctionnaires, les universitaires, la société civile, etc.

Tout le monde conviendra certainement que le premier thème sur la gouvernance économique constitue un choix naturel et inévitable. En effet, l'Union économique et monétaire, créée il y a plus de vingt ans, est fortement contestée en cette période tumultueuse de crise financière et économique. Malgré la récente amélioration de la situation économique en Europe, rien n'est encore complètement stabilisé, et dans tous les cas une analyse juridique des faits s'impose. Le temps est donc venu d'évaluer le statut juridique de la gouvernance économique de l'UE, et la question de l'asymétrie constitutionnelle entre les politiques économiques et monétaires. D'autres questions restent à traiter, telles que : quelles sont les conséquences juridiques des possibles divergences par rapport au droit de l'UE ? Quel est le rôle de la Cour de justice de l'Union européenne ? Quelles sont les perspectives pour l'avenir ? Le renforcement de l'union budgétaire est-il une question d'équilibre entre la souveraineté nationale et les structures de gouvernance fondamentales de l'euro ? Est-il nécessaire de modifier le traité pour introduire les euro-

9. Le traitement de ce sujet n'a pas suivi le « système » de « questionnaires », « Rapporteurs généraux », « Rapporteurs institutionnels » et « Rapporteurs nationaux ». Une table ronde réunissant les présidents et juges de cours internationales et nationales, ainsi que des universitaires, a été organisée à la place. Bien que le « Thème général du samedi » ne fasse pas directement l'objet de la présente publication, par souci d'exhaustivité, il convient de mentionner que ce sujet, en apparence un peu théorique, a en fait une importance concrète dans le travail quotidien de nombreux juristes et d'autres acteurs. Il porte plus particulièrement sur la façon dont le droit communautaire doit opérer dans un ordre juridique à plusieurs niveaux, et donc sur la relation des cours entre elles, et sur la pluralité des sources de droit. Dans la conception du pluralisme juridique, les hiérarchies n'existent plus de la même manière que dans l'Etat-nation traditionnel. En outre, cette conception nous invite à accepter que l'état actuel des choses contient dans une certaine mesure des éléments de complexité et d'imprévisibilité, et qu'il convient de faire des compromis. Dans le cadre de la recherche de compromis, certains préféreront laisser à jamais ouverte la question de la suprématie.

obligations ? Dans quelle mesure la législation fiscale doit-elle être harmonisée ?

La citoyenneté de l'Union est un sujet tout autant d'actualité et stimulant. Quelle est la réalité de la citoyenneté de l'Union dans les Etats membres, plus de deux décennies après l'insertion du concept dans le traité ? L'objectif est de mieux comprendre la mise en œuvre et le respect des droits associés à la citoyenneté de l'Union par les autorités nationales. Il s'agit également d'aborder une question essentielle pour les citoyens, à savoir si la citoyenneté de l'Union pourrait avoir un effet inverse à celui prévu et affecter les droits « acquis » des travailleurs. La citoyenneté de l'Union est également intéressante du point de vue de la légitimité de l'UE, et il est intéressant d'examiner l'étendue du sentiment de solidarité des Etats membres et de leurs citoyens à l'égard des autres Etats membres et citoyens. En outre, d'autres sujets délicats, comme le regroupement familial, les expulsions et le cas particulier des ressortissants de pays tiers, peuvent s'avérer pertinents.

Le troisième thème général, qui concerne le droit des marchés publics, touche à un domaine du droit qui joue un rôle pratique considérable dans la plupart des Etats membres. Il est lié aux dépenses publiques et donc, dans une certaine mesure, à la crise financière et économique. La réglementation des marchés publics revêt une importance croissante pour de nombreux juristes, entreprises et pouvoirs publics. Il se trouve justement que les directives sur les marchés publics ont fait l'objet d'une révision ces deux dernières années, et le Congrès de la FIDE offre ainsi la possibilité de discuter de l'orientation des changements proposés et d'analyser leurs implications. Le même constat s'applique à la directive sur les recours. En période de crise économique, la question des partenariats public-privé et du financement des services d'intérêt économique général est cruciale et parfois assez controversée. Cela est probablement également vrai concernant la protection sociale et environnementale, qui prend une place de plus en plus importante dans ce domaine.

En résumé, le XXVIe Congrès de la FIDE et ce volume, ainsi que ses deux « acolytes », se proposent de prendre la température du droit de l'UE, tant au niveau de l'Union qu'au niveau national, en s'intéressant à trois domaines juridiques essentiels et d'actualité. Ils constitueront ainsi, nous l'espérons, une mine d'or pour les juristes de l'UE et les spécialistes du droit comparé.

Une collaboration des grands esprits du droit Européen[10]

Afin d'approfondir plus encore les discussions et les analyses, ces volumes comprennent des études comparatives détaillées, conformément aux traditions de la FIDE. Par conséquent, longtemps avant le congrès proprement dit, un « questionnaire » a été soigneusement préparé pour chacun des trois thèmes par le ou les « Rapporteurs généraux » en charge du thème. À partir de ces « questionnaires », des analyses ont été réalisées par des experts nationaux nommés par les associations nationales de la FIDE.

Tous ces rapports sont publiés dans cette collection, ainsi que les « rapports généraux » rédigés par les « Rapporteurs généraux », complétés par les « rapports institutionnels » élaborés par les représentants des institutions de l'UE.[11] Du fait de la longue tradition de trilinguisme adoptée par la FIDE et ses congrès, les rapports sont rédigés soit en anglais, français ou allemand.[12]

Remerciements

L'organisation d'un événement comme le Congrès de la FIDE et les présentes publications n'auraient pas pu voir le jour sans l'aide d'un grand nombre de personnes ! Aussi, au nom de l'Association danoise pour le droit européen (DFE), qui est l'association danoise membre de la FIDE (depuis 1973), nous tenons à exprimer notre gratitude à tous ceux que nous avons rencontrés sur notre chemin, quelle que soit l'étendue de leur aide, qu'elle soit à un niveau pratique ou financier.[13] La FIDE et ses congrès ne pourraient exister sans les

10. Ce titre s'inspire de la devise du XXVIe Congrès de la FIDE, elle-même inspirée du titre de l'article suivant : Julia Laffranque : « FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law », Juridica International, 2011, p. 173-181. Julia Laffranque nous a autorisés à en faire notre devise. Celle-ci a été légèrement modifiée ainsi : « FIDE – Uniting Great Minds of EUropean Law », le but étant de souligner les relations entre le droit de l'UE et le droit européen.
11. Les analyses et les résultats concernant les thèmes 1, 2 et 3 sont présentés respectivement dans les volumes 1, 2 et 3. Les présentations orales reçues sous forme d'article, etc, sont destinées à être publiées sur le site Internet www.fide2014.eu.
12. Cela explique aussi pourquoi les « questionnaires » et ce chapitre d'introduction sont disponibles dans les trois langues mentionnées.
13. La DFE a été la septième association d'Etat membre à faire partie de la FIDE, et ainsi la première à se joindre aux « six premiers » dans le contexte de la FIDE. Le Conseil d'administration de la DFE comprend actuellement: Peter Biering, Kammeradvokaten ; Andreas Christensen, cabinet d'avocats Horten ; Professeur, Dr et Dr.jur. Jens Hartig Danielsen, Faculté de droit, Université d'Aarhus ; Commissaire au droit de

forces bénévoles quasi infinies qui les animent. À tous, nous disons merci. « Ne citons personne pour n'oublier personne », dit-on souvent en danois pour exprimer sa gratitude, mais également lorsque l'on craint de ne pas être pardonné si l'on a involontairement oublié quelqu'un. Néanmoins, nous osons exprimer explicitement nos remerciements aux personnes suivantes, en espérant être pardonnés si quelqu'un a été omis involontairement.[14]

Nous présentons nos hommages chaleureux et sincères à Son Altesse Royale, le Prince héritier Frederik de Danemark, qui a aimablement accepté d'être le parrain du Congrès, comme sa mère Sa Majesté la Reine le fut pour le Congrès de la FIDE organisé en 1978 à Copenhague.

En 2009, lors d'une réunion du Groupe de pilotage (appelé également « Comité directeur » ou comité exécutif) de la FIDE à Madrid, la DFE s'est vue confier non seulement la présidence de la FIDE, mais aussi l'organisation du Congrès de la FIDE en 2014. La DFE a ensuite décidé d'inviter la Faculté de droit de l'Université de Copenhague à participer à l'organisation, pour des raisons d'ordre pratique et afin d'assurer un haut niveau universitaire. Heureusement, Henrik Dam, doyen à ce moment-là, s'est montré très enthousiaste quant à cette idée, et a décidé de soutenir le prochain congrès de diverses manières. Nous souhaitons lui offrir les plus sincères remerciements de la part de la DFE et de la FIDE pour cette décision et son soutien continu. À cet égard, nous sommes également reconnaissants à l'équipe administrative de la Faculté de droit pour son aide dans la réalisation de cet événement. Nous remercions en particulier la coordinatrice du projet, Tina Futtrup Borg, mais aussi ses nombreux assistants, ainsi que la Chef de la communication, Birgitte Faber. À la Faculté de droit, nous souhaitons mentionner aussi l'école doctorale et les personnes ayant organisé un cours de doctorat sur le droit de l'Union européenne dans le cadre du Congrès (en particulier, Maître de conférences Constanze Semmelmann et Maître de conférences Clement Petersen).[15]

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l'UE et aux droits de l'homme Nina Holst-Christensen, Ministère de la Justice ; Chef de division, Christian Thorning, Ministère des Affaires étrangères ; Juge Lene Pagter Kristensen, Cour suprême ; Charlotte Friis Bach Ryhl, cabinet d'avocats Friis Bach Ryhl ; et Maître de conférences, Dr Grith Skovgaard Ølykke, Département de droit, Copenhagen Business School. Jusqu'au 14 novembre 2013, le ministère des Affaires étrangères était « représenté » par Vibeke Pasternak Jørgensen au lieu de Christian Thorning, celle-ci s'étant retirée à la suite d'une promotion.

14. Depuis la rédaction de cette « Introduction » et sa remise pour publication, il est possible que nous ayons reçu de l'aide supplémentaire, et nous sommes bien sûr également reconnaissants à l'égard de tous ces soutiens non mentionnés, *etc.*

15. À notre connaissance, il s'agit de la première fois qu'un tel cours est organisé dans le cadre d'un congrès de la FIDE, et peut être considéré comme une tentative de favori-

Nous devons également exprimer notre grande reconnaissance pour les services reçus de la Secrétaire Jette Nim Larsen du cabinet d'avocats Horten, qui a notamment apporté un soutien administratif précieux sur de nombreux sujets au Groupe de pilotage de la FIDE. En outre, DIS Congress Service, notre partenaire professionnel, et ses collaborateurs, en particulier Marianne Sjødahl et Peder Andersen, ont joué un rôle inestimable. La rédactrice en chef Vivi Antonsen de DJØF Publishing, responsable des présentes publications, s'est comme toujours montrée efficace et patiente, et mérite amplement notre profonde reconnaissance. En ce qui concerne le volume abordant le « thème général 3 », nous devons également remercier Mette Marie Lamm Larsen, stud.HA-jur.

D'autre part, nous présentons notre sincère reconnaissance à nos soutiens, fondations et partenaires. En particulier, nous sommes plus que reconnaissants aux entités et personnes suivantes :

- Les cours européennes (en particulier, Président Vassilios Skouris ; Vice-président Koen Lenaerts ; Juge Lars Bay Larsen ; et les nombreux interprètes) et autres institutions européennes ;
- Le ministère danois des Affaires étrangères (en particulier, Chef de division Vibeke Pasternak Jørgensen et Chef de division Christian Thorning) ;
- La Cour suprême du Danemark (en particulier, Président Børge Dahl et Juge Lene Pagter Kristensen) ;
- Les contributeurs Knud Højgaards Fond ; Professor og Dr.jur Max Sørensens Mindefond ; Reinholdt W. Jorck og Hustrus Fond ; Dreyers Fond, Fonden til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet ; et EURECO à l'Université de Copenhague.
- Le partenaire premium Kammeradvokaten, cabinet d'avocats Poul Smith (en particulier, Peter Biering) ;
- Le soutien du congrès, cabinet d'avocats Horten (en particulier, Andreas Christensen) ;
- Le soutien du congrès, Copenhagen Business School ;
- Le soutien du congrès, DJØF Publishing ;
- Per Magid, cabinet d'avocats Bruun & Hjejle ;
- Les exposants du congrès ; et
- La ville de Copenhague.

ser l'intérêt et la participation des prochaines générations de chercheurs à l'égard des activités de la FIDE.

Nous tenons également à exprimer notre gratitude aux nombreux membres du Groupe de pilotage de la FIDE, qui ont répondu si gentiment à nos nombreuses questions sur les traditions de la FIDE, les attentes, *etc.* Les associations des pays suivants ont notamment fourni une aide extraordinaire : Autriche (en particulier, Professeur Heribert Köck), Estonie (en particulier, Juge Julia Laffranque), Allemagne (en particulier, Professeur Peter-Christian Müller-Graff) et Espagne (en particulier, Avocat Luis Ortiz Blanco).

Enfin, le XXVIe Congrès de la FIDE et les présents volumes n'auraient jamais vu le jour sans nos « Rapporteurs généraux » enthousiastes, travailleurs, flexibles et dévoués : Professeur Fabian Amtenbrink, Professeur Niamh Nic Shibhne, Professeur Jo Shaw et Professeur Roberto Caranta. D'autre part, les « Rapporteurs institutionnels », Jean-Paul Keppenne, Michal Meduna et Adrián Tokár, ont relevé le défi avec un esprit positif similaire, également très apprécié. Grâce à tous les rapporteurs nationaux, nous avons pu obtenir une image assez complète du droit et des pratiques en vigueur dans la plupart des Etats membres de l'Union européenne, et nous leur témoignons notre immense reconnaissance pour leurs considérables contributions si précieuses. Enfin, citons les excellents conférenciers, modérateurs et participants, dont le travail contribuera sans aucun doute à faire de ce Congrès, encore une fois, un événement d'exception.

En résumé, les actions de chacun méritent les plus grands éloges, et nous sommes profondément reconnaissants à tous. Ce fut un honneur et un plaisir (mais aussi un défi) d'organiser le XXVIe Congrès de la FIDE et de donner jour à ces volumes. Nous sommes convaincus que, même après plus d'un demi-siècle d'existence, la FIDE et ses congrès ont encore beaucoup à nous offrir à tous, comme en témoigneront à leur façon, nous l'espérons, les présents volumes. Nous espérons également que la FIDE et ses congrès perdureront et se développeront avec succès pendant de nombreuses années à venir.

Vorwort

Ulla Neergaard und Catherine Jacqueson

Nina Holst-Christensen,
Jens Hartig Danielsen und Grith Skovgaard Ølykke[1]

Von 1978 bis 2014

Vom 28. bis 31. Mai 2014 findet in Kopenhagen der XXVI. FIDE-Kongress statt. Es ist bereits das zweite Mal, dass Kopenhagen die Ehre zuteil wird, diese Veranstaltung auszurichten. Im Jahre 1978, das heißt vor 36 Jahren, fand der Kongress zum ersten Mal in Kopenhagen statt.[2] Der damalige Präsident der FIDE, Professor Ole Lando, eröffnete das Treffen mit folgenden Worten:

»Wenn sich die ersten grauen Haare zeigen, denken Sie häufiger an Ihre Kindheit und frühe Jugend zurück. Sie erinnern sich oftmals daran, wie Sie damals die Welt sahen. Sie erinnern sich auch, wie die Erwachsenen der damaligen Zeit die Welt sahen. Vor 40 Jahren waren die ‚älteren Semester', die Europa mit dem Europa ihrer Jugend verglichen, im Allgemeinen von einer sehr düsteren Perspektive geprägt. Im Jahre 1898 schien Europa auf einen Kurs des Fortschritts in Frieden zu setzen. 1938 prophezeiten viele Menschen Krieg, Tyrannei und Armut, und sie hatten Recht. 1939 kam der Krieg. Fortan litten die meisten von uns unter der Tyrannei, und als der Krieg 1945 zu Ende war, lebten wir in Elend und Armut. Doch bereits 10 Jahre nach dem Krieg gründeten sechs europäische Länder, von denen zwei gegen die anderen vier Krieg geführt hatten, die Europäische Wirtschaftsgemeinschaft. Ihr Ziel war es, die europäischen Völker einander näher zu bringen, um wirt-

1. Professor, Dr. Ulla Neergaard, Universität Kopenhagen, Präsidentin der Dänischen Vereinigung für Europarecht (DFE), Präsidentin der FIDE 2013-14; Associate Professor, Dr. Catherine Jacqueson, Universität Kopenhagen, Generalsekretärin der FIDE 2013-14; Kommissarin für EU-Recht und Menschenrechte, Nina Holst-Christensen, Justizministerium; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Universität Aarhus; und Associate Professor, Dr. Grith Skovgaard Ølykke, Copenhagen Business School. Ulla Neergaard und Catherine Jacqueson tragen die Gesamtverantwortung für alle drei Bände, wohingegen Jens Hartig Danielsen in erster Linie an Band 1 arbeitete, Nina Holst-Christensen an Band 2 und Grith Skovgaard Ølykke an Band 3.
2. Die behandelten Themen waren: 1.»Gleichbehandlung von öffentlichen und privaten Unternehmen«; und 2. »Fairer Prozess im Verwaltungsverfahren«.

schaftliches Wachstum und sozialen Fortschritt zu fördern, die Lebensbedingungen zu verbessern sowie Freiheit und Frieden zu bewahren und zu stärken. Als 1955 vorgeschlagen wurde, einen Gemeinsamen Markt zu schaffen, erinnerten sich die Menschen in Europa noch immer an den Krieg und waren bereit, eine Politik zu akzeptieren, die dazu bestimmt war, Frieden und Freiheit zu garantieren. Frieden und Freiheit dominierten sowohl in den Köpfen der Menschen, die die Vision einer Annährung der europäischen Nationen hatten, als auch jener, die den Wohlstand durch Schaffung eines größeren Marktes für Handel und Industrie gewährleisten wollten. In den zurückliegenden Jahren haben sich die Ängste vor Tyrannei und Krieg gelegt. Die als Europäische Wirtschaftsgemeinschaft bekannte Organisation wird nicht länger als Hüterin von Frieden und Freiheit gesehen. Der Wohlstand, den so viele herbeisehnten, ist gekommen und wieder gegangen. Heute hat sich die anfängliche Begeisterung für ein geeintes Europa verflüchtigt.«[3]

Auch jetzt, nachdem wieder fast vier Jahrzehnte vergangen sind, kann man in der gleichen Weise zurückblicken, wie es Professor Ole Lando getan hat. Wie wir alle wissen, ist sehr viel passiert. Die Europäische Union von heute hat viel erreicht, z. B. eine tiefgreifende Erweiterung; die Verabschiedung der Grundrechtecharta; der Demokratiegedanke und europäische Grundwerte wurden weiter verbreitet; die Stärkung des freien Handels; beachtlichen Wohlstand; die Unionsbürgerschaft und mehr Sicherheit und Frieden. Allerdings könnte man weiterhin behaupten, dass sich die Begeisterung für ein geeintes Europa teilweise verflüchtigt hat und dass die Krise und die damit verbundenen Herausforderungen unterschiedlich bewertet werden. Der FIDE-Kongress 2014 wird zahlreiche Facetten der Krise untersuchen in der Hoffnung, die richtigen Schwerpunkte gesetzt zu haben.

FIDE – eine besondere Europäische Organisation

Die FIDE (*Fédération Internationale pour le Droit Européen / Internationale Föderation für Europarecht*) konzentriert sich auf die Untersuchung und Analyse des Rechts der Europäischen Union und seiner Institutionen sowie auf deren Berührungspunkte mit den Rechtssystemen der Mitgliedsstaaten. Sie vereint die nationalen Verbände für Europäisches Recht der meisten EU-Mitgliedsstaaten und Beitrittsländer sowie der norwegischen und Schweizerischen Verbände. Gegenwärtig gibt es 29 Mitgliedsverbände – alle in einem anderen Land beheimatet – die es sich aufgrund eigener Initiative zum Ziel gesetzt haben, das Wissen über die EU zu verbreiten.

3. Siehe Ole Lando (übersetzt aus dem Englischen): »Europe: From quantity to quality. [Europa: von Quantität zu Qualität] Rede anlässlich der Kongresseröffnung am 22. Juni 1978« in »FIDE. Achter Kongress, 22.-24. Juni 1978. Zusammenfassung der Diskussionen. Band 1. Kopenhagen 1979«, S. 6.

Die FIDE wurde bereits 1961 gegründet und gilt gemeinhin als treibende Kraft hinter der Etablierung des EU-Rechts als juristischer Disziplin.[4] Heute gibt es zwar viele andere Kanäle, die sich mit dem EU-Recht befassen. Dennoch werden der alle zwei Jahre stattfindende FIDE-Kongress und die damit verbundenen Publikationen von vielen als außerordentlich wichtig angesehen aufgrund ihrer Gestaltung, ihres Stellenwertes und nicht zuletzt ihres Einflusses in Politik, Gesetzgebung und Wissenschaft.[5]

Der XXVI. FIDE-Kongress und seine Hauptthemen

Die Hauptthemen des XXVI. FIDE-Kongresses wurden bereits einige Jahre im Voraus bestimmt. Der Auswahl gingen eingehende Beratungen mit wichtigen Akteuren in ganz Europa voraus. Folgende Themen stehen zur Diskussion:

– Allgemeines Thema 1 – Die Wirtschafts- und Währungsunion: konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung innerhalb der EU;[6]
– Allgemeines Thema 2 – Unionsbürgerschaft: Entwicklung, Auswirkungen und Herausforderungen;[7]
– Allgemeines Thema 3 – Vergaberecht für öffentliche Aufträge: Begrenzungen, Möglichkeiten und Widersprüche;[8] und

4. Siehe die Diskussionen in Morten Rasmussen, z. B. »Establishing a Constitutional Practice: The Role of the European Law Associations«, in Wolfram Kaiser und Jan-Henrik Meyer (Hrg.): »*Societal Actors in European Integration. Polity-Building and Policy-Making, 1958-1992*«, Palgrave Macmillan, 2013, S. 173-197; und Alexandre Bernier: „Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950-1970“, in »Contemporary European History«, 2012, S. 399-415.
5. Siehe weiterhin Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181.
6. Ernannt als »Generalberichterstatter«: Professor Fabian Amtenbrink; »Berichterstatter aus den EU-Institutionen«: Jean-Paul Keppenne, Juristischer Dienst, Europäische Kommission.
7. Ernannt als »Generalberichterstatter«: Professor Niamh Nic Shibhne und Professor Jo Shaw; »Berichterstatter aus den EU-Institutionen«: Michal Meduna, Generaldirektion Justiz, Europäische Kommission.
8. Ernannt als »Generalberichterstatter«: Professor Roberto Caranta; «Berichterstatter aus den EU-Institutionen«: Adrián Tokár, Juristischer Dienst, Europäische Kommission.

– Generalthema am Samstag – Das Verhältnis zwischen EU, nationalen und internationalen Gerichten und das Zusammenspiel mehrerer Rechtsquellen im Zeitalter des Rechtspluralismus.[9]

Die ausgewählten Themen sind alle von eminenter Bedeutung, um die Herausforderungen Europas in diesen Jahren und die Entwicklung des Europäischen Rechts zu veranschaulichen. Mit dieser Auswahl ist sichergestellt, dass sowohl verfassungsrechtliche als auch institutionelle Aspekte behandelt werden. Damit ist auch gewährleistet, dass der EU Binnenmarkt, einer der wichtigsten Grundsteine der EU, auf dem Kongress in angemessener Form Beachtung findet. Zusätzlich wird der Bedeutung der EU für die EU-Bürger, also die Menschen innerhalb der EU, großes Gewicht beigemessen. Wir hoffen, dass die ausgewählten Themen auf breites Interesse stoßen im privaten und öffentlichen Sektor sowie in den Bereichen Forschung, Lehre und Zivilgesellschaft.

Das Thema der »Economic Governance« ist gegenwärtig relevant wie kaum ein anderes. Die Wirtschafts- und Währungsunion wurde vor mehr als zwanzig Jahren ins Leben gerufen und war während der turbulenten Finanz- und Wirtschaftskrise nicht unerheblichem Druck ausgesetzt. Obwohl sich die wirtschaftliche Situation in Europa zuletzt verbesserte, hat sie sich noch nicht gänzlich stabilisiert. Eine rechtliche Analyse der Entwicklungen ist unum-

9. Die Behandlung dieses Themas orientiert sich nicht am »System« der »Fragebögen«, »Generalberichterstatter«, »Berichterstatter aus den EU-Institutionen« und »Berichterstatter eines Länderberichts«; stattdessen wird eine Podiumsdiskussion der Präsidenten und Richter führender internationaler/nationaler Gerichte sowie von Vertretern aus der Wissenschaft organisiert. Obwohl die vorliegenden Publikationen nicht direkt auf das »Generalthema am Samstag« Bezug nehmen, muss aus Gründen der Vollständigkeit erwähnt werden, dass dieses Thema auf den ersten Blick etwas theoretisch erscheint, aber in Wirklichkeit von großer und konkreter Bedeutung für die tägliche Arbeit vieler Juristen ist. Es befasst sich damit, wie EU-Recht in einer vielschichtigen und zusammengesetzten Rechtsordnung angewandt werden muss, mit dem Zusammenwirken der Gerichte und dem Phänomen des Nebeneinanders verschiedener Rechtsquellen. Im Zeitalter des Rechtspluralismus fehlen Normhierarchien wie sie aus den meisten nationalen Rechtsordnungen bekannt sind. In einem solchen zusammengesetzten Gebilde scheint es unumgänglich, ein gewisses Maß an Komplexität und Unvorhersehbarkeit zu akzeptieren und auf Kompromisse bei der Interaktion verschiedener normativer Ebenen hinzuarbeiten. Auf der Suche nach derartigen Kompromissen wird zum Teil dafür plädiert, die Frage nach dem Geltungsgrund des Rechts in einer zusammengesetzten Rechtsordnung jenseits des Geltungsgrundes der einzelnen normativen Ebenen und damit der letztlich verbindlichen Autorität offenzulassen.

gänglich. Es ist daher angebracht, den rechtlichen Status der ‘Economic Governance‘ in der EU und die Asymmetrie in Bezug auf die Gesetzgebungskompetenzen in Wirtschafts- und Währungsfragen zu bewerten. Des Weiteren ist eine Auseinandersetzung mit folgenden Fragen notwendig: Wie sind mögliche Abweichungen vom EU-Recht zu sanktionieren? Welche Rolle spielt der Gerichtshof der Europäischen Union? Wie sind die Aussichten für die Zukunft? Müssen in einer Fiskalunion nationale Souveränität und grundlegende Governance-Strukturen des Euro aufeinander abgestimmt werden? Sind Eurobonds nur nach Vertragsänderungen möglich? In welchem Umfang kann das Steuerrecht harmonisiert werden?

Die Unionsbürgerschaft ist ein gleichermaßen aktuelles wie komplexes Thema. Wie sieht die Realität der Unionsbürgerschaft in den Mitgliedsstaaten mehr als zwei Jahrzehnte nach Einführung der Unionsbürgerschaft im Vertrag aus? Es gilt zu untersuchen, wie die mit der Unionsbürgerschaft verknüpften Rechte von den nationalen Behörden umgesetzt und angewendet wurden. Aus Sicht der EU-Bürger drängt sich die Frage auf, ob die Unionsbürgerschaft gar kontraproduktive Wirkungen zeigen und die ‚erworbenen‘ Rechte der Arbeitnehmer negativ beeinflussen könnte. Die Unionsbürgerschaft besitzt außerdem erhebliches Potenzial, die Legitimität der EU zu beeinflussen. In diesem Zusammenhang stellt sich die Frage, wie groß die Solidarität der Mitgliedsstaaten und ihrer Bürger mit anderen Mitgliedsstaaten und deren Bürgern ist. Darüber hinaus gewinnen politisch und sozial sensible Themen wie Familienzusammenführung, Ausweisung und die Rolle von Angehörigen aus Drittstaaten an Relevanz.

Im dritten allgemeinen Thema geht es um das Recht der Vergabe öffentlicher Aufträge. Damit wird ein Bereich des Rechts berührt, der in den meisten Mitgliedsstaaten von herausragender praktischer Bedeutung ist. Das Thema berührt Fragen der öffentlichen Haushalte und ist von der Finanz- und Wirtschaftskrise kaum zu trennen. Das Regelwerk für die Vergabe öffentlicher Aufträge prägt die tägliche Arbeit vieler Anwälte, Unternehmen und Stellen im öffentlichen Sektor mit zunehmender Tendenz. Als Reaktion auf aktuelle Entwicklungen wurden die Vergaberechtsrichtlinien in den letzten Jahren überarbeitet. Der FIDE-Kongress bietet die Möglichkeit, die vorgeschlagenen Änderungen zu erörtern und ihre Implikationen kritisch zu analysieren. Das Gleiche gilt in Bezug auf die Richtlinie über Nachprüfungsverfahren. In Zeiten wirtschaftlicher Krisen sind Fragen der »public-private-partnerships« und der Finanzierung von Dienstleistungen von Allgemeinem Wirtschaftlichen Interesse von entscheidender Bedeutung – sie werden daher nicht selten kontrovers diskutiert. Dies mag auch für Umwelt- und Sozialfragen gelten, denen

in diesem Zusammenhang in Zukunft größere Beachtung geschenkt werden muss.

Insgesamt laden der XXVI. FIDE-Kongress und die damit verbundenen Publikationen dazu ein, sich sowohl auf EU-Ebene als auch auf nationaler Ebene mit dem Stand des EU-Rechts auseinanderzusetzen. Zu Beginn stehen drei hochaktuelle und ebenso gewichtige Themen, die weitreichende Betätigungsmöglichkeiten für rechtsvergleichend und europarechtlich arbeitende Anwälte bieten.

Eine Zusammenarbeit kenntnisreicher Spezialisten und großer Denker im Europäischen Recht[10]

Um umfangreiche Diskussionen und Analysen anzuregen, wurden in Übereinstimmung mit den Traditionen der FIDE detaillierte Vergleichsstudien erstellt. Lange Zeit vor dem eigentlichen Kongress wurde daher für jedes der drei Themen sorgfältig ein »Fragebogen« von dem für das Thema verantwortlichen »Generalberichterstatter« vorbereitet. Auf Grundlage dieser »Fragebögen« wurden von nationalen Experten, die von nationalen Verbänden der FIDE ernannt wurden, nationale Untersuchungen durchgeführt.

All diese Berichte wurden anschließend in dieser Sammlung zusammen mit den von den »Generalberichterstattern« vorbereiteten »Allgemeinen Berichten« veröffentlicht. Ergänzend wurden so genannte »Berichte aus dem EU-Institutionen« beigefügt, die von den Vertretern der EU-Institutionen erarbeitet wurden.[11] Wie die FIDE und ihre Kongresse werden diese Unterlagen traditionsgemäß dreisprachig (Englisch, Französisch, Deutsch) gehalten.[12]

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10. Diese Überschrift orientiert sich am Slogan des XXVI. FIDE-Kongresses, der sich wiederum von der Überschrift des folgenden Artikels leiten ließ: Julia Laffranque: »FIDE – Uniting Great Minds of European Law: 50 years of the International Federation for European Law«, Juridica International, 2011, S. 173-181. Der Verwendung als Slogan hat Julia Laffranque zugestimmt. Eine kleine Änderung wurde vorgenommen, so dass der Slogan im Englischen wie folgt lautet: »FIDE – Uniting Great Minds of European Law«.
11. Die Analysen und Ergebnisse in Bezug auf Thema 1 werden in Band 1 vorgestellt, für Thema 2 in Band 2 und für Thema 3 in Band 3. Mündliche Präsentationen, die in Papierform etc. eingehen, werden, soweit möglich, auf der Webseite www.fide2014.eu veröffentlicht.
12. Aus diesem Grund sind die »Fragebögen« und dieses Vorwort auch in drei Sprachen verfasst.

Dankesworte

Die Organisation einer Veranstaltung wie des FIDE-Kongresses und die Vorbereitung der vorliegenden Publikationen wäre nicht möglich ohne die Hilfe der zahlreichen Mitarbeitenden. Daher danke ich im Namen der Dänischen Vereinigung für Europarecht (DFE) – seit 1973 der dänische Mitgliedsverband der FIDE – allen, die uns in der eine oder anderen Form durch tatkräftige Unterstützung und finanzielle Zuwendungen geholfen haben.[13] Die FIDE und ihre Kongresse basieren größtenteils auf der Unterstützung freiwilliger Helfer. Wir sind allen zu großem Dank verpflichtet. »Niemand erwähnt, niemand vergessen«, wie man im Dänischen sagt, um seinen Dank auszudrücken. Wir bitten um Verzeihung, wenn wir jemanden aus Versehen vergessen haben sollten. Dennoch möchten wir ausdrücklich folgenden Personen danken:[14]

Unser herzlicher und aufrichtiger Dank gebührt Seiner Königlichen Hoheit, dem Kronprinzen Frederik von Dänemark, der freundlicherweise die Schirmherrschaft für den Kongress übernommen hat, ebenso wie seiner Mutter, Ihrer Königlichen Hoheit, der Königin, anlässlich des FIDE-Kongress 1978 in Kopenhagen.

Die DFE hat nicht nur die Präsidentschaft der FIDE, sondern auch die Organisation des FIDE-Kongresses 2014 übernommen. Es wurde schließlich von der DFE beschlossen, die Juristische Fakultät der Universität Kopenhagen einzuladen, sich an der Organisation zu beteiligen, um einen hohen akademischen Standard zu gewährleisten. Glücklicherweise konnte der Dekan, Herr Henrik Dam, für diese Idee gewonnen werden und entschied sich dan-

13. Die DFE war die siebte nationale Vereinigung, die der FIDE beitrat und damit die erste, die zu den sechs Gründungsvereinigungen der FIDE dazustiess. Derzeit arbeiten folgende Personen im Vorstand der DFE: Partner Peter Biering, Kammeradvokaten; Partner Andreas Christensen, Horten Rechtsanwälte; Professor, Dr. jur., Dr. Jens Hartig Danielsen, Rechtsfakultät Universität Aarhus; Kommissar für EU-Recht und Menschenrechte; Nina Holst-Christensen, Justizministerium; Referatsleitung, Christian Thorning, Außenministerium; Richterin Lene Pagter Kristensen, Oberster Gerichtshof; Partner Charlotte Friis Bach Ryhl, Friis Bach Ryhl Rechtsanwälte; und Associate Professor, Dr. Grith Skovgaard Ølykke, Abteilung Rechtswissenschaften, Copenhagen Business School. Bis zum 14. November 2013 war das Außenministerium durch Vibeke Pasternak Jørgensen vertreten. Nachdem diese wegen einer Beförderung den Posten aufgab, trat Christian Thorning an ihre Stelle.

14. Nachdem dieses Vorwort geschrieben und zur Veröffentlichung eingereicht worden ist, haben wir vermutlich noch weitere Unterstützung erhalten. Daher danken wir natürlich auch allen zum jetzigen Zeitpunkt noch unbekannten Unterstützern.

kenswerterweise, den bevorstehenden Kongress auf verschiedene Arten zu unterstützen. Seitens des DFE und der FIDE möchten wir Herrn Dekan Dam unseren aufrichtigen Dank für seine Entscheidung und die fortdauernde Unterstützung aussprechen. In diesem Zusammenhang danken wir auch dem administrativen Team der Juristischen Fakultät für die Unterstützung der Veranstaltung, insbesondere der Projektkoordinatorin, Frau Tina Futtrup Borg, und ihren vielen Helfern sowie der Leiterin der Kommunikationsabteilung, Frau Birgitte Faber. Innerhalb der Juristischen Fakultät möchten wir besonders die PhD School und jene Personen erwähnen, die einen PhD-Kurs zum Recht der Europäischen Union in Verbindung mit dem Kongress organisiert haben (insbesondere den beiden assoziierten Professoren, Frau Constanze Semmelmann und Herrn Clement Petersen).[15]

In großer Anerkennung und Dankbarkeit erwähnen wir die Hilfe, die wir von Jette Nim Larsen, Sekretärin der Rechtsanwaltskanzlei Horten, erfahren haben. Ihre administrative Unterstützung war bei allen Anliegen der FIDE-Lenkungsgruppe sehr wertvoll. Darüber hinaus fungierte der DIS Congress Service als unser Partner. Die Mitarbeit von Marianne Sjødahl und Peder Andersen war von unschätzbarem Wert. Die Chefredakteurin Vivi Antonsen von DJØF Publishing, die für die vorliegenden Publikationen verantwortlich ist, war eine höchst effiziente und geduldige Ansprechpartnerin, der unser besonderer Dank gilt. Mit Blick auf den Band »Allgemeines Thema 3« danken wir insbesondere Frau stud.HA-jur. Mette Marie Lamm Larsen.

Darüber hinaus gilt unser Dank unseren Unterstützern, sowie den beteiligten Stiftungen und Partnern. Ganz besonders danken möchten wir:

- Dem Europäischen Gerichtshof (insbesondere dem Präsidenten, Herrn Vassilios Skouris, dem Vizepräsidenten, Herrn Koen Lenaerts, dem Richter, Herrn Lars Bay Larsen, und den vielen Dolmetschern) und anderen europäischen Institutionen;
- Dem dänischen Außenministerium (insbesondere den Referatsleitern Vibeke Pasternak Jørgensen und Christian Thorning);
- Dem Obersten Dänischen Gerichtshof (insbesondere dem Präsidenten Børge Dahl und Richterin Lene Pagter Kristensen);
- Den Autoren Knud Højgaards Fond; Professor Dr. jur. Max Sørensens Mindefond; Reinholdt W. Jorck og Hustrus Fond; Dreyers Fond, Fonden

15. Unseres Wissens ist dies das erste Mal, dass ein solcher Kurs im Zusammenhang mit dem FIDE-Kongress organisiert wurde. Dieses Projekt kann als Versuch angesehen werden, die kommenden Generationen von Forschenden und ihr Engagement für die FIDE zu unterstützen.

til Støtte af Retsvidenskabelig Forskning ved Københavns Universitet; und EURECO an der Universität von Kopenhagen.
– Dem Premiumpartner Kammeradvokaten, Rechtsanwaltskanzlei Poul Smith (insbesondere dem Partner Peter Biering);
– Den Kongress-Helfern der Rechtsanwaltskanzlei Horten (insbesondere dem Partner Andreas Christensen);
– Den Kongress-Helfern von der Copenhagen Business School
– Den Kongress-Helfern von DJØF Publishing;
– Dem Partner Per Magid, Rechtsanwaltskanzlei Bruun & Hjejle;
– Den Kongress-Ausstellern; sowie
– Der Stadt Kopenhagen

Unser besonderer Dank gebührt auch den vielen Mitgliedern der FIDE-Lenkungsgruppe, die uns freundlicherweise geholfen haben, unsere vielen Fragen zu den Traditionen und Erwartungen im Zusammenhang mit FIDE zu beantworten, insbesondere den Verbänden folgender Länder, die uns tatkräftig unterstützt haben: Österreich (Professor Heribert Köck), Estland (Richterin Julia Laffranque), Deutschland (Professor Peter-Christian Müller-Graff) und Spanien (Rechtsanwalt Luis Ortiz Blanco).

Zuallerletzt bleibt hervorzuheben, dass der XXVI. FIDE-Kongress und die vorliegenden Bände niemals ohne die tatkräftigen und engagierten »Generalberichterstatter« möglich gewesen wären. Wir bedanken uns bei Professor Fabian Amtenbrink, Professor Niamh Nic Shibhne, Professor Jo Shaw und Professor Roberto Caranta. Darüber hinaus haben die »Berichterstatter von den EU-Institutionen« Jean-Paul Keppenne, Michal Meduna und Adrián Tokár, die Herausforderungen voller Enthusiasmus angenommen und mit Bravour erfüllt, wofür Ihnen unser höchster Dank gilt. Die nationalen Berichterstatter haben es ermöglicht, ein weitgehend vollständiges Bild von Gesetzgebung und Rechtspraxis in den meisten Mitgliedsstaaten der Europäischen Union zu erhalten. Wir danken ihnen für ihre umfangreichen und wertvollen Beiträge. Außerdem sollen die exzellenten Redner, Moderatoren und Teilnehmer nicht unerwähnt bleiben, deren Arbeit unzweifelhaft dazu beiträgt, den Kongress zu einem herausragenden und unvergesslichen Ereignis werden zu lassen. Tausend Dank an alle, die uns in welcher Form auch immer unterstützend zur Seite standen.

Es war uns eine große Ehre, Freude und zuweilen zugegebenermaßen eine kleine Herausforderung, den XXVI. FIDE-Kongress zu organisieren und die vorhandenen Bände zu vorzubereiten. Wir sind davon überzeugt, dass die FIDE und ihre Kongresse auch nach mehr als einem halben Jahrhundert noch immer eine große Bereicherung und Inspirationsquelle darstellen. Wir hoffen,

die vorliegenden Bände stellen dies unter Beweis. Wir wünschen uns, dass sowohl die FIDE als auch die Kongresse in Zukunft erfolgreich fortgeführt und weiterentwickelt werden können.

FIDE 2014

Questionnaire General Topic 1

The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU

Fabian Amtenbrink[1]

1 Introduction

The global economic and financial crisis and the subsequent euro area debt crisis have triggered ad hoc measures and permanent reform efforts that have a profound impact on the rules, processes and behavior that determine the way economic policy is exercised at the national and European level in the European Union (EU).[2] Economic governance in the Economic and Monetary Union (EMU) has undergone a major transformation, which, moreover, is far from complete. This development does not only result in an amendment of the substantive legal regime governing the EMU laid down in primary and secondary Union law and, moreover, intergovernmental treaties. At a somewhat more elevated level it also affects the constitutional and institutional structure of the European Union and its Member States as such. In general terms, the balance of power between the EU and its Member States shifts in favour of the former, especially within the euro area. Also, the distribution of powers between Union institutions is altered. At the level of the Member States, the new approach to economic governance raises (constitutional) legal questions *inter alia* with regard to the leeway of national governments to de-

1. Dr., Professor, Erasmus School of Law, Erasmus University Rotterdam. All three questionnaires have originally been elaborated in English, and subsequently translated into French and German. Therefore, in case of any discrepancies, it is the English versions which best represent the thinking of the General Rapporteurs.
2. This definition of governance is based on European Commission, *European Governance. A White Paper*, COM(2001) 428 final. It is presently readily acknowledged that this is far from being the only possible definition of governance.

termine economic policy autonomously and the position of national parliaments.

With the gradual shift of focus from crisis response to the medium and long term perspective of the EMU, the constitutional and institutional implications of economic governance come increasingly to the forefront. Mapping the emerging new economic governance in the EMU, its consequences for the Union and national legal orders, and in particular its strengths and weaknesses, are a vital precondition for building sustainable economic governance structures in the medium to long term.

Correspondingly, the aim of this questionnaire is to stimulate reports from the countries represented in FIDE and from the Union institutions on major constitutional and institutional issues related to the emerging new system economic governance in the EU. These reports will become the basis for the general report aimed at providing an in-depth and – to the extent possible – comparative analysis of the main challenges that economic governance faces in this regard, both in the national and European legal order. The questionnaire is divided into two main parts, which are linked to the two main policy fields of the EMU, which are economic policy and monetary policy. This is not to say, however, that these two policy fields can be viewed in isolation, as the euro area debt crisis has highlighted the close interconnectedness of both policy fields in a single currency area.

Considering the focus of the questions that are developed for each of these main pillars, a further subdivision can be made based on whether they relate to the constitutional and institutional situation in the domestic legal order of the Member States or the Union legal order. This subdivision has been introduced for reasons of structure and accessibility of the questionnaire, and thus is not meant to suggest that developments in the national legal order can be considered in isolation from developments at the Union level and vice versa.

It is readily admitted that not all legal issues pertaining to economic governance in the EMU are reflected in the questionnaire. Moreover, given the high volatility of EU economic governance it is likely that subsequent to the distribution of this questionnaire developments raise new legal questions that have not been anticipated at the time of drafting of this document. It is for this reason that the questionnaire closes with a general open question (Question 15).

2 Economic policy

2.1 EU legal order

Question 1
To what extent does primary Union law allow for the adoption of the EU and non-EU instruments that have been agreed upon in response to the euro area debt crisis?

Rapporteurs are invited to inter alia consider:
- Scope of Articles 121 (6), 122 (2), 126 (14) and 136 TFEU as legal bases for economic governance reform measures
- Scope of Articles 123-125 TFEU
  Scope of Article 127(6) TFEU in the context of the proposed Banking Union[3]
- Use of non-EU instruments to regulate EMU matters
- Compatibility with Union law of the provisions of the Treaty on Stability, Co-ordination, and Governance (e.g. conferral of new functions upon Union institutions, use of existing Union powers in the context of that treaty, role of the Court of Justice of the European Union, option(s) to adopt provisions of that treaty within the EU legal framework)
- Compatibility with Union law of the Treaty establishing the European Stability Mechanism
- Necessity for amendment of the TEU/TFEU, either by using the ordinary revision procedure or the simplified revision procedure

Question 2
What are the constitutional and institutional implications at the European level of the use of supranational (e.g. Six-Pack[4], Two-Pack[5]), inter-

3. See also Question 12.
4. Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L 306/8; Regulation 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implemen-

governmental (e.g. Treaty on Stability, Co-ordination, and Governance), private law (European Financial Stabilization Facility), and 'soft-law' (e.g. Euro Plus Pact, Europe 2020) instruments in reforming economic governance in the EMU?

Rapporteurs are invited to inter alia consider:
- Distribution of competences as laid down in primary Union law
- Basic governance mode for economic policy laid down in Articles 120-126 TFEU
- Relevant case law of the Court of Justice of the European Union
- Coherence and complexity of the general Union legal framework
- Coherence and complexity of the Union legal framework pertaining to economic governance in the EMU
- Enforceability of the Union legal framework
- Effects on Community/Union method
- Utilisation of Union institutions inside/outside Union framework
- Variable geometry Europe/Europe of different speeds (considering the position of Member States outside the euro area)
- Integrity of the internal market regime that applies to all EU Member States

Question 3

In '*A blueprint for a deep and genuine economic and monetary union*'[6] the European Commission argues for a stepwise approach in, ultimately, ensuring a full fiscal, economic, and political union, including e.g. the estab-

tation of the excessive deficit procedure, OJ 2011 L 306/33; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41.

5. At the time of writing this questionnaire; the European Commission, Proposal for a regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, COM(2011) 821 final; the European Commission, Proposal for a regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area, COM(2011) 819 final.
6. Communication from the European Commission, *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 28 November 2012, COM(2012) 777 final/2, 11 et seq. See also President of the European Council, *Towards a Genuine Economic and Monetary Union*, 5 December 2012.

lishment of a stronger fiscal capacity for the euro area. In the Four Presidents Report '*Towards a Genuine Economic and Monetary Union*' the plans towards a European fiscal capacity and more integrated economic decision making are further developed and – to some extent – concretised. To what extent and in what ways do these plans call for an amendment of national and (primary and secondary) Union law?

Rapporteurs are invited to inter alia consider:
- A new contractual approach to the implementation of structural reform measures, including an EU financial instrument to support re-balancing and adjustment of the euro area economies
- Increased ex ante coordination of major structural reform measures
- Deeper policy coordination in specific economic policy fields, such as taxation and employment

Centralising of debt issuing in the euro area (redemption fund & euro bills) and namely the compatibility of the collectivisation of debt with primary Union law
- Deeper policy coordination in the fiscal/budgetary sphere, including a possible EU veto right for national budgets
- Establishment of an autonomous euro area budget (for stabilisation purposes)
- Other measures for a further political integration of the EU or the euro area, including changes to the institutional structure/balance at the Union level

Question 4
What legal modifications (if any) are required at the EU level to ensure democratic legitimacy and accountability of economic governance in the Economic and Monetary Union?

Rapporteurs are invited to inter alia consider:
- Effects of the shift of power (e.g. reinforced position of the European Commission, European Council as informal agenda setter, role of the ECB) on current mechanisms providing democratic legitimacy and accountability of economic policy
- Role of Union institutions and bodies, e.g. the European Parliament (e.g. trend towards legislation packaging, economic dialogue) and the Court of Justice of the European Union (interpretation of EU and non-EU instruments) (institutional balance)
- Role of Euro Group

– Foreseeing a role for national parliaments
– Role of Civil Society

Question 5
What legal challenges (if any) does the EU face with regard to financial market regulation and supervision?

Rapporteurs are invited to inter alia consider:
– Impact of the European system of financial market regulation and supervision on economic and monetary policy
– Need for additional financial market regulations (areas?)
– Need for a (further) revision of financial market supervision in the EU and/or the euro area
– Need for differentiation between euro area Member States and other Member States?
– Need for a more centralised supervisory system (i.e. Single Supervisory Mechanism)
– Need for a Single Resolution Mechanism, including a common (fiscal) backstop
– Need for more harmonised and/or centralised deposit guarantee schemes

2.2 Legal orders of the Member States

Question 6
What legal challenges do euro area Member States, Member States in the antechamber to the euro area, and Member States that – for the time being – have opted not to participate in the single currency face with regard to their national fiscal rules and the applicable budgetary processes as a result of the various European ad hoc (e.g. European Financial Stabilisation Mechanism, European Financial Stabilisation Facility) and long term reform measures (e.g. Six-Pack, Two-Pack, Treaty on Stability, Co-ordination, and Governance in the European Union, Treaty establishing the European Stability Mechanism)?

Rapporteurs are invited to inter alia consider:
– Impact of obligations arising from EU and non-EU instruments (e.g. in the context of the European Semester, budgetary frameworks for Member States, macroeconomic imbalances procedure, possibility of (non) interest bearing deposits, balanced budget and debt break rule, implementation of fi-

nancial adjustment programmes (conditionality) under EFSM/EFSF/ESM) on domestic legal orders
- Impact of the obligations arising from EU and non-EU instruments on autonomous decision-making in the area of economic policy
- Role of national parliaments (including the role of the different chambers in bicameral parliamentary systems)
- Role of central and regional governments
- Impact of the Treaty establishing the European Stability Mechanism *inter alia* on the role of national parliaments in the budgetary process (namely in case of the application of Article 4 (4) of said Treaty) for euro area Member States and Member States in the antechamber to the euro
- Impact of the Euro Plus Pact and Europe 2020

Question 7
What changes (if any) have to be made at the level of the Member States to ensure democratic legitimacy and accountability of economic governance in the Economic and Monetary Union?

Rapporteurs are invited to inter alia consider:
- Current mechanisms providing democratic legitimacy and accountability of economic policy
- Effects of the implementation of the financial adjustment programmes under the ESM Treaty (conditionality) on national constitutional law
- Role of national and regional governments & parliaments and any other public institutions/bodies
- Role of Civil Society

Question 8
How have the duties arising from the Treaty on Stability, Co-ordination, and Governance in the European Union, namely those set out in Articles 3 (1), 4, 5, and 6, been accommodated for in the national legal order?

Rapporteurs are invited to inter alia consider:
- Nature and scope of legal instruments applied by euro area Member States to implement requirements
- Interpretation given to the obligations arising under Articles 3 (1), 4, 5 and 6
- Impact of the treaty on Member States outside the euro area (e.g. implementation of rules in anticipation of euro area membership)

– Compatibility with any previously existing national rules on a sound (balanced) budgetary position (debt break)

Question 9
Have the EU or non-EU instruments employed in addressing the euro area debt crisis been challenged before national (highest or constitutional) courts? If so, on which grounds and with what outcome?

Rapporteurs are invited to inter alia consider:
– Challenges to bilateral loans to Greece, Regulation 407/20010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism (EFSF), the Framework Agreement with the European Financial Stability Facility (EFSF) or any national legislative act providing the legal basis for financial assistance under the EFSF
– Challenges to the five regulations and one directive as part of the Six-Pack
– Challenges to the two regulations as part of the Two-Pack
– Challenges to the Treaty on Stability, Co-ordination, and Governance or national ratification instruments
– Challenges to the Treaty establishing the European Stability Mechanism or any national implementing act

Question 10
What are the specific legal challenges for Member States outside the euro area, that is Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency, of the emergence (mainly subject to Articles 121(6), 126(14), 136 TFEU, and intergovernmental treaties) of an ever more detailed economic governance regime for euro area Member States?

Rapporteurs are invited to inter alia consider:
– Influence of Member States outside the euro area on the new legal regime that is/has been adopted
– Influence of Member States outside the euro area on policy making and decision making pertaining to the new economic governance regime
– Pressure to adhere to standards that de jure are only applicable to euro area Member States
– Implications of new economic governance regime (e.g. macroeconomic imbalances procedure, Treaty on Stability, Co-ordination, and Governance in the European Union) for the scope/validity of the convergence criteria (Art. 140(1) TFEU)

– Implications of new financial regulatory and supervisory system on internal market rules (and any other EU policy areas) applicable to all EU Member States

3 Monetary policy

Question 11
Has the European Central Bank acted in accordance with its legal mandate laid down in primary Union law in responding to the euro area debt crisis?

Rapporteurs are invited to inter alia consider:
– Primary and secondary objectives of the ECB
– Prohibition of monetary financing (Article 123 TFEU & 7th recital of the preamble of Council Regulation No. 3603/93 of 13 December 1993, Article 18.1 Statute ESCB and ECB)
– Statutory independence of the ECB
– ECB monetary policy measures during the crisis (e.g. rules on collateral, long-term refinance operations, Securities Market Programme, Outright Monetary Transactions)
– Legal requirements for providing emergency liquidity
– Statutory rules for the distribution of risks and losses within the Eurosystem

Question 12
Considering its primary objective laid down in Article 127(1) TFEU, what precisely can the role of the ECB be from a legal point of view in prudential supervision of credit institutions (micro-prudential supervision) and how can this be linked to a role in contributing to the stability of the financial system (macro-prudential supervision)?

Rapporteurs are invited to inter alia consider:
– European Commission proposal for a single supervisory mechanism for banks (Banking Union) and namely the proposals for conferring specific

tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions[7]
- Scope of Article 127(6) TFEU
- Constraints in relation to Member States outside the euro area
- Compatibility of different tasks and objectives of the ECB (monetary policy, macro- and micro-prudential)
- Potential for conflicts of interest and other risks attached to a pooling of competences
- Relationship between ECB and national central banks
- Lessons to be learned from competence allocation in other policy fields (e.g. EU competition law)
- Accountability issues

Question 13
How can the statutory objectives of the ECB be redefined?

Rapporteurs are invited to inter alia consider:
- Single or multiple objectives (consider e.g. Article 2A of the Federal Reserve Act)
- Role of ECB as single monetary policy authority in the euro area
- Role of ECB in macro- and micro-prudential supervision
- Lender of last resort function

Question 14
What (if any) can the role of the Court of Justice of the European Union be in the interpretation and application of the primary and secondary EU law pertaining to monetary policy?

Rapporteurs are invited to inter alia consider:
- Judicial review of monetary policy decisions
- Judicial review of open market operations

7. Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012) 511 final). See also Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No. .../... conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012) 512 final).

4 Open question

Question 15
What are the other main legal concerns at the EU or national level regarding constitutional and institutional aspects of economic governance in the EMU that are not covered by any of the previous questions?

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FIDE 2014

Questionnaire du thème général 1

L'Union économique et monétaire : les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UE

Fabian Amtenbrink[1]

1 Introduction

La crise économique et financière que traverse le monde, et la crise de la dette qui s'est ensuivie dans la zone euro ont entraîné des mesures ponctuelles et des efforts de réforme permanents. Ceux-ci ont eu un impact profond sur les règles, les processus et les comportements qui sont déterminants dans la manière dont s'exerce la politique économique au niveau national et européen dans l'Union européenne (UE).[2] La gouvernance économique au sein de l'Union économique et monétaire (UEM) a subi une transformation majeure, qui est en outre loin d'être entièrement achevée. Ce développement entraine non seulement une modification du régime légal qui gouverne substantiellement l'UEM et qui s'inscrit dans le droit primaire et dérivé de l'Union européenne, ainsi que dans les traités intergouvernementaux. Mais, à un niveau plus élevé, il affecte également la structure constitutionnelle et institutionnelle de l'Union européenne et de ses Etats membres. De manière générale, l'équilibre du pouvoir entre l'UE et ses Etats membres se déplace en faveur de celle-ci, notamment au sein de la zone euro. De même, la distribution des pouvoirs entre les institutions européennes s'en trouve affectée. Au niveau

1. Professeur à l'Erasmus School of Law, Université Erasme de Rotterdam. Les trois questionnaires ont été initialement rédigés en anglais, puis ils ont été traduits en français et en allemand. En cas de divergence, veuillez vous reporter aux versions anglaises qui représentent mieux la pensée des rapporteurs généraux.
2. Cette définition de la gouvernance repose sur celle de la Commission européenne, *Gouvernance européenne. Un livre blanc*, COM(2001) 428 final. Il est généralement admis que cela ne saurait, et de loin, constituer la seule définition possible de la gouvernance.

des Etats membres, la nouvelle approche sur la gouvernance économique soulève des questions juridiques (constitutionnelles) *entre autres,* quant à la marge de manœuvre des gouvernements nationaux pour déterminer une politique économique de manière autonome, et à la position des parlements nationaux.

Alors que s'opère une réorientation progressive de gestion de la crise vers une perspective de l'UEM sur le moyen ou plus long terme, les implications constitutionnelles et institutionnelles de la gouvernance prennent de plus en plus d'importance. Dresser le profil de la nouvelle gouvernance économique émergente dans l'UEM, notamment ses conséquences pour l'Union européenne et les ordres juridiques nationaux, mais aussi ses forces et ses faiblesses, est une condition indispensable pour établir des structures de gouvernance économique durables sur le moyen ou plus long terme.

De ce fait, l'objectif de ce questionnaire est d'encourager l'élaboration de rapports provenant des pays représentés au sein de la FIDE et des institutions européennes sur des sujets constitutionnels et institutionnels majeurs, liés au nouveau système de gouvernance économique qui est en train de voir le jour dans l'UE. Ces rapports serviront de fondement au rapport général visant à fournir une analyse approfondie et, autant que possible, comparative des principaux défis auxquels est confrontée la gouvernance économique dans l'ordre juridique national et européen. Le questionnaire comporte deux grandes parties, qui sont liées aux deux principaux domaines politiques de l'UEM, la politique économique et la politique monétaire. Cela ne signifie pas, cependant, que ces deux domaines peuvent être considérés séparément, dans la mesure où la crise de la dette dans la zone euro a souligné l'étroite interconnexion qui existe entre ces deux domaines politiques dans une zone de monnaie unique.

Si l'on considère le sens des questions développées pour chacun des points principaux, il est possible d'opérer une subdivision supplémentaire entre les questions liées à la situation constitutionnelle et institutionnelle de l'ordre juridique nationale des Etats membres, ou celles liées à l'ordre juridique de l'Union européenne. Cette subdivision a été entreprise pour des raisons de structure et d'accessibilité au questionnaire, et non pour suggérer que des développements de l'ordre juridique national puissent être considérés séparément des développements au niveau de l'Union européenne, et inversement.

Il est communément admis que toutes les questions juridiques ayant trait à la gouvernance économique dans l'UEM ne font pas l'objet de ce questionnaire. Par ailleurs, étant donnée la forte instabilité de la gouvernance économique de l'UE, il est probable que des développements ayant lieu après la distribution de ce questionnaire soulèvent de nouvelles questions juridiques qui

n'ont pas été envisagées lors de la rédaction de ce document. Ceci est la raison pour laquelle ce questionnaire se termine par une question ouverte d'ordre plus général (Question 15).

2 Politique économique

2.1 L'ordre juridique de l'UE

Question 1
En quelle mesure le droit primaire de l'Union permet-il l'adoption d'instruments de l'UE et hors de l'UE qui ont été adoptés en réponse à la crise de la dette dans la zone euro ?

Les rapporteurs sont invités à considérer, entre autres :

- Le champ d'application des articles 121 (6), 122 (2), 126 (14) et 136 du TFUE en tant que bases légales pour les mesures destinées à une réforme de la gouvernance économique
- Le champ d'application des articles 123 à 125 du TFUE
- Le champ d'application de l'article 127(6) du TFUE dans le cadre de l'union bancaire proposée[3]
- L'utilisation d'instruments qui ne relèvent pas du droit de l'UE pour réglementer les questions touchant l'UEM
- La compatibilité, avec le droit de l'Union, des dispositions du Traité sur la stabilité, la coordination et la gouvernance (permettant de conférer de nouvelles attributions aux institutions européennes, l'utilisation des pouvoirs de l'Union dans le cadre de ce traité, le rôle de la Cour de Justice de l'Union européenne, une ou des options pour adopter des dispositions de ce traité dans le cadre juridique de l'UE)
- La compatibilité, avec le droit de l'Union, du Traité établissant le mécanisme de stabilité européen
- La nécessité de modifier le TUE/TFUE, soit au moyen de la procédure de révision ordinaire, soit au moyen de la procédure de révision simplifiée

3. Se reporter également à la Question 12.

Question 2
Quelles sont les implications constitutionnelles et institutionnelles, au niveau européen, de l'utilisation d'instruments supranationaux (notamment le « six-pack »,[4] le « two-pack »[5]), intergouvernementaux (notamment le Traité de stabilité, de coordination et de gouvernance), de droit privé (la Facilité européenne de stabilité financière) et des instruments à caractère non contraignant (notamment le Pacte pour l'euro plus, Europe 2020) destinés à réformer la gouvernance économique de l'UEM ?

Les rapporteurs sont invités à considérer, entre autres :

- La répartition des compétences telle que définie dans le droit primaire de l'Union
- Le mode de gouvernance concernant la politique économique tel que défini dans les articles 120 à 126 du TFUE
- La jurisprudence pertinente de la Cour de Justice de l'Union européenne
- La cohérence et la complexité du cadre juridique général de l'Union
- La cohérence et la complexité du cadre juridique de l'Union relatif à la gouvernance économique dans l'UEM
- L'application du cadre juridique de l'Union

4. Règlement no 1173/2011 sur la mise en œuvre efficace de la surveillance budgétaire dans la zone euro, JO 2011 L 306/1 ; Règlement no 1174/2011 établissant des mesures d'exécution en vue de remédier aux déséquilibres macroéconomiques excessifs dans la zone euro, JO 2011 L 306/8 ; Règlement no 1175/2011 modifiant le règlement (CE) no 1466/97 du Conseil relatif au renforcement de la surveillance des positions budgétaires ainsi que de la surveillance et de la coordination des politiques économiques, JO 2011 L 306/12 ; Règlement no 1176/2011 du Parlement européen et du Conseil du 16 novembre 2011 sur la prévention et la correction des déséquilibres macroéconomiques, JO 2011 L 306/25 ; Règlement no 1177/2011 du Conseil modifiant le règlement (CE) no 1467/97 visant à accélérer et à clarifier la mise en œuvre de la procédure concernant les déficits excessifs, JO 2011 L 306/33 ; Directive 2011/85/UE du Conseil sur les exigences applicables aux cadres budgétaires des Etats membres, JO 2011 L 306/41.
5. Au moment de la rédaction du présent questionnaire ; la Commission européenne, Proposition de règlement du Parlement européen et du Conseil concernant les dispositions communes pour le suivi et l'évaluation des projets de budgets et pour la correction des déficits excessifs dans les Etats membres de la zone euro, COM(2011) 821 final ; la Commission européenne, Proposition de règlement du Parlement européen et du Conseil relatif au renforcement de la surveillance économique et budgétaire des Etats membres connaissant ou risquant de connaître de sérieuses difficultés du point de vue de leur stabilité financière au sein de la zone euro, COM(2011) 819 final.

– L'incidence sur la méthode de la Communauté/de l'Union
– L'utilisation des institutions européennes à l'intérieur ou à l'extérieur du cadre de l'Union
– Une Europe à géométrie variable/Une Europe à plusieurs vitesses (selon la situation des Etats membres hors de la zone euro)
– L'intégrité du régime spécifique du marché intérieur qui s'applique à tous les Etats membres

Question 3

Dans « *Un projet détaillé pour une Union économique et monétaire véritable et approfondie* »[6] la Commission européenne préconise une démarche progressive afin, en dernier lieu, d'établir une union budgétaire, une union économique et une union politique complètes, incluant notamment l'établissement d'une capacité budgétaire renforcée pour la zone euro. Dans le rapport des quatre présidents « *Vers une véritable Union économique et monétaire* », les plans visant à élaborer une capacité budgétaire européenne et une prise de décisions économiques plus intégrée ont été développés plus en détails, et, dans une certaine mesure, concrétisés. Dans quelle mesure et de quelles manières ces plans requièrent-ils une modification de la législation nationale et de la législation (primaire et secondaire) de l'Union ?

Les rapporteurs sont invités à considérer, entre autres :

– Une nouvelle approche contractuelle pour la mise en place d'une réforme structurelle, incluant un instrument financier de l'UE contribuant au rééquilibrage et à l'ajustement des économies de la zone euro
– Une meilleure coordination préalable des grandes mesures de réforme structurelle
– Une coordination politique approfondie dans des domaines spécifiques de la politique économique, tels que l'imposition et l'emploi
– La centralisation de la dette émise dans la zone euro (fonds de remboursement et billets en euro) et notamment la compatibilité d'une collectivisation de la dette avec le droit primaire de l'Union

6. Communication de la Commission européenne, *Projet détaillé pour une Union économique et monétaire véritable et approfondie. Lancer un débat européen*, Bruxelles, le 28 novembre 2012, COM(2012) 777 final/2, 11 et suivantes. Voir également le rapport du Président du Conseil européen, *Vers une véritable Union économique et monétaire*, 5 décembre 2012.

– Une coordination politique plus approfondie sur le plan fiscal et budgétaire, incluant la possibilité d'un droit de véto européen sur les budgets nationaux
– L'établissement d'un budget autonome pour la zone euro (à des fins de stabilisation)
– Autres mesures pour une plus grande intégration politique de l'UE ou de la zone euro, incluant des changements de structure/d'équilibre institutionnel au niveau de l'Union

Question 4
Quelles modifications juridiques éventuelles devraient être prises au niveau de l'UE pour garantir une légitimité démocratique et une responsabilité de la gouvernance économique dans l'Union économique et monétaire ?

Les rapporteurs sont invités à considérer, entre autres :

– L'impact de la modification des pouvoirs (notamment la position renforcée de la Commission européenne, le rôle du Conseil européen qui mène informellement le jeu, et le rôle de la BCE) sur les mécanismes actuels qui assurent la légitimité démocratique et la responsabilité de la politique économique
– Le rôle des institutions et des organes de l'Union, que ce soit le Parlement européen (tendance vers un train de mesures législatives, dialogue économique), et la Cour de Justice de l'Union européenne (interprétation des instruments de l'UE et hors de l'UE) (équilibre institutionnel)
– Le rôle de l'Eurogroupe
– Prévoir le rôle des parlements nationaux
– Le rôle de la société civile

Question 5
Quels défis juridiques éventuels l'UE a-t-elle à relever quant à la réglementation et la surveillance des marchés financiers ?

Les rapporteurs sont invités à considérer, entre autres :

– L'impact du système européen de réglementation et de surveillance des marchés financiers sur la politique économique et monétaire
– Le besoin d'une réglementation renforcée des marchés financiers (dans quels domaines ?)

– Le besoin d'une révision (supplémentaire) de la surveillance des marchés financiers dans l'UE et/ou dans la zone euro
– Le besoin de différenciation entre les Etats membres de la zone euro et les autres Etats membres ?
– Le besoin d'un système de surveillance plus centralisé (par exemple le Mécanisme de surveillance unique)
– Le besoin d'un mécanisme de résolution unique, incluant un mécanisme commun de soutien (fiscal)
– Le besoin d'un système de garantie des dépôts mieux harmonisé et/ou centralisé

2.2 Ordres juridiques des Etats membres

Question 6
A quels défis juridiques les Etats membres de la zone euro, les Etats membres dans l'antichambre de la zone euro, et les Etats membres qui ont pour le moment choisi de ne pas participer à la monnaie unique, sont-ils confrontés quant à leurs règles budgétaires nationales et les procédures budgétaires en vigueur, suite aux différentes mesures européennes ponctuelles (notamment le Mécanisme européen de stabilité financière, la Facilité européenne de stabilité financière) et aux mesures de réforme sur le long terme (notamment le « six-pack », le « two-pack », le Traité sur la stabilité, la coordination et la gouvernance, le Traité établissant le mécanisme de stabilité européen) ?

Les rapporteurs sont invités à considérer, entre autres :

– L'impact des obligations découlant des instruments de l'UE et hors de l'UE (notamment dans le cadre du semestre européen, les cadres budgétaires des Etats membres, la procédure de déséquilibre macroéconomique, la possibilité de dépôts portant ou ne portant pas intérêts, l'équilibre budgétaire et les règles de dépassement de la dette, la mise en place de programmes d'ajustement financier (conditionnalité dans le cadre des MESF/FESF/MSE) sur les systèmes nationaux
– L'impact des obligations découlant des instruments de l'UE et hors UE sur une prise de décisions autonome dans le domaine de la politique économique
– Le rôle des parlements nationaux (dont le rôle des différentes chambres dans les systèmes parlementaires à deux chambres)

– Le rôle des gouvernements centraux et régionaux
– L'impact du Traité établissant le mécanisme de stabilité européen, *entre autres,* sur le rôle des parlements nationaux dans la procédure budgétaire (au cas où s'applique l'article 4 (4) dudit Traité) pour les Etats membres de la zone euro et les Etats membres dans l'antichambre de l'euro
– L'impact du Pacte pour l'euro plus, et de l'Europe 2020

Question 7
Quels changements éventuels doivent être faits au niveau des Etats membres pour garantir une légitimité démocratique et une responsabilité de la gouvernance économique dans l'Union économique et monétaire ?

Les rapporteurs sont invités à considérer, entre autres :

– Les mécanismes actuels qui assurent une légitimité démocratique et une responsabilité de la politique économique
– Les effets de la mise en place des programmes d'ajustement financier dans le cadre du Traité instituant le MSE (conditionnalité) sur le droit constitutionnel national
– Le rôle des gouvernements et des parlements nationaux et régionaux, et des autres institutions et organes publics
– Le rôle de la société civile

Question 8
De quelle manière les obligations découlant du Traité sur la stabilité, la coordination et la gouvernance dans l'Union européenne, en particulier celles qui sont prescrites aux articles 3 (1), 4, 5 et 6, ont-elles été prises en compte dans l'ordre juridique national ?

Les rapporteurs sont invités à considérer, entre autres :

– La nature et le champ d'application des instruments juridiques utilisés par les Etats membres de la zone euro pour appliquer les exigences imposées
– L'interprétation donnée aux obligations découlant des articles 3 (1), 4, 5 et 6
– L'impact du traité sur les Etats membres hors de la zone euro (notamment l'application des règles en prévision d'une adhésion à la zone euro)
– La compatibilité avec les règles nationales existantes relatives à une situation budgétaire (équilibrée) saine (dépassement de la dette)

Question 9
Les instruments de l'UE et hors de l'UE utilisés lors de la crise de la dette dans la zone euro ont-ils été contestés devant les juridictions nationales (juridictions suprêmes ou constitutionnelles) ? Le cas échéant, sur quels fondements, et quels en ont été les résultats ?

Les rapporteurs sont invités à considérer, entre autres :

- Les défis aux prêts bilatéraux accordés à la Grèce, règlement n° 407/2010 du 11 mai 2010 établissant un mécanisme européen de stabilisation financière (MESF), l'accord-cadre régissant la Facilité européenne de stabilité financière (FESF) et tout acte législatif national fournissant une base légale à l'aide financière dans le cadre de la FESF
- Les défis aux cinq règlements et de la directive faisant partie du « six-pack »
- Les défis aux deux règlements faisant partie du « two-pack »
- Les défis au Traité sur la stabilité, la coordination et la gouvernance, ou aux instruments de ratification nationaux
- Les défis au Traité établissant le mécanisme de stabilité européen, ou à tout acte de transposition national

Question 10
Quels sont les défis juridiques spécifiques aux Etats membres hors de la zone euro, c'est-à-dire les Etats membres dans l'antichambre de la zone euro et les Etats membres qui ont pour le moment choisi de ne pas participer à la monnaie unique, de l'émergence (en particulier en ce qui concerne les articles 121(6), 126(14), 136 du TFUE et les traités intergouvernementaux) d'un système de gouvernance économique toujours plus détaillé pour les Etats membres de la zone euro ?

Les rapporteurs sont invités à considérer, entre autres :

- L'influence des Etats membres hors de la zone euro sur le nouveau régime juridique adopté
- L'influence des Etats membres hors de la zone euro sur les décisions politiques et la prise de décision découlant du nouveau système de gouvernance économique
- La pression pour adhérer à des normes qui ne sont applicables de jure qu'aux Etats membres de la zone euro
- Les conséquences d'un nouveau système de gouvernance économique (notamment la procédure de déséquilibre macroéconomique, le Traité sur la

stabilité, la coordination et la gouvernance dans l'Union européenne) pour le champ d'application/la validité des critères de convergence (art. 140(1) du TFUE)
– Les conséquences d'un nouveau système de régulation et de surveillance du secteur financier sur les règles du marché intérieur (ou de tout autre domaine de la politique européenne) applicables à tous les Etats membres

3 Politique monétaire

Question 11
La Banque centrale européenne a-t-elle agi conformément à son mandat légal qui découle du droit primaire de l'Union en réagissant à la crise de la dette dans la zone euro ?

Les rapporteurs sont invités à considérer, entre autres :

– Les objectifs primaires et secondaires de la BCE
– L'interdiction de financement monétaire (article 123 du TFUE et le considérant 7 du préambule du règlement du Conseil (CE) n° 3603/93 du 13 décembre 1993, article 18.1 Les statuts du SEBC et de la BCE)
– L'autonomie statutaire de la BCE
– Les mesures prises par la BCE en termes de politique monétaire durant la crise (notamment les règles concernant les opérations de garantie et de refinancement sur le long terme, le Programme pour les marchés de titres, les opérations monétaires en prise ferme)
– Les exigences juridiques nécessaires pour fournir des liquidités d'urgence
– Les règles statutaires sur la répartition des risques et des pertes dans l'Eurosystème

Question 12
Compte tenu de son objectif primaire qui découle de l'article 127 (1) du TFUE, quel peut être le rôle précis de la BCE d'un point de vue juridique dans la surveillance prudentielle des établissements de crédit (surveillance microprudentielle) et comment celui-ci peut-être être lié à la mission qui lui est confiée, à savoir contribuer à la stabilité du système financier (surveillance macroprudentielle) ?

Les rapporteurs sont invités à considérer, entre autres :

- La proposition de la Commission européenne concernant un mécanisme de surveillance unique pour les banques (Union bancaire) et notamment les propositions confiant à la Banque centrale européenne des missions spécifiques ayant trait aux politiques en matière de contrôle prudentiel des établissements de crédit[7]
- Le champ d'application de l'article 127(6) du TFUE
- Les contraintes ayant trait aux Etats membres hors de la zone euro
- La compatibilité des différentes missions et objectifs de la BCE (politique monétaire, surveillance macroprudentielle et microprudentielle)
- Les sources de conflits potentiels et autres risques liés à la mise en commun des compétences
- La relation entre la BCE et les banques centrales nationales
- Les leçons à tirer de l'attribution des compétences dans d'autres domaines politiques (notamment la législation européenne sur la concurrence)
- Les problèmes de responsabilité

Question 13
Comment les objectifs statutaires de la BCE peuvent-ils être redéfinis ?

Les rapporteurs sont invités à considérer, entre autres :

- Un objectif unique ou des objectifs multiples (en considérant notamment l'article 2A de la Loi sur la réserve fédérale)
- Le rôle de la BCE en tant qu'autorité de politique monétaire unique dans la zone euro
- Le rôle de la BCE en matière de surveillance macroprudentielle et microprudentielle
- La fonction de prêteur de dernier recours

7. Proposition de règlement du Conseil confiant à la Banque centrale européenne des missions spécifiques ayant trait aux politiques en matière de contrôle prudentiel des établissements de crédit (COM(2012) 511 final). Se reporter également à la proposition de règlement du Parlement européen et du Conseil modifiant le règlement (UE) no 1093/2010 instituant une Autorité européenne de surveillance (Autorité bancaire européenne) en ce qui concerne son interaction avec le règlement (UE) n° …/…du Conseil confiant à la Banque centrale européenne des missions spécifiques ayant trait aux politiques en matière de contrôle prudentiel des établissements de crédit (COM/2012/0512 final).

Question 14
Quel serait le rôle éventuel de la Cour de Justice de l'Union européenne dans l'interprétation et l'application du droit primaire et secondaire de l'UE relatif à la politique monétaire ?

Les rapporteurs sont invités à considérer, entre autres :

– Le contrôle juridictionnel des décisions de politique monétaire
– Le contrôle juridictionnel des opérations d'open market

4 Question ouverte

Question 15
Quelles sont les autres grandes préoccupations juridiques au niveau européen ou national concernant les aspects constitutionnels et institutionnels de la gouvernance économique dans l'UEM qui ne sont abordées par aucune des questions précédemment posées ?

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FIDE 2014

Fragebogen, Generalthema 1

Die Wirtschafts- und Währungsunion: konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung innerhalb der EU

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1 Einleitung

Die weltweite Wirtschafts- und Finanzkrise und die daran anschließende Schuldenkrise im Euro-Währungsgebiet haben Sofortmaßnahmen und dauerhafte Reformanstrengungen ausgelöst, die tiefgehende Auswirkungen auf jene Regeln, Prozesse und Verhaltensweisen haben, die bestimmen, wie Wirtschaftspolitik in der Europäischen Union auf nationaler Ebene einerseits und auf europäischer Ebene andererseits durchgeführt wird.[2] Die wirtschaftspolitische Steuerung in der Wirtschafts- und Währungsunion (EWU) hat einen erheblichen Wandel erlebt, der zudem noch längst nicht abgeschlossen ist. Diese Entwicklung führt nicht nur zu einer Änderung des der EMU zugrunde liegenden materiellrechtlichen Regelwerks gemäß primärem und sekundärem EU-Recht und natürlich zwischenstaatlichen Verträgen, sondern auf etwas höherer Ebene ist dadurch auch die konstitutionelle und institutionelle Struktur der Europäischen Union und ihrer einzelnen Mitgliedstaaten betroffen. Allgemein ausgedrückt hat sich das Gleichgewicht der Kräfte zwischen der EU und ihren Mitgliedstaaten insbesondere im Euro-Währungsgebiet zugunsten der EU verschoben. Hinzu kommt eine geänderte Machtverteilung zwischen den Institutio-

1. Prof. Dr., Juristische Fakultät der Erasmus Universität, Rotterdam. Alle drei Fragebögen wurden ursprünglich auf English ausgearbeitet und anschließend ins Französische und Deutsche übersetzt. Sollten es Abweichungen geben, sind es die englischen Versionen, die am besten das Denken der Berichterstatter repräsentieren.
2. Diese Definition basiert auf der Veröffentlichung der Europäischen Kommission, *Europäisches Regieren – ein Weißbuch*, KOM/2001/0428 endg. Es wird gerne zugegeben, dass dies bei weitem nicht die einzige mögliche Definition ist.

nen der EU. In den Mitgliedstaaten wirft die neue Art der wirtschaftspolitischen Steuerung (konstitutionelle) Fragen u. a. in Bezug auf den Spielraum, den nationale Regierungen bei der autonomen Festlegung ihrer eigenen Wirtschaftspolitik haben, sowie in Bezug auf die Stellung der nationalen Parlamente auf.

Im Rahmen der allmählichen Schwerpunktverlagerung vom Krisenmanagement zu mittel- und langfristigen Perspektiven der EWU tritt die konstitutionelle und institutionelle Tragweite dieser wirtschaftspolitischen Steuerung immer mehr in den Vordergrund. Die Darlegung der sich herausschälenden neuen wirtschaftspolitischen Steuerung innerhalb der EU, ihrer Folgen für die Rechtsordnungen der Europäischen Union und ihrer Mitgliedstaaten und insbesondere ihrer Stärken und Schwächen sind eine entscheidende Vorbedingung für die Schaffung nachhaltiger Strukturen für diese Steuerung auf mittel- und langfristige Sicht.

Demgemäß soll mit diesem Fragebogen die Berichterstattung aus den in FIDE vertretenen Ländern und den Institutionen der EU über wichtige konstitutionelle und institutionelle Fragen in Verbindung mit dem neu entstehenden System der wirtschaftspolitischen Steuerung innerhalb der EU angeregt werden. Diese Berichte werden die Grundlage für den gemeinsamen Bericht bilden, der eine umfassende und, soweit möglich, vergleichende Analyse der wichtigsten Herausforderungen des neuen Steuerungssystems in Bezug auf sowohl nationale Rechtsordnungen als auch die EU-Rechtsordnung vorlegt. Der Fragebogen ist entsprechend der beiden Hauptbereiche der EWU, d. h. der Wirtschaftspolitik und der Währungspolitik, in zwei Teile gegliedert. Das ist jedoch nicht gleichbedeutend damit, dass diese Bereiche isoliert zu betrachten sind. Schließlich hat die Schuldenkrise im Euro-Währungsgebiet die enge Vernetzung dieser beiden Bereiche in einem einheitlichen Währungsraum nur zu deutlich gezeigt.

In Anbetracht der Ausrichtung der für jeden dieser Hauptbereiche entwickelten Fragen ist eine weitere Unterteilung sinnvoll, nämlich, ob es sich um konstitutionelle oder institutionelle Aspekte der nationalen Rechtsordnungen der Mitgliedstaaten oder der EU-Rechtsordnung handelt. Diese Unterteilung wurde eingeführt, um die Fragebögen besser zu strukturieren und verständlich zu machen. Damit soll also nicht angedeutet werden, dass Entwicklungen der nationalen Rechtsordnungen getrennt von Entwicklungen auf EU-Ebene betrachtet werden können und umgekehrt.

Es sei auch gerne eingeräumt, dass nicht alle Rechtsfragen in Bezug auf die wirtschaftspolitische Steuerung in der EWU in diesem Fragebogen angesprochen sind. Angesichts der laufenden Änderungen der wirtschaftspolitischen Steuerung innerhalb der EU ist es sogar wahrscheinlich, dass Entwicklungen nach der Verteilung des Fragebogens neue Rechtsfragen aufwerfen,

die zum Zeitpunkt der Ausarbeitung des Fragebogens nicht vorhersehbar waren. Aus diesem Grund endet der Fragebogen mit einer allgemeinen offenen Frage (Frage 15).

2 Wirtschaftspolitik

2.1 EU-Rechtsordnung

1. Frage
In welchem Ausmaß erlaubt primäres EU-Recht die Annahme von EU- und Nicht-EU-Instrumenten, auf die man sich als Reaktion auf die Schuldenkrise im Euro-Währungsgebiet geeinigt hat?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
- Anwendungsbereich von Artikel 121 Absatz 6, 122 Absatz 2, 126 Absatz 14 und 136 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) als Grundlage für die Reformierung der wirtschaftspolitischen Steuerung
- Anwendungsbereich von Artikel 123-125 AEUV
  Anwendungsbereich von Artikel 127 Absatz 6 AEUV im Rahmen der vorgeschlagenen Bankenunion[3]
- Verwendung von Nicht-EU-Instrumenten zur Regulierung von EWU-Angelegenheiten
- Vereinbarkeit mit EU-Recht im Sinne der Vorschriften des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts-und Währungsunion (z. B. Übertragung von neuen Funktionen auf EU-Institutionen, Verwendung von bestehenden EU-Befugnissen im Kontext dieses Vertrags, Rolle des Europäischen Gerichtshofs, Möglichkeit(en) zur Annahme von Vorschriften dieses Vertrags im EU-Rechtsrahmen)
- Vereinbarkeit von EU-Recht und dem Vertrag zur Errichtung des Europäischen Stabilitätsmechanismus
- Notwendigkeit von Änderungen von EUV/AEUV im Rahmen entweder des ordentlichen Änderungsverfahrens oder des vereinfachten Änderungsverfahrens

3. Siehe auch 12. Frage.

2. Frage

Worin bestehen die konstitutionellen und institutionellen Auswirkungen der Verwendung von supranationalen (z. B. Sechserpack,[4] Zweierpack[5]), zwischenstaatlichen (z. B. Vertrag über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion), privatrechtlichen (Europäischen Finanzstabilitätsfazilität) und rechtlich nicht zwingenden (z. B. Euro-Plus-Pakt, Europa 2020) Instrumenten bei der Reformierung der wirtschaftspolitischen Steuerung in der EWU?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:

- Verteilung der Kompetenzen gemäß primärem EU-Recht
- Grundlegendes Steuerungskonzept für die Wirtschaftspolitik gemäß Artikel 120-126 AEUV
- Einschlägige Rechtsprechung des Europäischen Gerichtshofs
- Kohärenz und Komplexität des generellen EU-Rechtsrahmens
- Kohärenz und Komplexität des generellen EU-Rechtsrahmens betreffend die wirtschaftspolitische Steuerung in der EWU
- Durchsetzbarkeit des EU-Rechtsrahmens

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4. Verordnung (EU) Nr. 1173/2011 über die wirksame Durchsetzung der haushaltspolitischen Überwachung im Euro-Währungsgebiet, ABl. 2011 L 306/1; Verordnung (EU) Nr. 1174/2011 über Durchsetzungsmaßnahmen zur Korrektur übermäßiger makroökonomischer Ungleichgewichte im Euro-Währungsgebiet, ABl. 2011 L 306/8; Verordnung (EU) Nr. 1175/2011 zur Änderung der Verordnung (EG) Nr. 1466/97 des Rates über den Ausbau der haushaltspolitischen Überwachung und der Überwachung und Koordinierung der Wirtschaftspolitiken, ABl. 2011 L 306/12; Verordnung (EU) Nr. 1176/2011 des Europäischen Parlaments und des Rates vom 16. November 2011 über die Vermeidung und Korrektur makroökonomischer Ungleichgewichte, ABl. 2011 L 306/25; Verordnung (EU) Nr. 1177/2011 des Rates zur Änderung der Verordnung (EG) Nr. 1467/97 über die Beschleunigung und Klärung des Verfahrens bei einem übermäßigen Defizit, ABl. 2011 L 306/33; Richtlinie 2011/85/EU über die Anforderungen an die haushaltspolitischen Rahmen der Mitgliedstaaten, ABl. 2011 L 306/41.
5. Zum Zeitpunkt der Ausarbeitung dieses Fragebogens; Europäische Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über gemeinsame Bestimmungen für die Überwachung und Bewertung der Übersichten über die gesamtstaatliche Haushaltsplanung und für die Gewährleistung der Korrektur übermäßiger Defizite der Mitgliedstaaten im Euro-Währungsgebiet, KOM/2011/0821 endgültig; Europäische Kommission, Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über den Ausbau der wirtschafts- und haushaltspolitischen Überwachung von Mitgliedstaaten, die von gravierenden Schwierigkeiten in Bezug auf ihre finanzielle Stabilität im Euro-Währungsgebiet betroffen oder bedroht sind, KOM/2011/0819 endgültig.

– Auswirkungen auf die Gemeinschaftsmethode
– Inanspruchnahme von EU-Institutionen innerhalb und außerhalb des EU-Rechtsrahmens
– Europa mit variabler Geometrie/Europa der verschiedenen Geschwindigkeiten (in Anbetracht der Situation von Mitgliedstaaten außerhalb des Euro-Währungsgebiets)
– Integrität des Binnenmarktkonzepts, das für alle EU-Mitgliedstaaten zutrifft

3. Frage

In *»Ein Konzept für eine vertiefte und echte Wirtschafts- und Währungsunion«*[6] spricht sich die Europäische Kommission für ein Vorgehen Schritt für Schritt aus, um letztendlich eine vollständige steuerliche, wirtschaftliche und politische Union zu erreichen, wozu u. a. auch die Schaffung einer besseren Fiskalkapazität für das Euro-Währungsgebiet gehört. In dem Bericht der vier Präsidenten »*Towards a Genuine Economic and Monetary Union*« (Auf dem Weg zu einer echten Wirtschafts- und Währungsunion) werden weitere Pläne für die europäische Fiskalkapazität und eine höhere Abstimmung wirtschaftlicher Entscheidungen entwickelt und, bis zu einem gewissen Grad, auch konkretisiert. In welchem Ausmaß und auf welche Weise verlangen diese Pläne eine Änderung von nationalem und (primärem und sekundärem) EU-Recht?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:

– Neuer vertraglicher Ansatz für die Umsetzung von Strukturreformmaßnahmen, einschließlich eines EU-Finanzinstruments zur Unterstützung der Wiederherstellung des Gleichgewichts und der Anpassung der Wirtschaften im Euro-Währungsgebiet
– Verstärkte Vorabkoordinierung von wichtigen Strukturreformmaßnahmen
– Größere Politikkoordinierung in bestimmten wirtschaftspolitischen Bereichen, wie z. B. Steuern und Beschäftigung
– Zentralisierte Emission von Schuldverschreibungen im Euro-Währungsgebiet (Schuldentilgungsfonds und Eurobills) und insbesondere die Vereinbarkeit der Vergemeinschaftung von Schulden mit primärem EU-Recht
– Größere Politikkoordinierung in Steuer- und Haushaltsfragen, einschließlich eines möglichen Vetorechts der EU für nationale Haushalte

6. Mitteilung der Kommission, *Ein Konzept für eine vertiefte und echte Wirtschafts- und Währungsunion. Auftakt für eine europäische Diskussion*, Brüssel, 28. November 2012, KOM/2012/777 endgültig/2, 11 et seq. Siehe auch Präsident des Europäischen Rates, *Towards a Genuine Economic and Monetary Union*, 5. Dezember 2012.

– Einrichtung eines autonomen Haushalts für das Euro-Währungsgebiet (zu Stabilisierungszwecken)
– Andere Maßnahmen für eine weitere politische Integration der EU oder des Euro-Währungsgebiets, einschließlich Änderungen der institutionellen Struktur bzw. des institutionellen Gleichgewichts auf EU-Ebene

4. Frage
Sind auf EU-Ebene rechtlichen Änderungen erforderlich, um die demokratische Legitimität und Rechenschaftspflicht der wirtschaftspolitischen Steuerung in der Wirtschafts- und Währungsunion zu gewährleisten und wenn ja, welche?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Auswirkungen der Machtverschiebung (z. B. stärkere Position der Europäischen Kommission, Europäischer Rat als inoffizieller Agenda-Setter, Rolle der EZB) auf die gegenwärtigen Mechanismen für demokratische Legitimität und Rechenschaftspflicht in der Wirtschaftspolitik
– Rolle der EU-Institutionen und EU-Körperschaften, z. B. des Europäischen Parlaments (z. B. Trend zu Rechtspaketen, Wirtschaftsdialog) und des Europäischen Gerichtshofs (Auslegung von EU- und Nicht-EU-Instrumenten) (institutionelles Gleichgewicht)
– Rolle der Euro-Gruppe
– Prognose für eine Rolle der nationalen Parlamente
– Rolle der Zivilgesellschaft

5. Frage
Wird die EU rechtlichen Herausforderungen in Bezug auf die Finanzmarktregulierung und -aufsicht gegenüberstehen und, wenn ja, welchen?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Auswirkungen des europäischen Systems einer Finanzmarktregulierung und -aufsicht auf die Wirtschafts- und Währungspolitik
– Notwendigkeit zusätzlicher Finanzmarktregulierungen (Bereiche?)
– Notwendigkeit einer (weiteren) Überarbeitung der Finanzmarktaufsicht in der EU und/oder dem Euro-Währungsgebiet
– Notwendigkeit einer Unterscheidung zwischen Mitgliedstaaten innerhalb und außerhalb des Euro-Währungsgebiets
– Notwendigkeit eines zentralisierteren Aufsichtssystems (d. h. eines einheitlichen Aufsichtsmechanismus)

– Notwendigkeit eines einheitlichen Abwicklungsmechanismus, einschließlich eines gemeinsamen (steuerlichen) Rettungsmechanismus
– Notwendigkeit von stärker harmonisierten und/oder stärker zentralisierten Einlagensicherungssystemen

2.2 Rechtsordnungen der Mitgliedstaaten

6. Frage
Welchen rechtlichen Herausforderungen stehen Mitgliedstaaten im Euro-Währungsgebiet, Mitgliedstaaten im Vorzimmer des Euro-Währungsgebiets und Mitgliedstaaten, die zumindest vorläufig auf eine Teilnahme an der gemeinsamen Währung verzichten, in Bezug auf das nationale Steuerrecht und geltende Haushaltsprozesse gegenüber, die sich aus den verschiedenen europäischen Sofortmaßnahmen (Europäischer Finanzstabilisierungsmechanismus, Europäische Finanzstabilitätsfazilität) und den langfristigen Reformmaßnahmen (z. B. Sechserpack, Zweierpack, Vertrag über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, Vertrag zur Errichtung des Europäischen Stabilitätsmechanismus) ergeben?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Auswirkungen der Verpflichtungen aufgrund von EU- und Nicht-EU-Instrumenten (z. B. im Zusammenhang mit dem Europäischen Semester, Haushaltsrahmen für Mitgliedstaaten, Verfahren bei einem makroökonomischen Ungleichgewicht, Möglichkeit von (un)verzinslichen Einlagen, Regel des ausgeglichenen Haushalts und der Schuldenbremse, finanzielle Konsolidierungsprogramme (Konditionalität) im Rahmen von EFSM/EFSF/ESM) auf nationale Rechtsordnungen
– Auswirkungen der Verpflichtungen aufgrund von EU- und Nicht-EU-Instrumenten auf die autonome Beschlussfassung in wirtschaftspolitischen Bereichen
– Rolle der nationalen Parlamente (einschließlich der Rolle der verschiedenen Kammern in parlamentarischen Zwei-Kammer-Systemen)
– Rolle der zentralen und regionalen Regierungen
– Auswirkungen des Vertrags zur Errichtung des Europäischen Stabilitätsmechanismus auf u. a. die Rolle der nationalen Parlamente im Haushaltsprozess (d. h. im Falle der Anwendung von Artikel 4 Absatz 4 des Vertrags) der Mitgliedstaaten im Euro-Währungsgebiet und der Mitgliedstaaten im Vorzimmer des Euro-Währungsgebiets

– Auswirkungen des Euro-Plus-Pakts und Europa 2020

7. Frage
Sind Änderungen auf Mitgliedstaatsebene zur Gewährleistung der demokratischen Legitimität und Rechenschaftspflicht der wirtschaftspolitischen Steuerung in der Wirtschafts- und Währungsunion erforderlich und, wenn ja, welche?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Derzeitige Mechanismen zur Sicherung von demokratischer Legitimität und Rechenschaftspflicht in der Wirtschaftspolitik
– Auswirkungen der Umsetzung von finanziellen Konsolidierungsprogrammen gemäß dem ESM-Vertrag (Konditionalität) auf nationales Verfassungsrecht
– Rolle der nationalen und regionalen Regierungen und Parlamente sowie anderer öffentlicher Institutionen/Körperschaften
– Rolle der Zivilgesellschaft

8. Frage
Wie wurden die Verpflichtungen aufgrund des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, insbesondere diejenigen im Sinne von Artikel 3 Absatz 1, 4, 5 und 6, in die nationalen Rechtsordnungen eingebunden?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Art und Anwendungsgebiet von Rechtsinstrumenten, die von Mitgliedstaaten im Euro-Währungsgebiet zur Umsetzung der Verpflichtungen verwendet werden
– Auslegung der Verpflichtungen gemäß Artikel 3 Absatz 1, 4, 5 und 6
– Auswirkungen des Vertrags auf Mitgliedstaaten außerhalb des Euro-Währungsgebiets (z. B. Umsetzung von Vorschriften in Erwartung des Beitritts zum Euro-Währungsgebiet)
– Vereinbarkeit mit geltenden nationalen Vorschriften über eine gesunde (ausgeglichene) Haushaltslage (Schuldenbremse)

9. Frage
Wurde vor einem nationalen Gericht (oberstes Gericht oder Verfassungsgericht) gegen EU- oder Nicht-EU-Instrumente zur Bewältigung der Schuldenkrise im Euro-Währungsgebiet geklagt? Wenn ja, mit welcher Begründung und welchem Ergebnis?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
- Probleme aufgrund von bilateralen Krediten an Griechenland, Verordnung (EU) Nr. 407/2010 vom 11. Mai 2010 zur Einführung eines europäischen Finanzstabilisierungsmechanismus (EFSM), Rahmenabkommen mit der Europäischen Finanzstabilitätsfazilität (EFSF) oder jeder nationale Rechtsakt, der die Rechtsgrundlage für Finanzhilfen unter dem EFSM bereitstellt
- Probleme aufgrund der fünf Verordnungen und der einen Richtlinie des Sechserpacks
- Probleme aufgrund der beiden Verordnungen des Zweierpacks
- Probleme aufgrund des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion oder nationaler Ratifizierungsinstrumente
- Probleme aufgrund des Vertrags zur Errichtung des Europäischen Stabilitätsmechanismus oder nationaler Umsetzungsvorschriften

10. Frage
Welchen spezifischen rechtlichen Problemen stehen Mitgliedstaaten außerhalb des Euro-Währungsgebiets, d. h. Mitgliedstaaten im Vorzimmer des Euro-Währungsgebiets und Mitgliedstaaten, die zumindest vorläufig auf eine Teilnahme an der gemeinsamen Währung verzichten, aufgrund des Aufkommens (in erster Linie aufgrund von Artikel 121 Absatz 6, 126 Absatz 14 und 136 AEUV sowie zwischenstaatlichen Verträgen) einer stetig differenzierteren wirtschaftspolitischen Steuerung in den Mitgliedstaaten im Euro-Währungsgebiet gegenüber?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
- Einfluss von Mitgliedstaaten außerhalb des Euro-Währungsgebiets auf neue bereits erlassene bzw. noch zu erlassende Rechtsvorschriften
- Einfluss von Mitgliedstaaten außerhalb des Euro-Währungsgebiets auf Politik und Beschlussfassung in Verbindung mit der neuen wirtschaftspolitischen Steuerung
- Druck zur Einhaltung von Maßnahmen, die de jure nur für Mitgliedstaaten im Euro-Währungsgebiet gelten

– Auswirkungen der neuen wirtschaftspolitischen Steuerung (Verfahren bei einem makroökonomischen Ungleichgewicht, Vertrag über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion) für das Anwendungsgebiet bzw. die Gültigkeit der Konvergenzkriterien (Artikel 140 Absatz 1 AEUV)
– Auswirkungen des neuen Systems für die Finanzmarktregulierung und -aufsicht auf Vorschriften des Binnenmarkts (und andere Bereiche der EU-Politik), die für alle EU-Mitgliedstaaten gelten

3 Währungspolitik

11. Frage
Hat die Europäische Zentralbank bei ihrer Reaktion auf die Schuldenkrise im Euro-Währungsgebiet in Übereinstimmung mit ihrem gesetzlichen Auftrag gemäß primärem EU-Recht gehandelt?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Primäre und sekundäre Ziele der EZB
– Verbot von Kreditfazilitäten (Artikel 123 AEUV und 7. Erwägungsgrund des Einleitungsteils zur Verordnung (EG) Nr. 3603/93 des Rates vom 13. Dezember 1993, Artikel 18.1 der Satzung des ESZB und der EZB)
– Gesetzlich gesicherte Unabhängigkeit der EZB
– Geldpolitische Maßnahmen der EZB während der Krise (z. B. Vorschriften für Sicherungsgeschäfte für die langfristige Refinanzierung, Programm für die Wertpapiermärkte, endgültige geldpolitische Transaktionen)
– Rechtliche Auflagen zur Bereitstellung von Liquiditätshilfen im Krisenfall
– Gesetzliche Regelungen für die Verteilung von Risiken und Verlusten innerhalb des Eurosystems

12. Frage
In Anbetracht des vorrangigen Ziels gemäß Artikel 127 Absatz 1 AEUV, welche Rolle kann die EZB aus juristischer Sicht bei der Beaufsichtigung von Kreditinstituten (Finanzaufsicht auf Mikroebene) spielen und wie kann dies mit einer Rolle als Unterstützer der Stabilität des Finanzsystems (Finanzaufsicht auf Makroebene) verknüpft werden?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
- Vorschlag der Europäischen Kommission für einen einheitlichen Aufsichtsmechanismus für Banken (Bankenunion) und insbesondere die Vorschläge zur Übertragung von bestimmten Aufgaben betreffend Maßnahmen in Verbindung mit der Beaufsichtigung von Kreditinstituten auf die Europäische Zentralbank[7]
- Anwendungsbereich von Artikel 127 Absatz 6 AEUV
- Restriktionen für Mitgliedstaaten außerhalb des Euro-Währungsgebiets
- Vereinbarkeit der verschiedenen Aufgaben und Ziele der EZB (Geldpolitik, Finanzaufsicht auf Mikro- und Makroebene)
- Möglichkeit von Interessenkonflikten und anderen Risiken aufgrund der Zusammenlegung von Kompetenzen
- Verhältnis zwischen der EZB und nationalen Zentralbanken
- Erfahrungen aus der Zusammenlegung von Kompetenzen in anderen Politikbereichen (z. B. EU-Wettbewerbsrecht)
- Fragen zur Rechenschaftspflicht

13. Frage
Wie lassen sich die gesetzlich verankerten Ziele der EZB umdefinieren?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
- Ein Ziel oder mehrere Ziele (unter Berücksichtigung von beispielsweise Artikel 2A des Gesetzes über ein Zentralbanksystem – *Federal Reserve Act* – in den USA)
- Rolle der EZB als Behörde für eine einheitliche Geldpolitik im Euro-Währungsgebiet
- Rolle der EZB bei der Finanzaufsicht auf Mikro- und Makroebene
- Funktion als Kreditgeber letzter Instanz

7. Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank (KOM/2012/511 endgültig). Siehe auch Vorschlag für eine Verordnung des Europäischen Menz und des Rates zur Änderung der Verordnung (EU) Nr. 1093/2010 zur Errichtung einer Europäischen Aufsichtsbehörde (Europäische Bankenaufsichtsbehörde) hinsichtlich ihrer Wechselwirkungen mit der Verordnung (EU) Nr. .../ ... des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank (KOM/2012/512 endgültig).

14. Frage
Kann der Europäische Gerichtshof eine Rolle bei der Auslegung und Anwendung von primärem und sekundärem EU-Recht zur Geldpolitik spielen und, wenn ja, welche?

Berichterstatter werden gebeten, u. a. Folgendes zu berücksichtigen:
– Gerichtliche Überprüfung von Entscheidungen zur Geldpolitik
– Gerichtliche Überprüfung von Offenmarkttransaktionen

4 Offene Frage

15. Frage
Welche anderen vorrangigen juristischen Überlegungen machen sich auf EU- oder nationaler Ebene in Bezug auf konstitutionelle und institutionelle Aspekte der wirtschaftspolitischen Steuerung in der EWU geltend, die nicht durch die obigen Fragen abgedeckt sind?

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General report

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I Introduction

The XXVI FIDE Congress 2014 takes place at a time when the effects of the European financial and sovereign debt crisis have anything but abated many Member States. The European Union (EU) and its Member States at times continue to find themselves forced to react to current developments in a rather makeshift fashion, while at the same time seeking structural remedies for the serious shortcomings of the Maastricht regime of economic policy coordination in Economic and Monetary Union (EMU) that the crisis has revealed.

Since the start of the European financial and euro area debt crisis this regime, which had been criticized from the very outset for its inability to ensure economic convergence namely between the Member States that share a single currency and which is held at least partly responsible for the current situation in the euro area, has undergone profound changes. Troika, Six-Pack, Two-Pack, TSCG and ESM are just a few main cues describing new economic governance in EMU. Driven by (a sense of) urgency and confined by the boundaries of the political and practically possible, next to supranational, also intergovernmental and even private law instruments have been utilised in an attempt to strengthen the existing governance framework primarily laid down in Title VIII of the Treaty on the Functioning of the European Union (TFEU) and namely its chapter 1 on economic policy.

This has arguably created a somewhat confusing picture of the current state of economic policy integration in the Union. On the one hand primary Union law and namely Articles 119 (1) and 120 TFEU continue to refer to the economic policies *of the Member States*. Moreover, Articles 121 and 126 TFEU basically describing the multilateral surveillance and excessive deficit procedure, as well as the associated Protocol on the Excessive Deficit Proce-

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dure itself,[2] have not been changed since the Treaty of Lisbon. On the other hand it is hardly an exaggeration to conclude that the Union and non-Union legal instruments that have been adopted to address the European financial and sovereign debt crisis, commencing with the financial support to Greece in the spring of 2010, call for the rewriting of handbooks on EMU. At a general level evidence for this view can be found for example in the introduction of the explicit balanced-budget rule for the contracting Member States of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[3] that arguably goes beyond what can be deduced from Article 126(1) TFEU in conjunction with the Protocol on the Excessive Deficit Procedure. At the more concrete implementation level this is highlighted by the introduction from 2011 of the so-called European Semester,[4] and thereafter the Six-Pack and Two-Pack legislation[5] that have profoundly changed the European economic policy coordination framework.[6]

2. Protocol No. 12 on the excessive deficit procedure, OJ 2008, C 115/279. See also Council Regulation 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, OJ 2009, L 145/1 (as amended), which does however not concern the reference values itself. (Codified version) (OJ L 145, 10.6.2009, p. 1).
3. T/SCG/en 1, signed on 2 March 2012 by all Member States with the exception of the Czech Republic and United Kingdom. Croatia, joined the EU on 1 July 2013.
4. See European Commission, *Mastering economic interdependence: Commission proposes reinforced economic governance in the EU*, Press release of 12 May 2012 (IP/10/561); European Commission, *EU economic governance: the Commission proposes a reinforced macro-economic, budgetary and structural surveillance*, Press release of 30 June 2012 (IP/10/859); European Council Conclusions of 16 September 2010 (EUCO 21/1/10 REV 1); Report of the Task Force to the European Council, 'Strengthening Economic Governance in the EU', Brussels, 21 October 2010, online available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf> accessed on 1 March 2014.
5. Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013 L 287/63; Regulation 1022/2013 amending Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation No 1024/2013, OJ 2013 L 287/5.
6. Next to the before-mentioned provisions of primary Union law this concerns namely Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 1997 L 209/1, as amended by Regulation 1055/2005 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2007 L 174/1; Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209/6, as

The European (regulatory) response to the European financial and sovereign debt crisis moreover has not been confined to economic policy. Firstly, the European Central Bank (ECB) could be seen engaging in crisis management and resolution in the shape of what the Bank describes as 'non-standard monetary policy measures'.[7] Secondly, a considerable amount of regulatory energy has also been put into the construction of a European financial supervisory system eventually resulting in the introduction of a Single Supervisory Mechanism (SSM), therewith not only acknowledging the complicity of the prior *Lamfalussy* architecture in the course of events, but more generally the close link between economic and monetary policy in the euro area and financial stability.

These measures that have been taken in response to the crisis arguably have implications for the future of European integration that reach far beyond the scope of EMU and financial market regulation and supervision, ranging from the integrity of the internal market to the very characteristics of the EU as a supranational legal order. It is for this reason that FIDE's 2014 General Topic 1 on EMU aims at examining the constitutional and institutional aspects of the economic governance in the Union and namely its consequences for the Union legal order and the legal orders of the Member States. A deep understanding of the impact of these developments is not only vital for building sustainable economic governance structures in the medium to long term, as has been noted already in the introduction to the Questionnaire for this topic, but arguably also for deciding on the broader issue of what future direction European integration should take.

In order to provide some structure and to make it more accessible the Questionnaire has been divided roughly into two parts with two subparts each differentiating between questions linked to economic and monetary policy and for each of these parts whether they refer to the Union or national legal framework. However, as becomes clear from the discussions in the context of many questions, any such differentiation is bound to be somewhat artificial, as it does not reflect the close interdependence of all four areas. In fact, if anything, the European financial and sovereign debt crisis has highlighted the close interconnectedness of economic and monetary policy, as well as devel-

amended by Regulation 1056/2005 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2005 L 174/5.

7. P. Cour-Thimann and B. Winkler, *The ECB's non-standard monetary policy measures the role of institutional factors and financial structure*, ECB Working Paper, Series No. 1528 / April 2013.

opments on the financial market. Moreover, the developments at the Union level are inseparable from those at the national level and vice versa.

The general report is based on one institutional report drafted by a member of the legal service of the European Commission and 17 national reports, 10 of which have been submitted by national federations representing euro area Member States and 6 from non-euro area Member States. Moreover one third country report has been submitted. As could be expected the reports differ considerably. Some reports do not address all of the 14 substantive questions *inter alia* referring to the euro-area or Union specific nature of the question. Most reports concentrate on illuminating certain legal issues, while not referring to others, the latter of which may be the focus in other reports.[8] This may be partly due to the rather strict page limits set by the organizers to which some national rapporteurs have taken a more flexible approach than others. What is more, some national reports explicitly refer to the prevailing legal opinions among academia and policy-makers, whereas other reports make use of the open and exploratory phrasing of the Questionnaire to offer a legal assessment that (also) reflect the learned opinions of the rapporteurs. From all these observations it becomes clear that this general report cannot provide more than an impressionistic and patchy account of the prevailing legal discussions and opinions in the countries that are covered by national reports.

It also needs to be stressed that it has been deliberately chosen to keep the structure of the Questionnaire intact and to let this general report be a reflection of the responses provided in the national reports rather than a legal essay occasionally referring to the former. In structuring and summarizing the main observations made in the national reports and – to some degree – to put them in context, the general report quotes from the national reports whenever possible in order to adequately reflect the (legal) analyses and opinions voiced therein. It is readily admitted that there is some overlap of the scope of some questions, depending on the way in which they are interpreted. The general report endeavours to avoid any repetitions by occasionally discussing responses in the context of another question than the one for which they have been provided for in the national report.

Before finally turning to the discussion of the questions and responses, a general disclaimer is called for. This general report neither aspires to provide an all-embracing account of the constitutional and institutional framework pertaining to EMU and all (potential) legal questions linked thereto, nor to fill

8. Question 15 was expressly included as a reserve question to allow for any additional comments not fitting any of the previous questions.

the inevitable gaps in the reporting, to critically question or comment on all the (legal) arguments offered in the reports, or to provide an overview of the growing body of literature that – at times – is referred to in the national reports.[9]

II Economic policy (coordination) in Economic and Monetary Union

European Union legal order

Question 1

To what extent does primary Union law allow for the adoption of the EU and non-EU instruments that have been agreed upon in response to the euro area debt crisis?

1. Background*: crisis management and reforms measures in conformity with Union law?*

In recent years economic governance in EMU has awakened from a rather static existence to become one, if not the most volatile area of law and policy of the supranational European legal order. Commencing with the financial assistance to Greece in May 2010 numerous measures have been taken both within and outside the EU legal framework at an unprecedented speed and – at least in the field of European economic and monetary policy – also in an unprecedented quantity and magnitude.

In principle three categories of measures may be differentiated that roughly coincide with the chronology of events. First of all there are the *ad hoc* and temporary crisis response measures both inside and outside the Union legal framework and namely the bilateral loans to Greece,[10] the establishment of temporary financial assistance facilities in the shape of the European Finan-

9. While some national reports in answering questions referred to monographs or other publications, it has been considered beyond the scope of this general report to also structurally include the findings of these and other relevant publications.

10. For an historical overview for Greece see Greek Report, question 9.

cial Stabilisation Mechanism (EFSM)[11] and the European Financial Stabilisation Facility (EFSF).[12] The second category includes the reform measures *within* the Union legal framework to structurally enhance the Maastricht legal framework on economic policy coordination in EMU, namely in the shape of the two legislative packages referred to as Six-Pack[13] and Two-Pack.[14] Finally, the third category includes measures adopted *outside* the Union legal framework to structurally enhance economic governance in EMU, namely the two intergovernmental treaties in the shape of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[15] and the Treaty establishing the European Stability Mechanism (ESM Treaty).[16]

From the start the activities of the Union institutions and Member States relating to *ad hoc* crisis measures and the structural reform of economic governance were surrounded by an aura of doubt concerning the compatibility of

11. EFSF Framework Agreement between Belgium, Germany, Ireland, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Slovakia, Finland, Greece and European Financial Stability Facility, 7 June 2010. Articles of Incorporation of 15 December 2010.
12. Council Regulation 407/2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1.
13. Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, OJ 2011 L 306/1; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ 2011 L 306/8; Regulation 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2011 L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ 2011 L 306/25; Council Regulation 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2011 L 306/33; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States, OJ 2011 L 306/41.
14. Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ 2013, L 140/1; Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ 2013, L 140/11.
15. T/SCG/en 1. Available at <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf> accessed 1 March 2014.
16. T/ESM 2012/en 1. Available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> accessed 1 March 2014.

these measures with Union law. This related first and foremost to the compatibility of the financial assistance to Greece and shortly thereafter also Ireland and Portugal namely with the prohibition of monetary financing provided for in Article 123(1) TFEU and the so-called no-bail out clause included in Article 125 TFEU. Secondly, the legal bases of the EFSM, as well as of several of the secondary Union law measures that have been adopted as part of the Six-Pack and Two-Pack have been subject to debate. Here the main question has been whether the scope of Articles 122(2) TFEU[17], Article 121(6) TFEU[18], Article 126(14)[19], as well as Article 136 TFEU in conjunction with Article 121 (6)[20] actually allow for the measures that have been adopted and, moreover, whether these measures are otherwise compatible with existing primary Union law.

With regard to the two intergovernmental treaties that have been concluded by a majority, albeit not all Member States, arguably the most evident question – at least prior to the preliminary ruling of the CJEU in *Pringle* – was whether and to what extent the Member States are allowed to act outside the Union legal framework in establishing a set of rules that have as their objective to strengthen the economic governance framework foreseen in Title VIII TFEU and corresponding secondary Union law. Moreover, the compatibility of these measures with Union law, including namely the conferral by these treaties of tasks to Union institutions has been questioned.

2. Responses*: seeking the outer limits of Union law and beyond(?)*

Of the three categories of measures identified above, most national reports focus on the structural reform measures that have been adopted inside and outside the Union legal framework, while to a somewhat lesser degree commenting on the bilateral loans granted to Greece and the establishment of the EFSM.

17. EFSM Regulation.
18. Regulation 1175/2011 and Regulation 1176/2011.
19. Regulation 1177/2011 and Council Directive 2011/85/EU.
20. Regulation 1173/2011, Regulation 1174/2011, Regulation 472/2013 and Regulation 473/2013.

2.1 Ad hoc and temporary crisis measures inside and outside the Union legal framework

The Institutional report implicitly recognizes the *ad hoc* character of the initial measures that were taken as a response to the (emerging) crisis, observing that:

> 'When the euro area crisis erupted, strong measures of solidarity and of reinforced coordination within the euro area were felt necessary, but the Union was cruelly missing adequate legal basis for their adoption.'[21]

In a similar vein, the rapporteurs of the Swedish report find that 'there was no clear legal basis for the EU to financially bail [member states] out of the crisis'[22], and the Greek report even goes so far as to state that 'Treaties' provisions hindered the adoption of decisive measures which could alleviate the consequences of the crisis and tackle issues of legal certainty and predictability throughout the Eurozone'.[23]

Only very view national reports take issue with the soundness of Article 122(2) TFEU as a legal basis for the establishment of the EFSM. In the Polish report it is argued that Article 122(2) TFEU is 'not a reliable basis for establishing financial rescue schemes' and that 'it could be argued [...] that it was used for setting up of the European Financial Stabilisation Mechanism only because no better legal anchor existed when it turned out that some euro-area Member States had merged into a balance of payment crisis'[24] The authors of the Swedish report question whether the conditions for the application of Article 122(2) TFEU and mainly the requirement of the existence of severe difficulties caused by natural disasters or exceptional occurrences beyond the control of the Member State in question was meet, arguing that 'the debt crisis in most countries was a man-made financial disaster'.[25]

Other rapporteurs consider Article 122(2) TFEU to be an adequate legal basis.[26] To this end the German report observes that the global financial and economic crisis was beyond the control of any one country and, moreover, that a contributory negligence on part of a Member State in distress does not

21. Institutional Report, p. 183.
22. Brackets added. Swedish Report, p. 576.
23. Greek Report, p. 376.
24. Brackets added. Polish Report, p. 487.
25. Swedish Report, p. 576. Doubts are also raised in the Croatian Report, p. 283.
26. See e.g. the Greek Report, p. 377, with reference to relevant literature.

exclude the application of this provision.[27] This view is supported in the Institutional report, which on the point of the interpretation of the phrase 'beyond the control' states that the Council 'developed, quite reasonably, a less rigorous interpretation. It considered that the crisis was 'unprecedented' and was of such a magnitude that it could be considered in itself as an exceptional occurrence beyond the Member states control'.[28] The authors of the Portuguese report consider that Article 122(2) should have also been utilized for the financial assistance to Greece and is rather critical of the solution that has been chosen instead, arguing that 'the European Commission refused to accept this possibility, leading to the atypical solution of resorting simultaneously to credit by the IMF and the EU.'[29] In this context it can be noted that the CJEU in its preliminary ruling in *Pringle* has emphasised that 'nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State'.[30]

Both the German and Institutional report also answer the question in the positive, whether Article 122(2) TFEU supports the establishment of a general, albeit temporary legal framework, such as has been done with the EFSM, rather than only the decisions to grant financial assistance on a case-by-case basis.[31] The German rapporteur observes in this context that Article 122(2) TFEU allows for the adoption of general (procedural) rules for the granting of financial assistance, as long as the conditions stated in that provision are met on each occasion.[32] A somewhat different interpretation is given by the Swedish rapporteurs who argue that this provision 'could be invoked to rescue only a specific Member State and not the currency region as a whole'.[33]

As to the compatibility with primary Union law and namely Articles 123-125 TFEU of the financial assistance granted bilaterally or as part of the temporary financial assistance mechanism provided for by the EFSM and EFSF, several rapporteurs refer to the findings of the CJEU in *Pringle.* Indeed, in the context of the review of the compatibility of the ESM Treaty with primary Union law the Court offers an interpretation of Articles 123 and 125 TFEU

27. German Report, p. 343.
28. Institutional Report, p. 186.
29. Portuguese Report, p. 502.
30. Case C-370/12 *Pringle* [2012] ECR I-nyp, para. 120.
31. For a brief genesis of Article 122 TFEU see Institutional Report, p. 183 et seq.
32. German Report, p. 343, with reference to relevant literature. See also Institutional Report, p. 185.
33. Swedish Report, p. 576.

that arguably equally applies to the EFSM and EFSF. The CJEU namely finds that 'Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States' and moreover that:

'The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.'[34]

With regard to Article 125 TFEU the Court states that 'that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State', as this provision only prohibits the assuming of or liability for existing commitments of Member States.[35] However, there cannot be an unconditional granting of financial assistance. Referring to the rationale of the prohibition of Article 125 TFEU, namely to ensure 'that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline', the Court emphasized that Article 125 TFEU 'prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished.'[36] Consequently the Court considers financial assistance only to be permissible if 'indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.'[37] The rapporteur of the Institutional report argues in this context that the inclusion of both Articles 125 and 122 TFEU in the Treaty was political compromise and that Article 122 can be perceived as 'an implicit derogation to the 'no bail out'.'[38]

The CJEU's reading of Articles 123 and 125 TFEU is supported by many rapporteurs.[39] The authors of the UK report may actually express a general moot when stating somewhat assertively that:

'Art. 125 TFEU is designed to further the success and survival of monetary union, not to destroy it.'[40]

34. Case C-370/12, *Pringle* (spra, n. 30), para. 125.
35. Ibid, para. 130.
36. Ibid, paras 135-136.
37. Ibid, para. 136.
38. Institutional Report, p. 82.
39. See e.g. Austrian Report, p. 263; German Report, p. 343; Greek Report, p. 377.
40. UK Report, p. 630, which even argues that the CJEU's reference to the conditionality 'could perhaps be seen by some as too much on the side of an 'austerity Union'.'

Nevertheless scepticism prevails in some national reports. The rapporteurs of the Finnish report indirectly critics the CJEU's preliminary ruling for its 'inconsistencies and violations of economic rationalities'.[41] The author of the Austrian report takes a broader approach to the issue. While supporting a broad reading of Article 125 TFEU the rapporteur argues that the crisis has highlighted that the reliance on the corrective force of markets that stands at the basis of Article 125 TFEU and, one may add also Articles 123 and 124 TFEU, was ill-conceived and 'a structural defect of EMU'.[42]

The Swiss report highlights that the problems with the EU faced with regard to finding the appropriate instruments for the crisis response measures were not unique. As a formal legal basis allowing government to purchase shares in an ailing Swiss credit institution were absent and could moreover also not be created in time, the measure had to be based on emergency powers provided in the Swiss Federal Constitution to safeguard the interest of the country and the internal security.[43]

2.2 Structural reform measures: within the Union legal framework

Turning first to the appropriateness of the several legal bases chose for the Six-Pack and Two-Pack measures the national reports are mainly supportive of the view that Articles 121(6), 126(14) and 136 in conjunction with 121(6) TFEU are viable legal bases.[44] Both the authors of the German report and the Institutional report in this context focus on the scope of Article 136(1) TFEU as the co-legislative basis for some of the measures. The German report refers to arguments raised in the German legal debate that these measures result in a modification of the multilateral surveillance and excessive deficit procedure as foreseen in primary Union law, whereas Article 136(1) TFEU is limited to the adoption of measures 'in accordance with the relevant provisions of the Treaties'. However, the rapporteur rebuts this interpretation of Article 136(1) TFEU as too narrow, arguing that this phrase may in fact also 'be understood in such a way that it only refers to the material scope of [Articles 121 and 126 TFEU], but not to the provisions in their entirety (that is conditions, possible legal consequences and applicable decision-making procedures)'.[45] The Insti-

41. Finnish Report, p. 321.
42. Own translation. Austrian Report, p. 263, with reference to relevant literature.
43. Swiss Report, p. 603.
44. See e.g. Spanish Report, p. 547, which states in rather general term that 'there is no doubt about their legal soundness'.
45. Own translation. Brackets added. German Report, p. 344.

tutional report seconds this view by pointing out that a restrictive interpretation of the provision would mean that the euro area Member States cannot make use of existing Union competences, whereas 'a more dynamic and teleological interpretation' entails that 'binding measures going further than what is envisaged by Articles 121 and 126' can be adopted, 'provided they remain adequate and proportionate'.[46]

At the same time the authors of several national reports consider the actual scope of the economic governance regime that has been introduced by the Six-Pack and Two-Pack as the outer limits of what is legally possible. Thus, for example, the Finish rapporteurs observe that 'the preliminary conclusion would be that the measures taken by the EU and its Member States could mostly be defended although with substantial stretching of the interpretational limits'.[47] In a similar vein the Dutch rapporteurs observe that 'primary law has been stretched to (almost) its limits in issues such as voting procedures, sanctions, competences and institutional balance'.[48] Interestingly, the Finnish report states that the issue may not be so much the legality of the individual measures, but rather 'the combination of actions and their relation with the principles of the European economic constitution that raises the main worries.'[49]

Despite a generally positive evaluation of the choice of legal bases, the Institutional rapporteur does voice some doubts about the choice of Article 126(14) TFEU as a legal basis, which in its third paragraph allows for the adoption by the Council on a proposal from the Commission and after consulting the European Parliament of detailed rules and definitions for the application of the Protocol on the Excessive Deficit Procedure annexed to the treaties. Referring to Council Directive 2011/85/EU, which forms part of the Six-Pack, he argues:

> 'It was indeed not obvious that this provision was a sufficient legal basis for harmonizing national budgetary procedures with the goal of assuring 'uniform compliance with budgetary discipline'.'[50]

In fact, as is also pointed out in the Institutional report, the very same procedure was already applied for the adoption Regulation 1467/97 and, one may

46. Institutional Report, p. 191.
47. Finnish Report, p. 321.
48. Dutch Report, p. 465.
49. Finnish Report, p. 323.
50. Institutional Report, p. 194.

add, also for the 2005 revision of this Regulation.[51] It can be observed in this context that this choice of legal basis was already questioned at the time of the adoption of the Stability and Growth Pact.[52]

2.3 Structural reform measures outside the Union legal framework

As has been noted above, one of the most distinctive characteristics of the new approach to economic governance is the use of intergovernmental instruments to enhance the Union legal framework on EMU. Arguably the most fundamental legal question arising in this context has been whether and to what extent Member States are actually free to conclude such agreements considering their obligations under primary Union law. Indeed, the material scope both of the TSCG and the ESM Treaty are close linked to Title VIII TFEU and the corresponding secondary Union law, mainly in the shape of Regulations 1466/97 and 1467/97, as well as the Six-Pack and Two-Pack. For the TSCG this becomes already clear from its Article 1, according to which the aim is:

> 'to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion'.

For the ESM Treaty this link becomes apparent from the fact that its aim is to safeguard the subsistence of EMU by allowing for the granting of financial assistance when necessary to safeguard the financial stability of the euro area as a whole and of its Member States.[53] Moreover, there is a clear link to the objectives stated in the TSCG, as the granting of financial assistance is made subject to the ratification of the latter and compliance namely with the balanced budget rule of Article 3(2) TSCG.[54]

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51. Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997, L 209/6; Council Regulation 1056/2005 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 2005, L 174/5.
52. F. Amtenbrink, J. de Haan and O.C.H.M. Sleijpen, 'The Stability Pact – Placebo or Panacea?' *European Business Law Review* 8 (1997), pp. 202-210 and 233-238.
53. Article 3 ESM Treaty.
54. As stated in the preamble to the TSCG.

As far as the compatibility of the ESM Treaty with Union law is concerned the majority of national reports extensively refer to the CJEU's preliminary ruling in *Pringle*. In addition to what has been observed with regard to Articles 123 and 125 TFEU above, the CJEU considered that the material scope of the ESM is not linked to monetary policy and thus a policy field for which the Union holds an exclusive competence pursuant to Article 3(1)(c) TFEU. The Court observes that:

'it is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[55]

Moreover, in the opinion of the CJEU:

'Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.'[56]

The material scope of the ESM Treaty is thus considered to be linked to economic policy for which the EU, as becomes clear from Article 5 TFEU, neither has an exclusive nor shared competence; an area in which according to the CJEU Member States 'are entitled to conclude an agreement between themselves for the establishment of a stability mechanism'.[57]

Not all national rapporteurs are (entirely) convinced of this reading of the ESM Treaty. The author of the Polish report observes that the CJEU 'is ready to accept an accommodative reading of the Treaty provisions as long as this could improve the financial stability' and 'even when the literary interpretation suggests a conflict'.[58] Arguably the UK rapporteurs offer the most substantiated critique, as they consider the CJEU's approach 'unpersuasive'.[59] Arguments are submitted supporting the view that the material scope of the ESM, and namely its aim, is covered by the scope of monetary policy. In the opinion of the rapporteurs this would not have rendered an application of Article 136(3) TFEU void, as 'the EU's empowerment [through Article 136(3)

55. Case C-370/12, *Pringle* (supra, n. 30), para. 96.
56. Ibid, para. 56.
57. Ibid, para. 68.
58. Polish Report, p. 488.
59. UK Report, p. 626.

TFEU] turns the use which the Member States make of that empowerment into a form of implementation of EU law, with all that this involves in terms of the application of relevant EU law principles', the advantage of such an approach being that 'the ESM Treaty would be regarded as fully subject to EU law' and 'much less intergovernmental that it is conceived at present.'[60] The restrictive interpretation of the Union's exclusive competence in the area of monetary policy is also noted in the Austrian report, whereby the rapporteur states that the Court's interpretation could become 'extremely problematic' for the future of the Union.[61]

The authors of the UK report are also highly critical of the CJEUs dealing with Article 3(2) TFEU and namely the question, whether the ESM Treaty has to be considered an agreement that 'may affect common rules or alter their scope', which would establish an exclusive competence for the Union. Firstly, they observe that in reviewing the ESM Treaty under Article 3(2) TFEU the CJEU is in fact applying this provision to *inter-se* agreements, whereas Article 3(2) refers to the conclusions of international agreements by the Union.[62] Moreover, the rapporteurs take issue with the way in which the CJEU has applied the *AETR* principle enshrined in Article 3(2) TFEU, observing that 'its application of that principle was most cursory and not in line with the implied powers case law'.[63] In fact, for the reasons stated above, the authors consider that 'the ESM Treaty is sufficiently close to EU law norms to be capable of 'affecting' them or 'altering their scope'.'[64]

A number of national reports also question whether the ESM Treaty is actually covered by the scope of Article 136(3) TFEU. The Dutch report in this context refers to the findings of the Dutch Council of State (*Raad van State*) in its advice to government. Firstly, the Council of State has noted that Article 3 ESM Treaty, which does not only refer to the financial stability of the euro area 'as a whole', but also 'of its Member States' seems to have a broader scope than Article 136(3) TFEU, which does not refer to the individual Member States.[65] Moreover, while the latter provision foresees in 'a stability mechanism to be activated if indispensable to safeguard the financial stability

60. Brackets added. Ibid, p. 626.
61. Own translation. Austrian Report, p. 263.
62. UK Report, p. 627, with further references.
63. Ibid, p. 629.
64. Ibid, p. 629.
65. Dutch Report, p. 466.

of the euro area as a whole', Article 14(1) ESM Treaty also foresees in the granting of 'precautionary financial assistance'.[66]

While the TSCG was clearly outside the scope of review in *Pringle*, it can be argued that the CJEU's preliminary ruling clearly has implications for that intergovernmental instrument as well. In the German report it is argued that the Member States were entitled to act outside the Treaty framework as a result of the Union's limited coordinating competence in matters of economic policy. At the same time the close link to Union law is recognized, as it is pointing out that the TSCG does not infringe upon, 'but rather strengthen the objectives of Union law', which is moreover secured by Article 2 of that treaty.[67]

Yet, similar to the ESM Treaty a number of national reports raise doubts about the choice to move outside the Union framework and, moreover, about the actual compatibility of the TSCG with Union law. With regard to the former, the Estonian rapporteurs argue:

> 'it is questionable whether a matter that is subject to rather extensive regulation in [the] TFEU should be completed by non EU instruments as well as decision-making mechanisms that are different from those of the EU'.[68]

Also the Portuguese report rather is critical, stating that 'it is paradoxical to decide to focus energies on drafting a new treaty [...] especially when it was determined that there was no consensus between the 27 Member States, which only weakened the solution arrived at'.[69] Moreover it is observed, 'nothing which was included in the Treaty [...] is truly innovative. And that which would truly justify a revision treaty – through the ordinary revision procedure – is absent from the Treaty.'[70] The Polish rapporteur argues that Article 136 TFEU could have functioned as legal basis 'for the golden rule and the debt brake mechanism provided for in the Fiscal Compact'.[71] In the same vein the Dutch report points out that the Dutch government has taken the position that same results could have been reached within the framework of the EU,[72] while at the same time apparently being of the opinion that 'all

66. Ibid, pp. 466-467.
67. Own translation. German Report, p. 345.
68. Brackets added. Estonian Report, p. 307.
69. Brackets added. Portuguese Report, p. 501.
70. Brackets added. Ibid, pp. 501-502.
71. Polish Report, p. 488.
72. Dutch Report, p. 467, by applying Art. 136(1) in conjunction with Art. 352 TFEU and, possibly, enhanced cooperation.

developments that came after the entering into force of the SGG (Six-Pack, Two-Pack, Banking Union) are a logic consequence of the choices made in the SGP at the end of the nineties of the previous century'.[73] On the contrary the Croatian rapporteur doubts whether all parts of the TSCG could be realized in the Union legal framework with or without making use of enhanced cooperation without Treaty amendment.[74] Returning to the issues of Union competences, the UK report suggests that if, based on Article 3(2) TFEU and the *AETR* principle, the material scope of the TSCG would be considered to fall within an exclusive competence of the Union, a treaty empowerment along the lines of Article 136(3) TFEU for the ESM would be missing for the TSCG.[75]

While acknowledging the political realities at the time of the drafting of the TSCG[76], the authors of the Swedish report find the compatibility of the substance of the TSCG with Union law problematic, arguing that the TSCG 'for example requires euro countries to either amend their national constitution or adopt special legislative measures to incorporate some of its provisions but there is no such provision in the Lisbon Treaty'.[77] According to the Dutch report the Dutch Council of State has maintained that the TSCG 'is not a complementary but parallel structure with legal obligations which for a large part overlap with the EU legal framework'.[78] Moreover concerns were voiced that the TSCG 'could undermine the normative power of the existing EU obligations'.[79] The Hungarian rapporteur refers in the context of the TSCG to 'a considerable transformation of power-arrangements in EU economic governance'.[80]

The possible overlap of the TSCG with the provisions governing the multilateral surveillance and excessive deficit procedure in Union law is discussed in several national reports. For the Portuguese rapporteurs the TSCG amounts to 'in essence, an attempt to raise the failed (not by accident) Growth and Stability Pact to the level of a treaty, in exchange for the creation of the European Stability Mechanism'.[81] In this context the Estonian rappor-

73. Ibid, p. 469.
74. Croatian Report, pp. 285-286.
75. UK Report, p. 630.
76. See in this regard also the Spanish Report, p. 547, which explicitly refers to the 'opposition of two Member States'.
77. Swedish Report, p. 577.
78. Dutch Report, p. 468.
79. Ibid, p. 468.
80. Hungarian Report, p. 427.
81. Portuguese Report, p. 502.

teur observes that the TSCG creates procedures parallel to Articles 121 and 126 TFEU that are (partially) incongruent, arguing for example that 'Art. 126(13) will lose its original meaning due to the fact that reversed qualified majority voting will be used'. [82] This point was apparently also raised by the Dutch Council of State, which has observed that Article 7 TSCG may de facto amount to an 'amendment' of the procedure laid down in Article 126 and Regulation 1467/97 for that matter that is not feasible by means of an intergovernmental treaty. At the same time the Dutch government has taken the position that Article 7 is not enforceable before the CJEU.[83] It may be observed that this issue is linked to the question of the enforceability of the decision-making procedures applicable in the excessive deficit procedure, a legal issue that has to some extent been dealt with by the CJEU in *Commission v Council*.[84] Doubts are raised in the several national reports about the compatibility of the judicial procedure provided for in Article 8 TSCG with Article 126(14) TFEU.[85]

Setting a counterpoint to these critical voices on the compatibility of the TSCG with the Union legal framework, the authors of the Italian report maintain that mainly the requirement include in Article 4 TSCG (annual reduction of debt above 60% GDP by one-twentieth per year) is 'a mere *renvoi* to Article 2 of Council Regulation (EC) No. 1467/97'.[86] Moreover, the authors of this report argue that the balanced budget rule 'entails no inconsistency with the 3% GDP threshold', as the latter is 'a ceiling which does not prevent states to commit themselves in a stricter way'.[87]

82. Estonian Report, p. 307,
83. Dutch Report, p. 468.
84. Case C-27/04 *Commission v Council* [2004] ECR I-6649.
85. Croatian Report, p. 286; Estonian Report, pp. 307-308; Slovenian Report, p. 518.
86. Italian Report, p. 453.
87. Ibid, p. 454.

Question 2

What are the constitutional and institutional implications at the European level of the use of supranational (e.g. Six-Pack, Two-Pack), intergovernmental (e.g. Treaty on Stability, Co-ordination, and Governance), private law (European Financial Stabilization Facility) and 'soft-law' (e.g. Euro Plus Pact, Europe 2020) instruments in reforming economic governance in EMU?

1. Background*: Constitutional and institutional challenges resulting from new economic governance*

As has already become clear from the introduction to this general report and moreover from the discussions in the context of question 1 is that namely the structural reform measures that have been taken to strengthen economic policy (coordination) in EMU have an enormous impact on the Union *acquis*. This is not only the case, as has been observed above, for the previously existing economic governance regime introduced into primary Union law by the Treaty on European Union and subsequent secondary law, but – at least potentially – also for the nature and main (institutional) characteristics of the supranational European legal order.

The repeated recourse to intergovernmental instruments essentially aimed at supporting the achievement of Union objectives raise questions about the effects *inter alia* on the vertical and horizontal distribution of power, the coherent application of Union law throughout the whole territory of the Union, and the application of the Community/Union method in the area of economic governance.

2. Responses*: a new 'semi-intergovernmental'*[88] *method of integration?*

The national reports engage mainly with the effects of the use of intergovernmental instruments on the Union legal order. The Italian rapporteur note that the TSCG 'brings about [...] a transformation of the project of European integration resulting from the Treaty of Lisbon, giving rise to different levels

88. The phrase is borrowed from the Institutional Report, p. 177.

of deepening of the Economic and Monetary Union'.[89] According to this view the TSCG is:

> 'a kind of 'integration core' or 'advance guard', aimed at going further in the strengthening of the EMU's economic policy, consecrating budgetary discipline in national provisions of reinforced value and accepting more intense degrees of economic policy coordination'.[90]

In the Institutional report, which offers a structured overview of main constitutional and institutional issues, it is observed that the Union response to crisis has resulted in 'the emergence of what could be called a form of 'semi-intergovernmental' method', intergovernmental by using public international law and private law instruments, but with 'a strong link and even interdependence with Union law', as mainly the involvement of Union institutions in the intergovernmental structures and the reference to the Union framework in intergovernmental instruments highlight.[91] In fact, considering the political and economic situation in which these measures have been adopted it could be added that this semi-intergovernmentalism was born out of pragmatism rather than a fundamental conviction of the parties to move economic governance outside the Union legal framework.

Yet, this pragmatism in utilizing intergovernmental instruments potentially comes at a price, as many national reports point out. The Finnish report observes that 'many of the measures adopted to maintain stability in the Euro zone may have increased fragmentation'.[92] While pointing to the advantages that intergovernmental instruments may offer in reacting to economic developments in a rapid and flexible manner, in the view of the Slovenian rapporteurs 'it can also be argued that such an approach could undermine – or even completely downplay – the mechanism of enhanced cooperation which allows the Member States to act 'within the framework of the Union's non-exclusive competences''.[93] The authors moreover point to criticism that has been voiced regarding the balance that has been struck between Union and non-Union legal instruments.[94] The Hungarian rapporteur observes that it is a 'highly sensitive question' for non-euro Member States, whether the TSCG includes measures 'that could threaten the Union's objectives of sincere co-

89. Brackets added. Italian Report, p. 504.
90. Ibid, p. 503.
91. Footnotes omitted. Institutional Report, p. 203.
92. Finnish Report, p. 323.
93. Footnote omitted. Slovenian Report, p. 520.
94. Ibid, pp. 519-520, with reference to relevant literature.

operation'.[95] In the German report it is noted that the crisis management has produced 'special regimes' which are not applicable to all Member States, but are also not limited to the euro area, as a consequence of which the integration gap between the members of the euro currency-area and the rest of the EU – mainly in the area of economic policy – has increased.'[96]

This may not only have consequences for the position of the non-euro area Member States *inter alia* in the development of the economic governance regime, as will be discussed in the context of question 6, but also for the coherent application of the Union framework on EMU. While it is noted in the Dutch report that for the Dutch government the Six-Pack, Two-Pack and TSCG 'constitute one coherent package',[97] in the Hungarian report it is argued that even the inclusion of Article 2 TSCG does not change the assessment that 'the Treaty has a significant indirect influence on primary EU law'.[98] This is not necessarily to say that the TSCG introduces a more stringent system. The German rapporteur notes in this context that the mechanisms created outside the Union legal framework 'cannot reach and produce the same effectiveness and stringency as supranational Union law (albeit in the area of EMU until now also only with limited success).'[99] Concerns about the use of intergovernmental instruments in terms of their effectiveness are also raised by the Polish rapporteur, who argues that even supranational instruments 'are hardly enforceable, for many – primarily other than legal – reasons'.[100] For the author this is so because 'they do not really change the distribution of powers between the EU and Member States. Therefore they intend to counteract the externalities produced by sovereign decision-making without allowing EU institutions to eliminate those externalities in the first place.'[101]

Several national reports are also rather critical about the way in which intergovernmental instruments assign tasks to Union institutions. The UK rapporteurs first of all points out the position taken by the UK government that this requires the consent of *all* Member States of the Union. Considering that contrary to the ESM Treaty such consent has not been given in the case of the

95. Hungarian Report, p. 420.
96. Own translation. German Report, p. 346.
97. Dutch Report, p. 469.
98. Footnote omitted. Hungarian Report, p. 420, with reference to relevant literature.
99. Own translation. German Report, p. 346.
100. Polish Report, p. 489.
101. Ibid, p. 489.

TSCG the rapporteurs observe with reference to the legal writing of *Craig* and *Peers* that:

'the lawfulness and constitutionality of the conferral of extra-EU powers on the Commission and the ECB, particularly by the Fiscal Compact, are questionable'.[102]

The UK report is also highly critical of the approach taken in *Pringle*, were the CJEU approves of the allocation in the ESM Treaty of tasks to the European Commission and ECB. In its preliminary ruling the CJEU states that:

'the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM. Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.'[103]

Interestingly, at the same time the CJEU emphasizes the close link of the tasks performed by the ECB and the European Commission in the context of the ESM with the Union objectives, stating with regard to the latter that:

'It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union.'[104]

In the view of the UK rapporteurs the CJEU statement that the tasks of the European Commission and ECB under the ESM do not amount to the power to make decisions of their own bears the serious risk that 'this renders ESM decisions unreviewable' and that 'Member States participating in the ESM may well hide behind the ESM's legal personality'.[105] What is more the CJEU is attested with 'a rather formalistic conception of the tasks conferred on these institutions, in particular as regards the negotiation of MoUs with Member States requiring financial assistance.'[106] Indeed, as is highlighted by the author of the Institutional report 'the frontier between intergovernmental

102. UK Report, p. 632, with reference to the two authors mentioned. The fact that the CJEU is not handling the requirement that all Member State have given their consent is also noted in the German Report, p. 345.
103. Case C-370/12, *Pringle* (supra, n. 30), paras 160-162.
104. Ibid, para. 164. See also para. 165 with regard to the ECB.
105. UK Report, p. 633.
106. Ibid, p. 633.

and Union bodies tends to disappear'.[107] Interestingly, in the Institutional report it is emphasised that this development is not one-directional and thus a threat to the Community method, as the latter 'also invades the intergovernmental scene: In other words, the contamination plays in both directions.'[108] What is more, the use of Union institutions may also be considered as a way to ensure the coherence with the Union legal framework of the intergovernmental instruments, as argued in the German report with reference to *Pringle*.[109]

More generally with regard to the institutional challenges resulting from new economic governance, several national reports reflect on the inter-institutional balance at Union level. In the view of the Estonian rapporteurs the application of the different instruments referred to in the question results in:

'the growing consolidation of power to the Council (acting either as Council, ESM Board of Directors, or representatives of the Member States/shareholders, depending on the legal basis), the interests of which the Commission has to bear in mind while executing its tasks under the TFEU as well as non-EU Treaties'.[110]

In the same direction it is noted in the Institutional report, that:

'there has been a clear shift in favour of the European Council throughout the crisis. This institution has more and more tried to assume the role of legislative initiator to the detriment of the Commission'.[111]

At the same time it is pointed out that the position of the European Commission has been enhanced in what the Institutional report summarizes as 'the day-to-day *implementation of the governance.*'[112] The authors of the Italian report state with regard to the automatic correction mechanism foreseen in the TSCG that the Commission 'acquires a relevant normative power to guide national legislation in terms of common principles'[113] The authors of the Slo-

107. Institutional Report, p. 204, with reference to the Eurogroup working group of the Economic and Financial Committee.
108. Footnote omitted. Ibid, p. 205, with reference to relevant literature.
109. German Report, p. 346.
110. Estonian Report, p. 308.
111. Footnote omitted. Institutional Report, p. 208, with reference to relevant literature.
112. Institutional Report, p. 208.
113. Italian Report, p. 455.

venian report moreover refer to the reversed qualified majority voting in the Council and the Commission's increased role in budgetary surveillance.[114]

Some national reports suggest that the current status should be considered temporary in any event. With reference to Article 16 TSCG, according to which within five years steps are to be taken to incorporate the substance of the TSCG into the Union legal framework, the authors of the Italian report argue that 'the great majority of Member States already considered the need to bring back to the EU system at least that exceptional instrument which was conceived in the middle of the crisis' and that moreover:

'Therefore the juxtaposition of the EU legal framework and an international instrument ratified by a limited number of member states only is accepted on a temporary basis.'[115]

Somewhat contrary to this view, the Croatian rapporteurs state that this provision 'provides a route, but no definite obligation to incorporate [the TSCG] within EU law.'[116] Be that as it may, the challenge ahead may lie in the integration of the intergovernmental instruments in the Union legal framework in due course.[117]

Question 3

In '*A blueprint for a deep and genuine economic and monetary union*' the European Commission argues for a stepwise approach in, ultimately, ensuring a full fiscal, economic and political union, including e.g. the establishment of a stronger fiscal capacity for the euro area. In the Four Presidents Report 'Towards a Genuine Economic and Monetary Union' the plans towards a European fiscal capacity and more integrated economic decision making are further developed and – to some extent – concretized. To what extent and in what ways do these plans call for an amendment of national and (primary and secondary) Union law?

114. Slovenian Report, p. 522.
115. Italian Report, pp. 443-444.
116. Brackets added. Croatian Report, p. 285.
117. See also the discussion in the context of question 3.

1. Background*: what future for economic governance in EMU?*

At the time of the drafting of the Questionnaire the possible future direction of economic governance in EMU and mainly applying to the euro area Member States was discussed in several documents by Union institutions, including the European Commission's *Blueprint for a deep and genuine economic and monetary union*,[118] the Four Presidents Report *Towards a Genuine Economic and Monetary Union*,[119] and the EP's response to the latter report.[120]

The European Commission's *Blueprint* proposes the successive development towards a full banking, fiscal and economic union, namely through the establishment of a 'deeply integrated economic and fiscal governance framework' for the euro area, including the establishment of an autonomous euro area budget providing for a fiscal capacity for the EMU and the common issuance of public debt.[121] The report also states that such a development 'will require parallel steps towards a political union with a reinforced democratic legitimacy and accountability'.[122] In the Four President's Report a 'roadmap towards a genuine EMU' is stipulated as a staged-process, commencing with the strengthening of the economic governance framework, the establishment of the SSM and the setting up of the operational framework for the recapitalization of banks by the ESM.[123] This is supposed to be followed by the further development towards an integrated financial framework, mainly through the

118. Communication from the European Commission, *A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 28 November 2012. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF> accessed 1 March 2014.

119. President of the European Council (in close cooperation with the Presidents of the Commission, the Eurogroup and the European Central Bank), *Towards a Genuine Economic and Monetary Union*, 5 December 2012. Available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf> accessed 1 March 2014. See also European Council, The President, *Towards a Genuine Economic and Monetary Union. Report by President of the European Council Herman Van Rompuy*. Brussels, 26 June 2012 (EUCO 120/12).

120. European Parliament, Committee on Economic and Monetary Affairs, Report 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', 24 October 2012, p. 16, point DP. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0339&language=EN> accessed 1 March 2014

121. European Commission, *A Blueprint* (supra, n. 118), pp. 12-13.

122. Ibid, p. 13.

123. Four President's Report (supra, n. 119), p. 3 and 4.

establishment of a single resolution mechanism and furthermore mechanisms that ensure the observance of sound structural policies. In its final stage EMU should than include 'a well-defined and limited fiscal capacity to improve the absorption of country-specific shocks', as well as 'common decision-making on national budgets and an enhanced coordination of economic policies, in particular in the field of taxation and employment'.[124]

Other contributions including the EP's response the *Four Presidents Report* and the French-German joint contribution *Together for a stronger Europe*, make concrete proposals for the strengthening of the governance of the euro area, *inter alia* through the establishment of a full-time president for the Eurogroup and the introduction of euro area specific structures.[125] Moreover, the European Commission has set up an expert group to study 'the merits and risks, legal requirements and financial consequences of initiatives for the joint issuance of debt in the form of a redemption fund and eurobills'.[126] However, the outcome of this study had not yet been published at the time of writing of this general report.

The question that these main (institutional) studies on the future of economic governance, in addition to those submitted by academics in numerous contributions to the debate, raise is not only whether and in what ways further integration steps are desirable and will help to achieve the envisaged objectives, but also whether such plans can be pursued within the present Union framework or call for a (major) revision of the latter.

2. Responses*: a roadmap to ...?*

At the outset it is worth noting that several national reports are rather critical about the effectiveness of the reform measures that have been adopted until now. For the author of the Polish report 'the EU does not seem to have good ideas how to pursue necessary economic reforms',[127] and in the Portuguese report it is observed that 'The modifications made to the governance of the euro area are of little importance', that there is 'no credible plan to solve the

124. Ibid, p. 5.
125. Presse- und Informationsamt der Bundesregierung, Pressemitteilung Nr. 187/13 vom 30. Mai 2013. Available at <http://www.ambafrance-de.org/IMG/pdf/2013-05-30-dt-frz-erklaerung-deutsch.pdf> accessed 1 March 2014.
126. European Commission, Press release of 2 July 12013 (MEMO/13/635). Available at <http://europa.eu/rapid/press-release_MEMO-13-635_en.htm> accessed 1 March 2014.
127. Polish Report, p. 488.

euro area's problems' and, moreover, that 'the solutions arrived at do not represent a step towards federalization, despite of what has been widely suggested'.[128] With regard to the TSCG and ESM Treaty this report concludes that the reform measures 'do not bring about any significant innovation, their main impact being to expose the insufficiency of the EU primary law to react to Europe's sovereign debt crisis'.[129] In the Greek report it is observed that 'the new architecture and its governance offer a reactive system', one that takes a 'punitive approach to preventing another crisis [that] will certainly not reverse growing real divergence'.[130] This report also contests the usefulness of the ESM, arguing that 'it is not feasible to handle the Eurozone crisis without the means and tools provided in the Treaties, using simply ad hoc contractual arrangements in the form of international agreements, as is the case so far', a critique that is equally applied to the TSCG discussed hereafter.[131]

This fundamental critique of the current state of affairs suggest that economic governance is still in a transitional stage, whereby the contours of the final structure are arguably still anything but clear. What derives from a study of the national reports is that most rapporteurs consider further steps necessary. Yet, whether these reforms should then be primarily geared towards a further strengthening of budgetary discipline inside and outside the euro area or rather the pursued of the broader economic aims formulated in Article 3(2) TEU is addressed only in a view national reports.[132] The Austria rapporteur argues that the task of European governance must be to address causes of macroeconomic imbalances between Member States. whereas the authors of the Greece report state that the measures that have been taken go in the wrong direction altogether, as:

'With divergence as the cause of the crisis, policies to encourage convergence should have been the basis for overhauling the system.'[133]

Concerning the general direction of future reform steps two main issues are identified in the national reports, namely whether these steps should be taken inside or outside the Union legal framework and, whether they should be geared towards providing the euro area governance with a more prominent

128. Portuguese Report, p. 502.
129. Ibid, p. 502.
130. Bracket added. Greek Report, p. 378.
131. Ibid, p. 378.
132. See in this context also the discussion on question 13.
133. Greek Report, p. 378.

place in the Union framework. With regard to the former point, it emerges from the direction that the discussions in the national reports take that there is a clear preference for action *within* the Union legal framework. While this preference is not explicitly stated in all national reports, the Italian rapporteur are rather clear:

> 'International agreements may be tolerable in time of crisis but cannot, on their own, be a lasting solution and a fortiori cannot be a new form of EU law.'[134]

Recognizing the limitations of today's Treaty provisions, these authors suggest that the current Treaty amendment procedure should be revisited and 'the legal and political implications concerning a treaty revision without unanimity (similar to the UN Treaty)' be explored.[135]

Several reports discuss the issue whether the governance of the euro area should get a more prominent place in the Union legal framework, for example along the lines of the French-German joint contribution *Together for a stronger Europe*, which makes concrete proposals for the strengthening of the governance of the euro area. The Institutional report discusses the creation of a '*Euro filière*' and refers in this context to the proposals of the so-called Glienicker Group[136] that has suggested the creation of a euro government and a euro parliament.[137] Several national reports indicate support for what may be described as a more permanent (institutional) structure for the euro area. For example the Spanish report discusses the creation of a 'euro area Ministry of Finance'.[138] The Hungarian report is somewhat more sceptical, warning that the proposals put forward in *Blueprint* and the *Four President's Report* will widen the 'regulatory gap' between the euro area and non-euro area Member States.[139] The alternative approach pointed out in the Institutional report is to continue on the Treaty assumption manifest in Article 139 TFEU that the current situation is temporary as the aim continues to be the integration of all Member States in the euro area. The Institutional rapporteur argues that reforms should than focus mainly on increasing the power of euro area

134. Italian Report, p. 446. See also Hungarian Report, p. 422.
135. Ibid, p. 446.
136. The findings of this group of mainly academics entitled 'Towards a Euro Union' can be found at <http://www.glienickergruppe.eu/english.html> accessed 1 March 2014.
137. Institutional Report, p. 213.
138. Spanish Report, p. 563.
139. Hungarian Report, p.422.

Member States within the existing institutional structure and namely in the EP, the Council and the European Commission.[140]

On the substance of future reform measures the national reports critically engage with the concrete proposals made for a further reform of economic governance mainly in the European Commission's *Blueprint* and the *Four President's Report*. Specifically engaging with these documents, the Finnish report characterizes them as 'neo-functional documents' that 'seem to advocate extensive constitutional changes that would go well beyond the already extensive changes that have occurred with the somewhat chaotic ad hoc measures.'[141] In the view of these authors such proposals are however 'more administrative and fiscal policy related than market economy based' and 'constitute further deviation from the constitutional principles of the European economic constitution'.[142] Equally critical about the general direction of the proposals currently on the table is the Hungarian report, where it is doubted whether 'deeper coordination in specific economic policy fields, such as taxation or employment' is feasible arguing:

> 'Many Member States use tax policy to support social policy and level playing field in competitiveness, and they are not keen on any fundamental changes in tax legislation.'[143]

In the opposite direction, the authors of the Portuguese report consider a process of 'true European fiscal harmonization', including in the area of direct taxation, necessary, thereby getting rid of tax competition between Member States.[144]

What emerges from this debate is what is also identified in the Institutional report as the basic policy choice between the integration of economic policy and the reinforcement of the current decentralized model. A further integration of economic policy along the lines proposed in *Blueprint,* the *Four President's Report*, including for example the establishment of Union debt instruments, an autonomous budgetary capacity for the euro area to stabilize national economies,[145] would – as the Institutional rapporteur points out – require 'deep and major Treaty changes'.[146]

140. Institutional Report, p. 212 et seq.
141. Finnish Report, p. 325.
142. Ibid, p. 325.
143. Hungarian Report, p. 423. See also Slovenian Report, p. 521; Italian Report, p. 447.
144. Portuguese Report, p. 505.
145. See e.g. Austrian Report, p. 271; Greek Report, pp. 379-380; Hungarian Report, p. 423; Slovenian Report, p. 521.
146. Institutional Report, p. 213.

Nevertheless, several national reports support the idea of increasing the fiscal capacity of – at least – the euro area. The Spanish rapporteurs argue in favour of 'a wider EU budget aimed at fiscal counter-cyclical actions', and in the Portuguese report it is concluded that:

> 'there seems to be no room for doubts that European integration is not sustainable without a Union budget that allows for the financing of common policies aimed at correcting the structural imbalances found within the Union'.[147]

Interestingly, whereas the authors of the latter report consider an enhanced European budget as a means to address economic asymmetries between Member States and thus, arguably, as an instrument of redistribution, the Polish rapporteur points out that an additional fiscal capacity at the Union level would require addressing of 'the inefficiency of redistribution' first.[148] For the author of the Austrian report a fiscal union is a prerequisite for the introduction of a system of centralized debt issuing.[149]

Focusing on the idea of centralized debt issuing and a European debt redemption fund, it is argued in the German report that considering the current level of integration these proposals could not be introduced by means of secondary Union law instruments alone, but would require intergovernmental solutions similar to the TSCG and ESM Treaty, taking moreover the CJEU's interpretation of Article 125 TFEU into account.[150] In the same vein the Institutional report argues with reference to *Pringle* that 'any financial arrangement providing not only for joint but also several liability between Member States is caught by the prohibition ex Article 125(2) TFEU' and, moreover, that 'a financial assistance mechanism cannot be construed so as to completely disconnect the first Member State from the market discipline'.[151] One may observe in this context that this argument is only valid for as long as the market discipline rationale mainly expressed by Articles 123 and 125 TFEU is not revised in the wage of the introduction of a centralised debt issuing mechanism.

While limitations set by today Union legal framework may be overcome by Treaty amendment, however complex that may be legally and politically, this option may not be available in the case of national constitutional limita-

147. Spanish Report, p. 564; Portuguese Report, p. 505.
148. Polish Report, p. 489.
149. Austrian Report, p. 271.
150. German Report, p. 348.
151. Institutional Report, p. 199.

tions. Several national reports point out that additional substantive reform measures should be subject to the introduction of an institutional framework to ensure the democratic legitimacy of such future activities and their back coupling with the national level, namely with regard to an increased budgetary capacity of the Union and centralized debt issuing.[152] Thus for example in the context of the proposals for central debt issuing the German report explicitly refers to the national constitutional situation pointing out that any such arrangements have to recognize the budgetary rights of German parliament as emphasized in the jurisprudence of the German Federal Constitutional Court (*Bundesverfassungsgericht*).[153] In the opinion of the German rapporteur, German guarantees for joint bonds or bonds in the context of the redemption fund would have to be subject to regular approval by the German parliament and even then the liabilities that are created could be considered to 'exceed the outer limits' of the decision-making prerogatives of parliament with regard to the risks involved for future budgets.[154] Potential constitutional limitations are also identified by the authors of the Greek report, which point out that it could be argued that:

'the attribution of budgetary powers to institutions beyond the direct elected Parliament constitutes a violation of the 'foundations of democratic government', which set explicit limits on the attribution of powers to institutions beyond the national borders'.[155]

This suggests that there may be limits to the extent more democratic legitimacy can be injected at the European level, for example by means of a 'real political union', as suggested by the Italian rapporteur.[156] The role of the national legal orders of the Member States in this regard is discussed in the context of question 7.

152. Austrian Report, p. 270; Spanish Report, p. 562.
153. On the position of the German Federal Constitutional Court see the discussion in the context of question 9.
154. German Report, p. 348.
155. Greek Report, p. 381, whereby the rapporteurs wonder whether such a transfer of power would still be covered by the enabling clause in the Greek constitution.
156. Italian Report, p. 447.

Question 4

What legal modifications (if any) are required at the EU level to ensure democratic legitimacy and accountability of economic governance in Economic and Monetary Union?

1. Background*: democratic legitimacy and accountability of economic governance at the Union level*

As has become clear from the discussions in the context of the previous questions the ad hoc and even more so the structural reform measures that have been taken in response to the crisis have brought with them a shift in economic governance in EMU both in substantive and institutional terms. The Spartan concept of the coordination of *national* economic policies based on rather crude – if not somewhat randomly chosen – deficit limits, European broad economic policy guidelines, as well as self-commitment and peer review by the Member States, previously foreseen in primary Union law, has made place – at least on paper – for a more stringent system geared towards the eradication of governments deficits, the systematic reduction of government debts, and a broader in-debt review of macroeconomic developments in the Member States based on a European scoreboard. Overall, it is thus hardly an exaggeration, when the author of the Institutional report notes that 'there has been a gradual change in nature of the Union competence regarding economic policy' and that 'it becomes more and more difficult to maintain that economic governance is based only on mere coordination'.[157]

What is more, the tasks of the different Union institutions in economic governance have changed mainly as a result of the Six-Pack and Two-Pack, and Union institutions have moreover been assigned new tasks in the context of the intergovernmental TSCG and ESM. Finally, non-euro area Member States have been only partially involved in the decision-making process leading up to the new governance regime.

Despite the shift of power and influence that can thus be observed and that influences the relationship between the Member States and the Union, as well as in-between the Union institutions, primary Union law with the exception of Article 136 TFEU, has remained unchanged. Considering that 'the condition in which public policy is defined and implemented has an impact on the

157. Institutional Report, p. 211.

legitimacy and accountability of public policy', this is potentially problematic.[158] Indeed, it is hard to perceive that the recent reform measures have not had an impact on the delicate framework provided by primary Union law involving both national and supranational level in legitimizing the exercise of public power at the supranational level.

Mapping the impact on the reform measures for democratic legitimacy and accountability, including namely the inter-institutional balance at the Union level, is thus a necessary precondition for answering the question to what extent new economic governance calls for the strengthening of democratic legitimacy and accountability. Answering the question whether the existing channels of legitimacy and accountability are still adequate in principle also calls for an examination of possible new mechanisms in this regard, such as namely the so-called economic dialogue introduced by the Six-Pack legislation.

Interestingly, while the reflections of the different Union institutions on the future of EMU referred to in question 3 do not take an express position as to whether the current reform measures may suffer from a 'democratic deficit', both the European Commission's *Blueprint* and the *Four President's Report* recognise that further integration of fiscal and economic-decision-making requires the reinforcement of the mechanisms ensuring legitimate and accountable.[159]

2. Responses*: enhancing democratic legitimacy and accountability, but at which level?*

Generally it can be observed that the vast majority of national reports recognise that the economic governance reforms have had an impact on the democratic legitimacy and accountability of economic governance. At the same time different routes are proposed in the reports as to the ways in how this should be addressed.

For the Hungarian rapporteur the reform measures have so far focused 'on efficient economic solutions while lacking considerations on its political side

158. F. Amtenbrink, 'Some Reflections on the (Potential) Effects of the Euro Area Debt Crisis on the European Union Constitutional Order', in F. Basaran Yavaslar, Avrupa Birligi'nde Mali Kriz Ve Tuerkiye'YE Etkileri (The Economic Crisis in the European Union and Its Effects on Turkey), seckin, 2013, pp. 165-199, at 189.

159. Four President's Report (supra, n. 119), at 6; *Blueprint* (supra, n. 118), p. 35 et seq; European Parliament (supra, n. 120), p. 16 et seq.

(i.e. legitimacy and accountability).'[160] Both the UK and Dutch report point to the consequences of the use of intergovernmental treaties for democratic accountability for the areas covered by them. In its advice to government the Dutch Council of State on the ESM Treaty apparently has noted a 'lack of institutional checks and balances of the EU in the ESM' and, moreover, that 'the democratic control by national parliaments of the functioning of national representatives in organs of the ESM can only partially compensate for the lack of mechanisms for democratic control'.[161] The UK rapporteurs argue with regard to the TSCG:

> 'Its adoption has subverted the Treaty amendment process – in so far as it contains provisions equivalent to those in the Treaties – and the EU legislative process – in so far as the TSCG contains provisions which could be adopted by way of EU legislation, or indeed by way of enhanced cooperation. The constitutional rigour and concepts of representative democracy which the Treaty of Lisbon introduced have been circumvented just a few years after its entry into force.'[162]

Next to the application of intergovernmental method and instruments outside Union legal framework, for the Greek rapporteurs mainly the increased role of the executive branch of government, such as the European Commission has come 'to the detriment of the European Parliament's role'.[163] The authors of this report consider these developments as a sign of a 'shift of power within the EU institutions' that calls for 'legal modifications of the current system to protect [...] principles and rules of democratic legitimacy' laid down mainly in Articles 2 and 10 TFEU.[164] The Italian rapporteur questions whether the increased role of the Commission in economic governance (e.g. through reversed voting) is justified given its current position in the Union institutional framework 'being still a semi-technocratic institution'.[165] In a similar vein, the Finnish report observes that 'the balance between executive and parliamentary power has moved to the former' and, moreover, 'the increased role of the independent expert bodies, such as the ECB, that, in balance, has reduced the roles of both parliaments as well as democratically elected responsible executive organs.'[166] This view is supported by the authors of the Slo-

160. Hungarian Report, p. 424.
161. Dutch Report, p. 467.
162. UK Report, pp. 632-633.
163. Greek Report, p. 382.
164. Ibid, p. 382.
165. Italian Report, p. 448.
166. Finnish Report, p. 326.

venian Report that consider the EP to be in a weak position as a result of the application of intergovernmental instruments, as well as in the application of the multilateral surveillance and excessive deficit procedure, and even with regard to the EP's right to a motion of censure, which is described as 'nothing but an empty threat'.[167]

Exemplary for what is observed in several national reports, the Slovenian rapporteur is also rather critical about the effects that the reform measures have on the role of national parliaments, arguing that the vertical shift of power 'leaves the national parliaments with little say in the budgetary matters which are primarily theirs and form an inherent part of the State's sovereignty'[168], or, as the Portuguese rapporteurs describe it 'one of the last bastions of sovereign power of each Member State and its democratic legitimacy.'[169] In the view of the authors of the latter report:

'the democratic process is circumvented by the intervention of a European institution [...] in a sense [leaving] national parliaments to be held politically accountable for decisions actually taken by European institutions'.[170]

Yet, not all rapporteurs are so negative about the current state of affairs. While emphasising that the need the democratic legitimation increases with the level of European involvement in economic and budgetary policy, the German rapporteur points out that through legislative packaging and its vetoing power for the Union budget the EP is already able to extent its influence beyond the ordinary legislative procedure.[171] The Institutional report states even that:

'the current level of democratic legitimacy and accountability of the EU institutional model is generally considered adequate in relation with the current attribution of competences to the Union. There is, therefore, no democratic deficit and this applies in particular in the field of EMU'.[172]

167. Slovenian Report, p. 523.
168. Ibid, p. 523. See also the Italian Report, p. 448.
169. Portuguese Report, p. 507.
170. Brackets added. Ibid, p. 509, where it is even considered that European Commission's role engagement with national budgets in the context of the European Semester 'may be seen as calling into question the old principle of 'no taxation without representation'.'
171. German Report, p. 348.
172. Institutional Report, p. 219.

While recognizing the shortcomings of the EFSF and ESM Treaty in clearly defining the role of the EP, in the opinion of the Institutional rapporteur this has been compensated for by the arrangements in the Six-Pack and Two-Pack and namely the new economic dialogue and the EP's information rights in the context of the preparation and implementation of the macroeconomic adjustment programs.[173] Moreover, the Institutional Report points to the possibility provided for by Article 7(10) and (11) Regulation 472/2013 for the EP and the national parliaments respectively to engage in an 'exchange of views with the European Commission.[174] However, the Institutional rapporteur is somewhat more critical of the situation in the intergovernmental sphere and namely the role of the EP arguing that:

'It is unclear whether the political control by the Parliament extends to the tasks performed by the Commission (and the ECB) under the so-called 'Bangladesh mandate' and this system also creates complexity and uncertainty regarding the responsibilities for the decisions taken.'[175]

To the extent that it is argued in national reports that the current level of reform measures call for enhanced democratic legitimacy and accountability a somewhat diverse picture emerges namely as to the level at which this should be achieved. A number of reports clearly are in favour of the injection of additional mechanism at the supranational European level and namely with regard to the position of the EP. The Italian rapporteur state that 'the multilevel democratic nature of the EU system needs to be reinforced so that it will rely less on national legitimacy input and more on its own direct source of democratic accountability.'[176] In the view of the Institutional rapporteur the approach should be that 'accountability should be ensured at the level where the respective executive decision is taken, whilst taking due account of the level where the decision has an impact', a view that reflects the Commission Blueprint.[177] Also linking the level at which legitimacy and accountability has to be improved to the level at which power is actually exercised is the Dutch report. While recognizing the important responsibility of national parliaments in the context of the subsidiarity procedure and the mandating of their respective executive government, reference is made to the position taken by the

173. Ibid, p. 219.
174. Ibid, pp. 219-220.
175. Ibid, p. 220. With regard to the intergovernmental instruments see also the Italian Report, p. 449.
176. Italian Report, p. 450.
177. Institutional Report, p. 221.

Dutch Council of State according to which democratic legitimation has to be primarily sought at the level at which power is exercised.[178] At the same time it is argued that national parliament should only be involved at the European level when given a meaningful role that is, if 'accompanied by specific powers within the European decision-making process, in particular in the euro area', whereas:

'Hybrid forms in which both national parliaments and the European Parliament are involved, and which do not amount to more than an exchange of information, merely make the situation unclear.'[179]

A similar position is also taken by the Italian rapporteur, which in the context of the conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments included in the TSCG observe that the engagement of national parliaments with the EP is not 'the panacea for recovering democratic accountability if one adopts the idea of deliberative democracy through deliberation of citizen's elected representatives'.[180]

Concrete proposals to improve the position of the EP can be found in the Greek report, including *inter alia* parliamentary accountability of the Eurogroup, enhanced cooperation between national parliaments and the EP or the establishment of a national chamber at the EP, a right of initiative for the EP together with the Council, as well as the fusion of the mandate of the presidency of the Commission and of the European Council.[181] The German rapporteur also recognises an increased role for the EP, but mainly questions the participation of MEPs from non-euro area Member States in legislative procedures leading up to the adoption of euro area specific measures as problematic. In a similar vein also the Dutch report argues that non-euro area MEPs should be excluded from decisions or otherwise a euro area EP should be established.[182] In this context the Institutional report suggests that a possible improvement could be the creation at the EP 'of a dedicated subcommit-

178. Dutch Report, p. 472. Referring to the role of the subsidiarity principle is the Slovenian Report, p. 523.
179. Ibid, p. 471.
180. Italian Report, p. 449.
181. Greek Report, p. 383. With regard to short-term and medium-term solutions, including a two-chamber parliament, see also the Institutional Report, p. 222.
182. Dutch Report, p. 472, however arguing that the latter solution should only be considered 'if divergence becomes unavoidable'.

tee composed of Members from the euro area Member States only in order to better adjust an increased role for the EP in euro area matters'.[183]

Yet, in some national reports also a certain scepticism can be sensed when it comes to ideas to enhance the role of the EP. Exemplary in this regard are the observations in the Finnish report. The rapporteurs are critical of the upgrading of the role of the EP, as in their view 'it does not seem to be particularly well equipped to take more responsibility of the legitimacy and accountability' and, furthermore, the 'EP has not been able to gain legitimacy vis-à-vis European peoples even with increased powers that it has been given over the years'.[184] The authors of the Estonian report go so far as to state that there is no need for further measures to increase democratic legitimacy and accountability at the European level as long as 'economic policy remains a national affair'.[185] Instead the report suggests that the future may lay in the role of national parliaments that 'in some countries have become more active on the EU issues during the crisis'.[186] These views are contrary to the EP's self-perception, as it is stressed that it has 'full legitimacy of Parliament, as parliamentary body at the Union level for a reinforced and democratic EMU governance' whereby the European Parliament rejects the idea of a cooperation with national parliaments that could result in 'a new mixed parliamentary body at the Union which would be both ineffective and illegitimate on a democratic and constitutional point of view'.[187]

The author of the Institutional report also explicitly discusses the role of judicial review in providing democratic accountability in economic governance, arguing that it should become possible for the CJEU to review the non-compliance with budgetary discipline as part of an infringement procedure.[188] The report is also critical of the limited role of the CJEU in the TSCG and ESM. [189]

With regard to the long-term perspective, in the view of the Italian rapporteur 'A genuine European political democracy is needed in order to pursue a sense of collective identity when the citizens evaluate the output side of the

183. Institutional Report, p. 220. Overall critical on the idea of an EP subcommittee for the euro area is the Slovenian Report, p. 523, with references to relevant literature.
184. Finnish Report, p. 326.
185. Estonian Report, p. 309.
186. Ibid, p. 326.
187. European Parliament (supra, n. 120), p. 19, point 13.
188. Institutional Report, p. 224. Currently Article 126(1) TFEU explicitely exlcudes the application of Arts. 258 and 259 TFEU.
189. Ibid, pp. 224-225.

measures adopted under the economic policy-making'.[190] In a similar vein, the Institutional rapporteur argues that 'when all economic and budgetary competences would be moved to the European level, one could envisage some form of 'democratic federalism'.[191] Focusing on the access to justice by natural and legal persons the UK rapporteurs point out the consequences of the CJEU's preliminary ruling in *Pringle,* where the Court has rejected to consider the ESM has an 'implementation of EU law' for the purpose of the EU Charter on Fundamental Rights. Thus, as the report points out, while ESM decisions through the application of conditionality have every potential to affect individuals, 'the ESM is not bound by the Charter'.[192]

For the authors of the Hungarian and Polish report the solution does not seem to be found in the increase of traditional channels of democratic legitimacy and accountability at all. For the Hungary rapporteurs this is so 'because governance in the EU is strongly characterized by non-majoritarian independent institutions like the Commission and the ECB and decision-making process in the EU is very different from those in the Member States' The authors of this report seem to prefer more efforts towards creating an efficient system (e.g. through increased EU competence to harmonize national economies) and thus, more output legitimacy.[193] The Polish rapporteur is even more outspoken when taking the position that 'more electoral accountability may make things only worse'.[194] This author finds evidence for this in the crisis itself, arguing that:

> 'The main issue the economic governance has been confronted with seems to stem [...] from the politician's fear that they would be held accountable by voters had they ventured reforms necessary to improve the economic competitiveness towards the rest of the world.'[195]

But even a focus on output legitimacy does not seem to provide a way out for this author, as the Union is diagnosed with having lost 'its ability to build its legitimacy on output factors (output legitimacy) – i.e. by delivering prosperi-

190. Italian Report, p. 450.
191. Footnote omitted. Institutional Report, p. 222, with reference to relevant literature.
192. UK Report, p. 633, where it is also pointed out those Union institutions is nevertheless bound by the Charter even when acting under the ESM.
193. Footnotes omitted. Hungarian Report, p. 424, with further references to relevant literature.
194. Polish Report, p. 491.
195. Ibid, pp. 490-491.

ty and economic stability'.[196] The Greek, Polish and Portuguese reports emphasise the need for greater involvement of civil society.[197]

Question 5

What legal challenges (if any) does the EU face with regard to financial market regulation and supervision?

1. Background*: towards an integrated financial framework*

In the influencial *de Larossière* Report of February 2009 regulatory and supervisory failures are identified for having contributed considerably to the financial crisis. The report identifies 'serious limitations in the existing supervisory framework globally, both in a national and cross-border context', insufficiently focusing 'on macro-systemic risks of a contagion of correlated horizontal shocks'.[198] In the European context the Lamfalussy regulatory framework has been considered inadequate to deal with the financial crisis, observing namely that the:

'The national-based organisation of EU supervision lacks a framework for delivering supervisory convergence and limits the scope for effective macro-prudential oversight based on a comprehensive view of developments in financial markets and institutions.'[199]

What the *de Larossière* Report recommended at the institutional level was the establishment of a European system of financial supervision, featuring a new set of European authorities to replace the existing level 3 Lamfalussy committees, with the mandate to 'coordinate the application of supervisory standards and guarantee strong cooperation between the national supervisors'.[200] Moreover the establishment of a new body to monitor macro-economic developments and make recommendations on macro-prudential policy was suggested.[201] Interestingly while the Report argued in favour of a role for the

196. Ibid, p. 491.
197. Ibid, p. 491; Greek Report, p. 383; Portuguese Report, p. 505.
198. The High-level Group on Financial Supervision in the EU, chaired by J. de Larosière, Brussels, 25 February 2009, p. 10. Available at <http://ec.europa.eu/internal_market/finances/committees/index_en.htm> 1 March 2014.
199. Ibid, p. 69.
200. Ibid, p. 48.
201. Ibid, p. 44.

ECB in monitoring systemic risks, it spoke out against an involvement of the ECB in micro-prudential supervision, *inter alia* arguing that such a task could affect the statutory primary monetary policy objective of the ECB and could jeopardize its independence. Moreover, it was pointed out that:

'conferring responsibilities to the ECB/Eurosystem which is not responsible for the monetary policy of a number of European countries, would not resolve the issue of the need for a comprehensive, integrated system of supervision'.[202]

Finally, the *de Larossière* Report also recommended the adoption of measures to provide for effective crisis management and resolution tools, namely to provide for 'an orderly and efficient handling of an institution in difficulty' in the internal market,[203] a harmonisation of deposit guarantee schemes, preferably pre-funded by the private sector, and a more detailed criteria for the burden sharing in cases of crisis resolution.[204]

What followed from these recommendations in 2010 was the introduction at the Union level of three new European supervisory authorities (ESA's), effectively replacing the before-mentioned level 3 committees, including the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA).[205] While the three ESA's are charged with developing

202. Ibid, p. 43.
203. Brackets added. Ibid, p. 33.
204. Ibid, p. 35.
205. Regulation 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, OJ 2010, L 331/12; Regulation 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 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331/48; Regulation 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ 2010, L 331/84. See also Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pen-

guidelines, recommendations, and draft regulatory and implementing technical standards, and moreover have to observe that the regulatory and implementing technical standards adopted at the European level are observed by the financial institutions in the Member States, this institutional framework fell 'significantly short of a centralized European supervisor' first and foremost with regard to (systemic relevant) large cross-border financial institutions.[206] Next to the three ESA's, the European Systemic Risk Board (ESRB) was set up charged with the macro-prudential oversight of the financial system within the Union and for an initial period of 5 years headed by the president of the ECB.[207]

In its September 2012 *A Roadmap towards a Banking Union* the European Commission concluded that additional measures are required 'to tackle the specific risks within the Euro Area, where pooled monetary responsibilities have spurred close economic and financial integration and increased the possibility of cross-border spill-over effects in the event of bank crises, and to break the link between sovereign debt and bank debt and the vicious circle'.[208] The Commission proposed the establishment of a single supervisory mechanism entrusting the ECB with specific tasks linked to the prudential supervision of credit institution. The establishment of a single supervisory mechanism and a single resolution mechanism for banks was moreover also endorsed in the European Commission's *Blueprint* and, moreover in the *Four President's Report*, which proposed the establishment of 'An integrated financial framework to ensure financial stability in particular in the euro area and minimise the cost of bank failures to European citizens'.[209] This has lead to the creation of the Single Supervisory Mechanism (SSM), with the ECB at the helm, with the objectives of 'setting up an efficient and effective frame-

sions Authority) and the European Supervisory Authority (European Securities and Markets Authority), OJ 2010, L 331/120.

206. F. Amtenbrink, 'Legal Developments', *JCMS – Journal of Common Market Studies* 2011 Vol. 49 Annual Review, 165-186, p. 167.

207. Arts. 3 and 5 Regulation 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ 2010, L 331/1. See also Council Regulation 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ 2010, L 331/162.

208. Roadmap towards a Banking Union, Communication from the Commission to the European Parliament and the Council (COM/2012/0510 final). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0510:FIN:EN:HTML> accessed 1 March 2014, section 1.

209. Four President's Report (supra, n. 119), pp. 3-4.

work for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions'.[210]

Moreover, in July 2013 the European Commission has published a proposal for the establishment of a single resolution mechanism (SRM), aimed at establishing uniform rules and procedures for the resolution mainly of credit institutions and parent undertakings established in one of the euro area Member States or non-euro area Member States that participate in the mechanism and, and the establishment of a single resolution fund (SRF).[211] With regard to the latter, the euro area Member States have decided to include the details of its functioning yet another in yet another intergovernmental agreement.[212]

Finally, the *Liikanen* Report from October 2012 emphasised the need to structural reforms of the European banking sector, concluding 'that it is necessary to require legal separation of certain particularly risky financial activities from deposit-taking banks within a banking group.'[213] In the wake of this report, on 29 January 2014 the European Commission has published a proposal for a Regulation on structural measures improving the resilience of Union credit institutions and, moreover, a proposal for a regulation on reporting and transparency of securities financing transactions.[214]

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210. Preamble No. 87, Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ 2013, L 287/63; Regulation 1022/2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ 2013, L 287/5.
211. Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (COM/2013/520 final). The Presidency compromise text of the Commission proposal of 17 December is available at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2017742%202013%20INIT> accessed 1 March 2014.
212. See section 2 below.
213. High-level Expert Group on reforming the structure of the EU banking sector chaired by Erkki Liikanen, Final report, Brussels, 2 October 2012, letter from the Chairman, p. i. Available at <http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf> accessed 1 March 2014.
214. COM/2014/43 final and COM/2014//40 final. Available at <http://ec.europa.eu/internal_market/bank/structural-reform/index_en.htm#maincontentSec1> accessed 1 March 2014.

Question 5 was deliberately broadly formulated allow the national rapporteurs to reflect on issue of financial market regulation and supervision in the light of the reform of economic governance, but also in the broader context of the internal market and the widening regulatory gap between euro and non-euro area Member States. In considering the responses discussed hereafter it needs to be noted that some of the developments in the legislative sphere described above have taken place after the Questionnaire had been submitted to the national rapporteurs and in some instances also after the national reports had been submitted.

2. Responses*: placing prudential supervision at the level of the functioning of the system*

Overall it can be observed that the majority of national reports are in favour of a more centralized financial market regulatory and supervisory system. At the same time several legal issues are identified in this context that deserve attention.

Focusing on the SSM first, the Slovenian report takes the position that 'Supervision should be organized at the level of the functioning of the supervised system'.[215] Stressing the need for a single regulatory and supervisor framework in the Union is also the Hungarian report, which in this context points to the competitive disadvantage of European banks that 'operate at a higher cost than their counterparts because of weaker transparency caused by the different regulatory frameworks'.[216] In a somewhat similar vein the authors of the UK report argue:

> 'The Banking Union involves a significant move towards supranational financial regulation, in potentially in lieu of a regulatory race-to-the bottom in the field of financial services.'[217]

Pleading in favour of a reduction of the national space for discretion in banking supervision, namely though the introduction of a Single Rulebook, is also the Austrian report.[218] Addressing the loss of sovereignty, something that ar-

215. Slovenian Report, p. 526.
216. Hungarian Report, p. 424.
217. UK Report, p. 635.
218. Austrian Report, p. 273, pointing out that until the establishment of such a Single Rulebook the ECB faces the challenge, together with the national authorities, to apply

guably has stood in the way of effective supervision in the single financial market for some time, the Greek report refers to the 'financial trilemma' observed by *Schoenmaker*, according to which global financial stability, cross-border financial integration and national sovereignty over financial policy (the three policy objectives) taken together are incompatible, as '[A]ny two of the three objectives can be combined but not all three together'.[219] Finally, considering the role of the ECB, for the authors of the Swedish report the Banking Union is as 'a bridge between monetary policy and financial stability'.[220]

Setting a counterpoint to the overwhelming support in the national reports for a more centralized financial supervisory system in the shape of the SSM is the Finnish report:

> 'Badly executed centralised systems can naturally make things substantially worse than is the case currently. Actually, looking at the EU one finds both banking sectors that have fared poorly even in the global perspective as well as banking sectors that have remained fundamentally very stable. One would need to be a major optimist to assume that centralised systems would be particularly close to the better fared systems.'[221]

At the operational level, the Spanish report identifies the main challenges of the SSM as implementing the regulatory framework by the ECB and the establishment of a Single Rulebook by the EBA, as well as the asset quality review by the ECB and the establishment of parameters for a comprehensive assessment in this regard.[222]

Turning to the SRM and SRF, the German Report refers to a close link between, on the one side, the national financial institutions and the Member States in which they are situated, and on the other side the internal financial market. In the event of a financial or debt crisis this connection can result in 'a negative feedback loop', which ultimately may result in a flight of capital, a breakdown of the national financial system and the insolvency of the country.[223] It is against this background that the German rapporteur argues that all

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possibly diverging national laws, triggering legal questions on the delineation of competences and the applicable law.

219. Brackets added. Greek Report, p. 387, with reference to relevant literature.
220. Swedish Report, p. 581, also observing 'the division of responsibilities between the national and the two supranational regulatory actors need to be more specifically clarified and defined'.
221. Finnish Report, p. 327.
222. Spanish Report, p. 565.
223. Own translation. German Report, p. 367.

measures must be considered to substantially strengthen the stability of the financial system to prevent such consequences, including namely the SRM and a joint depository guarantee scheme.[224] The negative loop between sovereign and banks is also identified in the Greek report, where the future *direct* recapitalization of banks through the ESM, following the introduction of the SSM and SRM, is considered as the main remedy.[225] In fact, it is argued that the inclusion of such a possibility would have rather fundamental consequences for the working of the internal market and the position of economically weaker Member States. In the view of the rapporteurs that 'the Eurozone will be forced to effectively contribute in the economic growth endeavor', and, moreover,

> 'It will no longer be Europe's interest to maintain depreciation of weak member states' economies to allow healthy states' enterprises to invest in them at low-prices; instead a collective interest would emerge, creating prospects for the effective operation of the national banking sector to support the troubled states' economic recovery.'[226]

With regard to the proposals for structural reforms of the European banking sector, several reports refer to the *Liikanen* Report and the structural reforms it proposes. The Greek rapporteurs point to 'the proposed mandatory ring fencing mechanism, entailing the separation of retail banking from trading/investment activities' that in the view of the authors signifies 'a return to traditional banking culture'.[227] Moreover, in the view of these authors the 'Corporate Governance of banking institutions will be simpler and more focused, to give a more feasible and coherent working environment'.[228] The Finish rapporteur is also in favour of a splitting of banking activities into conventional banking and (more risky) investment activities, arguing that 'there is no practical difference between many of the investment banking functions of the large universal banks and the actions of the trading-based hedge funds'.[229] The need for a reform of corporate governance is also emphasized in the national report for Slovenia.[230]

224. Ibid, p. 367, whereby the author observes that for political reasons such a joint depository guarantee scheme could only be set up for new financial liabilities.
225. See Euro Area Summit Statement, Brussels, 29 June 2012.
226. Greek Report, pp. 387-388.
227. Ibid, p. 385. See also Spanish Report, p. 565.
228. Ibid, p. 385.
229. Finnish Report, p. 328.
230. Slovenian Report, p. 527.

In a considerable number of national reports arguments can be found in favour of the establishment of a joint European depository guarantee scheme. Apart from the German report already mentioned above, also the Austria rapporteur supports the establishment, next to a common banking restructuring mechanism, of such a scheme in order to protect public budgets from potential future need for the recapitalization of credit institutions.[231] In the view of the Greek rapporteurs the absence of such a European-wide scheme has as a consequence that 'depositors are led to the banks of the Eurozone strong economies, where the State is able to intervene in case of a bank default'.[232] A 'pan European system of deposit guarantee scheme common to all Member States' is proposed by the Swedish rapporteurs, which in any event are in favour of setting a fixed coverage level, warning that such a scheme could otherwise become 'an instrument of unfair competition which could seriously jeopardies the proper functioning of the EU's banking market'.[233] In this context it can be observed that in the wake of the financial crisis the original Directive 94/19/EC on deposit-guarantee schemes has been amended setting the coverage for the aggregate deposits of each depositor at EUR 100.000 by the end of 2010. Moreover, in December 2013 a political agreement on the reform of rules applicable to deposit guarantee schemes has been reached between the EP and the Member States, *inter alia* confirming a universal guarantee of deposits to the amount stated above and speeding up the process of repayment.[234]

Despite the generally positive attitude towards the establishment of a more robust financial market regulatory and supervisory system at the supranational level, the national reports also identify several legal issues related mainly to the SSM, SRM and SFM, including the legal bases for the reform measures, the position of Member States outside the new supervisory framework and the delegation of powers to Union agencies.

Regulation 1024/2013 which confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions is based on Article 127(6) TFEU, according to which the Council, unanimously, and after consulting the EP and the ECB, may confer 'specific tasks' upon the ECB relating to the prudential supervision of financial institutions with the

231. Austrian Report, p. 273. See also Portuguese Report, p. 506; Slovenian Report, p. 525.
232. Greek Report, p. 386.
233. Swedish Report, p. 583.
234. Commissioner Barnier welcomes agreement between the European Parliament and Member States on Deposit Guarantee Schemes, European Commission, MEMO/13/1176 of 17 December 2013.

exception of insurance undertakings. Both the Finish and Hungarian report are critical of the application of this specific legal basis based on the wording of this provision. The Finish rapporteur consider legislation adopted based on Article 127(6) TFEU granting 'general and quite open powers in the area of banking supervision to the ECB' as problematic, whereas the Hungarian rapporteur argues that this legal basis 'does not allow for all the range of tasks in supervision, just 'specific' tasks'.[235] Finally, the Polish report doubts whether this provision is the right legal basis 'when the scope of the banking supervision transcends the monetary union', i.e. the euro area Member States.[236] This author suggests the use of Article 114 TFEU as alternative legal basis, '[I]f the banking union is primarily perceived as an internal market issue'.[237]

Interestingly, several national rapporteurs contest the application of Article 114 TFEU *inter alia* for the establishment of the SRM and a SRF. Both the UK and Italian rapporteurs question whether this internal market legal basis can be utilized for measures that do not applying to *all* Member States.[238] The Dutch report highlights the doubts raised by Dutch Parliament, which 'has accepted a motion that this legal basis is not desirable and calls on the Government to find another legal basis with other like-minded Member States.'[239] Both Article 352 TFEU and enhanced cooperation are discussed as possible alternatives. The somewhat limited scope of application of the measures is also discussed by the Croatian rapporteurs. Yet, the latter do not only questions whether the measures contribute to the working of the *whole* internal market, but also whether they enhance the internal market at all.[240] In a similar vein, the Dutch report is critical about the feasibility of Article 114 TFEU as legal basis for measures to regulate the financial market. The Dutch rapporteurs argue first of all that 'the question arises whether this legal basis can still be used when it cannot be established that national legislation in the field exists or is likely to exist'. Moreover the position is taken that 'The preservation of the functioning of the internal market is not recognized in the Treaty as a common policy'.[241] Finally, according to the author of the Institutional report:

235. Finnish Report, p. 322; Hungarian Report, p. 425.
236. Polish Report, p. 488; Italian Report, p. 460.
237. Brackets added. Ibid, p. 488.
238. UK Report, p. 636; Italian Report, p. 488.
239. Dutch Report, p. 474.
240. Croatian Report, p. 288.
241. Dutch Report, p. 473.

'The question which arises is whether a total centralization of resolution at European level falls within the case-law. Is it possible to consider that the Resolution authorities to be set up are only contributing to a process of harmonization?'[242]

A number of national reports point towards the challenges which the SSM and namely the central role given to the ECB creates in the relationship between euro area Member States and non-euro area Member States that may or may not decide to participate in the mechanism. The author of the German report observes in this context that the banking regulation that results from the specific regulatory needs of euro area Member States can 'hardly be extended to additional EU Member States without friction (especially considering the role of the ECB)'.[243] Yet, as the author argues, at the same time the non-application of such rules to non-euro area Member States may not 'impair the unity of the internal market for financial services'. [244] For the Hungarian rapporteur, different to economic policy coordination, there is less room for differentiation between euro and non-euro area Member States when setting up common rules for banks in an internal market. In the view of these authors such rules should not only apply to the euro area.[245] Finally, the Portuguese report is also critical on a differentiation between euro area and non-euro area Member States pointing out that 'this could jeopardize the functioning of the internal market, leading to a step back in the affirmation of the fundamental market freedoms'.[246] A somewhat more pragmatic interpretation of the scope of Article 114 TFEU is offered by the author of the Institutional report, according to which it could be argued that 'the Regulation indeed legally applies to the whole Single Market and that it is only its effective application that is suspended in the Member States that are part of the SSM'.[247]

Focusing extensively on the governance structure of the SSM applicable to participating non-euro area Member States in the SSM, the Danish rapporteurs come to the conclusion that 'the non-Euro area member states have gained as much influence in the SSM as possible under the adopted legal framework.'[248] At the same time the authors point out that the decision for non-euro area Member States to participate in the SSM may not only be guid-

242. Institutional Report, p. 229.
243. Own translation. German Report, p. 346.
244. Ibid, p. 346. Concerns in this regard are raised in the Swedish Report, p. 582.
245. Hungarian Report, p. 425.
246. Portuguese Report, p. 506.
247. Institutional Report, p. 229.
248. Danish Report, p. 303.

ed by the applicable governance structure, but also by the possibility provided in the SSM to exist the mechanism, as well as 'e.g. the range and coverage of ECB's supervisory task, and the accountability of the ECB in the exercise of supervisory tasks'.[249] This is a subtle reminder that different to euro area Member States, non-euro area Member States in principle have a choice in the matter, albeit future participation in the euro area may mean this this freedom is of a rather temporary nature.

Finally, in the context of the envisaged SRM, the lawfulness of the delegation of powers to the Single Resolution Board, to be established as Union agency with legal personality and *inter alia* charged with taking decision 'in connection with resolution planning, the assessment of resolvability, the removal of impediments to resolvability and the preparation of resolution actions', is questioned against the background of *Meroni*. Namely the question is raised whether the delegated executive power 'is clearly defined' and, moreover, whether 'the exercise of the power is subject to strict review in the light of objective criteria'.[250] The authors of the Dutch report, which state that the *Meroni* doctrine stands in the way of the delegation of 'large discretionary powers', wonder how this prohibition has to be interpreted in the context of financial market supervision:

> 'It seems difficult to define supervisory powers so narrowly that the decision to be taken does not entail any discretion. The question is therefore how much room for appreciation can be left to the authorities or bodies which are entrusted with supervisory powers.'[251]

The author of the Institutional report also emphasizes that 'such a delegation of executive decision making power is not unlimited' as it 'may not replace the policy choices of the delegator by the choices of the delegate'.[252] At the same time it is pointed out that Article 17 TEU and 291 TFEU 'do not exclude that the EU legislature or the Commission may, in principle, delegate executive powers to a separate body'.[253] However the Institutional rapporteur is critical about the position taken by the Council that resolution decisions should be decided by the Single Resolution Board, whereby the role of the Council is limited to objecting to such decisions in a short space of time and

249. Footnote omitted. Danish Report, p. 303, with reference to relevant literature.
250. See e.g. joined Cases C-154/04 and C-155/04 The Queen v Secretary of State for Health and National Assembly for Wales [2005] ECR I-6451, para. 90, with reference to case C-9-56 and 10-56 *Meroni v High Authority* [1957/1958] ECR 133.
251. Footnote omitted. Dutch Report, p. 475.
252. Institutional Report, p. 228 with reference to Meroni.
253. Ibid, p. 228.

only for a predetermined list of reasons. The Institutional report in this context points out that the European Commission has made its opposition to these arrangement known during the Economic and Financial Affairs Council meeting of 18 December 2013, as they are considered to reduce 'the discretion of the Council to an extent which is not compatible with the Meroni case law'.[254]

In the context of the debate on the *Meroni* doctrine, reference can be made to the recent decision by the CJEU on the challenge by the UK of the intervention powers of ESMA in exceptional circumstances to regulate or prohibit short selling Member States.[255] In this case the parties to the main proceedings had *inter alia* claimed a breach of the principles laid down in *Meroni* as the discretion given to ESMA essentially exceeded what was acceptable based on the Court's case law. With judgment of 22 January 2014 the CJEU dismissed the action stating that the powers under review comply with the requirements stated in *Meroni*, as 'the powers available to ESMA under Article 28 of Regulation No 236/2012 are precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority'.[256]

Finally, the Institutional report also points out that the European Commission is critical about the decision taken by the euro area Member States at the Economic and Financial Affairs Council meeting of 18 December 2013 to negotiate an intergovernmental agreement on the functioning of the single resolution fund, including namely details on the national contributions to the fund, as in its view 'the application of a Union law Regulation was made dependent on conditions laid down in an international treaty'.[257] The Institutional rapporteur in this context questions 'whether Member States are allowed to decide collectively in an area which is shard competence of the Union and the Member States, especially in case there is a parallel Regulation to be adopted', as this could effectively amount to a circumvention of the Community method.[258]

254. Ibid, p. 228.
255. Article 28 Regulation 236/2012 on short selling and certain aspects of credit default swaps, OJ 2012, L 86/1.
256. Case C-270/12, *UK v EP and Council* [2014] ECR I-nyr, para. 53.
257. Institutional Report, p. 229.
258. Ibid, pp. 229-230.

Legal orders of the Member States

Question 6

What legal challenges do euro area Member States, Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency face with regard to their national fiscal rules and the applicable budgetary processes as a result of the various European ad hoc (e.g. European Financial Stabilization Mechanism, European Financial Stabilization Facility) and long term reform measures (e.g. Six-Pack, Two-Pack, Treaty on Stability, Coordination, and Governance in the European Union, Treaty establishing the European Stability Mechanism)?

1. Background*: impact of new economic governance on the national legal order*

As has already become clear in the context of question 1 the various mainly supranational and intergovernmental measures that have been taken result in a considerable revision of the system of economic policy coordination as foreseen mainly in Articles 121 and 126 TFEU. Indeed the Six-Pack and Two-Pack provisions, as well as the obligations introduced by the TSCG have not only extended the scope of review by Union institutions of the economic situation in the Member States, but mainly also substantially increased the obligations of the Member States.

The question that arises in this context is what the impact of these obligations arising from Union and non-Union instruments is on autonomous decision-making in the area of economic policy of the Member States. This concerns first and foremost the effects of the reform of economic governance role of national federal, central and regional governments in the drafting and adoption of national budgets.

2. Responses*: accommodating the new system*

From the national reports it becomes clear that the impact of the measures taken in response to the crisis on the national constitutional orders has varied depending namely on the extent to which they already provide for strict (constitutional) budgetary rules and, arguably also, on the extent to which the new

European budgetary rules were considered a substantive departure from the previous system. Thus, for example for the author of the Austrian report already the Maastricht Treaty featured limits on government borrowing. Consequently, the balanced budget rule included in Article 3(2) TSCG is characterized as no more than 'repetition and clarification of a fundamental choice of the Union's economic policy'.[259] Moreover, the TSCG is considered to superimpose national constitutional law.[260] The German report points to the existence of a comprehensive national legal framework for budgetary and financial planning and the existence of a debt break already before the introduction of the new Union legal regime, requiring only minor adjustments as a result of the TSCG.[261]

However, several national reports also point out that the European reform measures have triggered substantial amendments in the applicable national laws and procedures. Thus, for example, the Greek report explains that fundamental changes in the Greek legal order relating to budgetary questions have taken place since 2010, namely 'the reorganization of the procedure applicable to drafting and monitoring of the execution of the national budget that applies to the central Government and the regional entities.'[262] Reference is made in the report to new rules to ensure 'fiscal discipline of Public Enterprises and Private Entities owned by the State', the establishment of a 'Parliamentary Budget Office' for mid-term fiscal strategic planning, as well as a 'specific Committee' within the State Treaty Office to ensure compliance of the national system with the EU framework on economic governance.[263] The report also refers to an ongoing debate in Greece on a constitutional amendment to include some basic fiscal rules (balanced budget, debt break), at the same time pointing out that the inclusion of such fiscal rules could infringe the 'economic neutrality proclaimed by the Constitution'.[264] Yet, the authors of the Greek report acknowledge 'Structural problems [...] related to tax avoidance and evasion and poor collection mechanisms still persist' in Greece.[265]

259. Own translation and footnote omitted. Austrian Report, p. 275, with reference to relevant literature.
260. Ibid, p. 275, with reference to Article 13(2) of the Austrian Federal Constitutional Law (*Bundes-Verfassungsgesetz*).
261. German Report, p. 350. Moreover the report mentions the adjustment of statistics rules in order to comply with Directive 2011/85/EU, which forms part of the Six-Pack.
262. Greek Report, p. 389.
263. Ibid, pp. 389-390.
264. Ibid, p. 340.
265. Brackets added. Ibid, p. 390.

The ratification of the TSCG has resulted in a constitutional amendment in Italy namely to comply with the obligations included in Article 3(2). With effect from 2014 'the state as a whole [is obliged] to ensure a balanced between budget revenue and expenditure, taking into account situations of adversity and favorable phases of the economic cycle'.[266] The introduction of the Six-Pack and Two-Pack measures, as well as TSCG has also resulted in notable changes in Slovenia, notably through the adoption of a constitutional balanced budget rule and the amendment of the Slovenian Public Finance Act to accommodate for the implementation of Directive 2011/85/EU.[267] One very interesting development in Slovenia concerns the impact of the obligations undertaken as part of the TSCG on the right to a referendum secured in the Slovenian Constitution. The right for parliament to call a referendum on the entry into force of a law, if supported by at least forty thousand voters, has been somewhat restricted, excluding inter alia 'laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters', as well as laws 'on taxes, customs duties, and other compulsory charges, and on the law adopted for the implementation of the state budget, and on laws on the ratification of treaties'.[268] The impact of the new economic governance regime on the national constitutional system is also highlighted for Finland. According to the rapporteurs the constitutional principle that the state debt levels are decided by parliament was challenged by the legal arrangements foreseen in the EFSF and the ESM, as these mechanisms do not 'define exactly the limits of the financial burden and risks of the State'.[269] This was solved by a pragmatic interpretation by the Finish parliament of the existing legal regime: 'It had to accept a very practical conclusion that it should suffice that a probable amount of financial burden must be known.'[270]

That the introduction of the new economic governance regime has resulted in tensions with the national (constitutional) legal order also applies for the Netherlands. The rapporteurs point out that the TSCG and ESM challenge national parliamentary budgetary prerogative as secured by the Dutch constitu-

266. Brackets added. Italian Report, p. 451.
267. Slovenian Report, p. 528.
268. Art. 90 Slovenian Constitution as amended by constitutional act amending Articles 90, 97 and 99 of the Constitution of the Republic of Slovenia (UZ90,97,99). Adopted on 24 May 2013 and entered into force on 31 May 2013 (Official Gazette of the Republic of Slovenia No. 47/2013 of 31 May 2013).
269. Art. 82 Finnish Constitution. Finnish Report, p. 328.
270. Finnish Report, p. 328.

tion and recognized in constitutional doctrine.[271] On the TSCG the authors point out with reference to *Van Rossem* that the compatibility of the TSCG with the constitution has been questioned 'since it removes the possibility to make fundamental choices on how to stimulate the Dutch economy'.[272] The author of the Dutch report nevertheless point out that the majority opinion considers the TSCG to be compatible with the Dutch constitution, even if 'tensions with the budgetary autonomy of Parliaments' are observed.[273] A similar standpoint is taken with regard to the impact of the Six-Pack and Two-Pack. In the Austrian report it is highlighted that ratification of the ESM Treaty has resulted in an amendment of the constitution providing for a participation of the lower chamber of parliament (*Nationalrat*) in ESM matters.[274]

Question 7

What changes (if any) have to be made at the level of the Member States to ensure democratic legitimacy and accountability of economic governance in Economic and Monetary Union?

1. Background*: securing democratic legitimacy and accountability of economic governance at the national level*

Question 7 complements question 4, which focuses on the democratic legitimacy and accountability at the Union level. From the discussions in the context of that question it has become clear that many national rapporteurs, at least at the current state of European integration, consider the national legal order to continue to fulfil an important role in the democratic legitimation of the Union activities in the sphere of economic governance in EMU.

The question than arises is whether and to what extent the introduction of the *ad hoc* and structural reform measures both inside and outside the Union framework including *inter alia* the Six-Pack, Two-Pack, TSCG and ESM have had an adverse effect on the democratic legitimacy of public power and

271. The report (p. 478) also observes that currently additional legislation is pending to strengthen budgetary discipline (*Wet Houdbare Overheidsfinancien*).
272. Footnote omitted. Dutch Report, p. 476, with reference to relevant literature.
273. Ibid, p. 476.
274. Austrian Report, pp. 275-276.

the system of checks and balances applicable at the national level. To the extent that this is indeed stated, what measures – if any – have been taken or are discussed at the national level to remedy the situation?

2. Responses*: (constitutional) challenges for the national policy space*

Considering the responses in the national reports to question 4 it is little surprising that a majority of rapporteurs focus on the challenges which new economic governance poses for national parliaments and namely their budgetary rights.

Arguably one of the Member States that has been exposed most extensively to measures in the context of new economic governance is Greece. For this country the national rapporteurs observe first of all that compliance with the several memoranda of understanding attached to the (bilateral) financial assistance to that country has 'revealed a number of questions as to the democratic legitimacy of measures imposed by Parliament and/or the Executive as well as the technique of their implementation'.[275] Firstly, reference is made to the extensive delegation of legislative powers to the executive that is described as potentially problematic for not meeting the criteria for such a delegation defined by the Greek constitution.[276] Secondly, the report point out that extensive use has been made of a procedure provided for by the Greek constitution to adopt 'emergency legislation issued by the executive without statutory delegation'.[277] According to the authors such measures are *ex post* approved by parliament, which, due to 'the long duration of the economic crisis deprived in reality from Parliament the possibility to really discuss and analyse such measures, which have been quasi imposed to it'.[278] In fact in the opinion of the rapporteurs the current practice amounts to 'deviations from the democratic principle' that need to be addressed *inter alia* by reviewing the conditions under which legislative power can be delegated to the executive in accordance with the Greek constitution.[279] In this context, referring to the Union's role in providing financial assistance, the author of the Polish report observes that from the point of view of the receiving country the legitimacy of the conditions attached to financial assistance is undermined by the

275. Greek Report, p. 391.
276. Ibid, p. 391.
277. Ibid, p. 391.
278. Ibid, p. 391.
279. Ibid, p. 392.

fact that creditor countries, and moreover also the Troika, are dictating the conditions.[280]

The authors of the Slovenian report are rather sceptical whether national parliaments will actually retain budgetary powers considering the new procedures:

'The fear thus remains that the economic policy decisions taken at the EU level, much like Le Corbusier's design of skyscrapers, neglect to take into account that they are ultimately destined for and bear an impact on the people.'[281]

With reference to the academic debate the Slovenian rapporteurs are also rather critical about the implementation of Article 3(2) TSCG and namely the balanced budget rule for 'the effect it may have on the fundamental constitutional principles, such as the rule of law the principle of the social state and on the principle that the power in Slovenia is vested in its citizens', especially considering the recent restriction of the right to hold a referendum on certain types of laws.[282] The pressure on the position of national parliaments resulting from the reform of economic governance is also acknowledged in the Estonian report, observing that current arrangements are such that decision-making is 'trusted with the executive part of government, while the legislator is left with 'pre-agreed' option or options by the time the matter is presented to the national parliament'.[283] The authors observe moreover 'notable changes in the institutional balance on the national level' as a result of the reform measures and observe that the Slovenian parliament is pushing for an increased cooperation with government in EU decision-making, which calls for an updating of the legal instruments regulating the cooperation in EU affairs.[284] According to the rapporteurs the Slovenian parliament wants to mainly be involved in the discussions on the national reform programs and the Stability Program prior to their submission, and also be in a position to

280. Polish Report, p. 493, pointing out that occasionally such conditions have been (initially) rejected, such as in the case of Cyprus and – via the Constitutional Tribunal – in Portugal. With regard to the latter see also the discussions in the context of question 9.
281. Footnote omitted. Slovenian Report, p. 529, with reference to relevant literature.
282. Footnote omitted. Ibid, p. 532, with reference to relevant literature. With regard to this possibility of a referendum see also the discussion in the context of question 6.
283. Estonian Report, p. 311. Observing a loss of power by national parliaments namely in the budgetary sphere is also the Portuguese Report, p. 507.
284. Slovenian Report, pp. 529-530.

discuss the draft country-specific recommendations issued by the Council.[285] The Finish and Italian rapporteurs also emphasise the importance of national parliaments to engage with government in the preparatory stage. The latter point out that the Italian parliament has been given the right to 'adopt formal instructions addressed to the Government, as well as parliamentary scrutiny reservations', whereby any government activity pertaining to economic policy 'is subject to a serious scrutiny control by the Italian parliament'.[286]

Clear signals that national parliaments are seeking a meaningful role in new economic governance in EMU also come from the Netherlands. Explaining the parliamentary budgetary control rights and the role of the Court of Auditors in brief, the Dutch rapporteurs point out that 'during the budgetary year, the obligation of Ministers and State Secretaries to inform Members of Parliament is of vital importance for legitimacy and accountability of the economic policy'[287] At the same time it is observed that 'parliamentary control is in practice rather limited', as 'Approximately 90% of the government budget is normally already engaged of a budgetary year'.[288] Nevertheless, new ways are sought to increase parliamentary influence mainly also in the light of the intergovernmental instruments. The Dutch rapporteurs observe that in the context of the approval of the ESM Treaty a motion has been adopted in the lower house of parliament (*Tweede Kamer der Staten-Generaal*) according to which plans to change the authorized capital of the ESM to be submitted by amending treaty and any required supplemental budget have to be forwarded by the government in advance for approval to parliament.[289] Moreover the authors report of 'procedural arrangements between the finance minister and the parliament' that are established to ensure proper information of parliament.[290] These arrangements must ensure that government provides information beforehand and, in case this is not possible, makes 'a parliamentary reservation for irrevocable decisions'.[291] Interestingly the Dutch rapporteur themselves point out that the latter is not possible in the

285. Ibid, p. 529.
286. Italian Report, pp. 452-453. See also Finnish Report, p. 329.
287. Dutch Report, p. 477, with reference to Art. 68 of the Dutch Constitution.
288. Ibid, p. 478.
289. Ibid, p. 478, with reference to: Motie van het lid Harbers C.S., introduced on 24 mei 2012, Kamerstukk, 33 221, nr. 11.
290. Ibid, p. 478.
291. Ibid, p. 478.

case of the application of the emergency voting procedure foreseen in Article 4(4) ESM, where the Netherlands do not have a right to veto decisions.[292]

The limits for national parliamentary control are also identified in the Finnish report, which points out that the emergency voting procedure undermines the role of parliaments of smaller Member States.[293] This report moreover also argues that in the context of ESM 'national parliaments may be restricted to exercise their control over the executive branch of the government, as the latter may benefit from the professional secrecy rules of the ESM.'[294] The latter issue had of course also been raised by the applicants in the constitutional challenge *inter alia* of the ratification of the ESM Treaty before the German Federal Constitutional Court. In its judgment of September 2012 regarding several applications for the issue of temporary injunctions the Court considered the professional secrecy rules included not to stand in the way of the ratification of said Treaty provided that they are interpreted in such a way that they allow for a comprehensive information of both chambers of the German parliament (*Bundestag*, *Bundesrat*).[295] General with regard to the TSCG and the ESM, referring to the long-standing case-law of the German Federal Constitutional on the constitutional budgetary rights of the federal parliament the German report concludes that 'the German participation in the different measures is thus subject to comprehensive democratic control by the German federal parliament'. [296]

A somewhat more critical view on the added value of measures to enhance democratic legitimacy and accountability at the national level can be found in the Polish report:

'The macroeconomic governance, which has almost exclusively been exercised at the national level, has been plagued by time inconsistencies of policymakers' incentives, mixed with rational ignorance of voters.'[297]

The Polish rapporteur concludes from this that:

'More democratic (electoral) accountability may easily further exacerbate the problem, so this is hardly a remedy for ineffective macroeconomic governance processes. Democratic

292. On this point see also the discussion in the context of question 9.
293. Finnish Report, p. 312.
294. Ibid, p. 311.
295. BVerfG, 2 BvR 1390/12 vom 12.9.2012, recital 260.
296. Own translation. German Report, p. 351. See also the discussion in the context of question 9.
297. Polish Report, p. 493.

legitimacy could arguably support the soundness of macroeconomic policies where voters tend to think in a longer perspective and where the economic awareness is traditionally better ensconced.'[298]

Leaving the validity of this political economy analysis aside, this reasoning is remarkable, as it seems to suggest that the main objective of democratic legitimacy or accountability should be a more effective macroeconomic policy.

An interesting perspective on the effects of the TSCG on the national democratic process can be found in the Italian report. In fact the authors of this report seem to consider the TSCG as a kind of constitutional self-restraint, observing that 'the balanced budget obligations prevents the elites governing a country, and their policy autonomy, from adoption unethical debt-creating policies, which will be paid by future generations'.[299] The balanced budget rule is perceived to 'protect democracies from inter-generational conflicts', as 'fiscal discipline is one of the basic elements of a social pact among generations'.[300] The choice of an intergovernmental instrument to introduce the balanced budget rule is welcomed, as 'the direct involvement of national parliaments through their constitutional processes of ratification is a far better solution, instead of using secondary law tools', considering the deep impact that a balanced budget rule can have on the constitutional legal order of a Member State.[301]

Question 8

How have the duties arising from the Treaty on Stability, Co-ordination, and Governance in the European Union, namely those set out in Articles 3 (1), 4, 5 and 6, been accommodated for in the national legal order?

1. Background*: Member State's obligation to comply*

The TSCG, which entered into force on 1 January 2013 between the Member States that had ratified the treaty by that time, includes a number of concrete duties for Member States pertaining to economic policy, apart from the ratification of the Treaty itself, that in principle call for action on the part of the

298. Ibid, p. 493.
299. Italian Report, p. 451.
300. Ibid, p. 451.
301. Ibid, p. 440.

Member States.[302] This concerns mainly Article 3(2) TSCG, according to which the rules laid down in Article 3(1) TSCG 'shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes.' This includes the obligation that the budgetary position of the general government of the Member States must be balanced or in surplus and, moreover, that a significant observed deviations from the medium-term budgetary objective or the adjustment path towards it must automatically trigger a correction mechanism.[303] Moreover, in putting in place such an automatic correction mechanism the Member States must observe common principles adopted by the European Commission.[304]
Principles referred to in Article 4 TSCG have been laid down in a Communication from the Commission on common principles on national fiscal correction mechanisms in June 2012.[305]

Against the background of these obligations arising from the TSCG question 8 is geared towards exploring the nature and scope of legal instruments applied by the signatory Member States to comply with the substantive requirements of the TSCG and the interpretation in this context of the obligations arising namely from Articles 3(1) TSCG.

302. For the latest overview of the state of play of ratification of the TSCG, as well as the ESM Treaty and the Council decision amending Article 136 TFEU, available at the time of writing of this general report see EP Directorate General for Internal Policies, *Article 136 TFEU, ESM, Fiscal Stability Treaty. Ratification requirements and present situation in the Member States*, 15 January 2014. Available at < http://www.europarl.europa.eu/RegData/etudes/note/join/2013/462455/IPOL-AFCO_NT(2013)462455_EN. pdf> accessed 1 March 2014.
303. Art. 3(1) (a) and (e) TSCG.
304. See Communication from the Commission, Common principles on national fiscal correction mechanisms, Brussels, 20 June 2012 (COM(2012)342 final). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0342:FIN:EN:PDF> accessed 1 March 2014.
305. COM (2012) 342 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0342:FIN:EN:PDF> accessed 1 March 2014.

2. Responses*: securing reinforced budgetary discipline in the national legal orders*

It has to be observed at the outset that the responses to this question are at times somewhat sketchy, for example only referring to the ratification of the TSCG itself rather than the compliance with its Article 3(2). Nevertheless, what becomes clear from the reports is that the significance of the introduction of an obligation to feature a balanced budget rule has varied depending on the national legal situation and namely the existing of a similar rule at the time of the coming into effect of the TSCG. Moreover, it can be observed that some, but certainly not all Member States have chosen for the inclusion of the balanced budget rule at the constitutional level.

Member States that have chosen to introduce a balanced budget rule at the constitutional level include Slovenia and Spain. In the latter case, the Spanish report states that the Spanish constitution has been amendment in July 2012 'to reflect the fiscal balance rule of the Fiscal Compact.'[306] The author of the Slovenian report observes that there was discussion on the legal necessity to take any legislative action to implement the balanced budget rule, as in the view of some commentators the Slovenian Public Finance Act already includes a sufficient provision calling for budget revenues and expenditure to be in balance.[307] Moreover it is reported that it was considered by some that any implementation of the TSCG beyond its ratification was unnecessary, as the Slovenian constitution states that ratified international agreements 'are binding in the Slovenian legal order and in hierarchy rank above the law.'[308] However, in the end it was decided to amend Article 148 of the Slovenian Constitution, which now states:

> 'Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.'[309]

Interestingly, while pointing out that detailed rules 'as regards the application of the obligations set out in the Fiscal Compact have not yet been enacted',

306. Spanish Report, p. 567.
307. Slovenian Report, pp. 530-531, with reference to relevant literature.
308. Footnote omitted. Ibid, p. 531.
309. An English version is available at <http://www.us-rs.si/media/constitution.en.14.11.2013.pdf> accessed 1 March 2014. Slovenian Report, pp. 530-531, where it is also pointed out that details have to be laid down by an act of parliament.

the Greek report also refers to a constitutional provision according to which international treaties, once ratified, 'an integral part of the domestic Greek law and shall prevail over any contrary provision of existing or future.'[310] It does not become clear from the report whether the authors are of the opinion, similar to what has apparently been argued by some for Slovenia, that a further implementation of the balanced budget rule and the automatic correction mechanism is unnecessary.

A somewhat different perspective on the extent of the obligation to comply with the TSCG is offered in the Hungarian report. Here, based on a textual interpretation of Article 3(2) TSCG, the authors argue that:

'the implementation of the Treaty can be considered adequate without any legal changes if the country can present well established budgetary practices with a long tradition and reliable track record. This shows that the Treaty prefers pragmatism than legal form'.[311]

Whether and to what extent the implementation of obligations arising from the TSCG can actually be meet with reference to legal traditions and practice alone can be debated. In any event, the Hungary report also refers to an existing constitutional debt break, namely Article 36(5) of the Hungarian Fundamental Law.[312] According to this provision:

'As long as state debt exceeds half of the Gross Domestic Product, Parliament may only adopt a State Budget Act which contains state debt reduction in proportion to the Gross Domestic Product.'

The authors observe that this rule is 'even tighter than the 60% debt break stipulated by the TSCG', as the 'debt ratio cannot exceed 50% of the GDP, as long as it is higher than 50%, debt ratio has to decline each year.'[313]

As is pointed out in the national report, Germany already had a comprehensive legal framework for budgetary and financial planning and even featured a debt break, requiring only minor adjustments of existing federal fi-

310. Greek Report, p. 392.
311. Hungarian Report, pp. 427-428.
312. An English language version is available at <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> accessed 1 March 2014.
313. Hungarian Report, p. 428.

nancial laws as a result of the ratification of the TSCG.[314] According to Article 115(2) sentences 1-3 of the German Basic Law:

'Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal gross domestic product. In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically.'[315]

The German rapporteur in this context points out that based on this provision deficit reduction has commenced in 2011, whereby from 2016 at the federal the budgetary deficit may not exceed 0.35% of GDP and from 2020 federal states are not allowed to take on any new debts at all.[316] Details are regulated in the so-called Budgetary Principles Act (*Haushaltsgrundsätzegesetz*). Moreover, pursuant to Article 109a of the German Basic Law, in order to avoid budgetary emergencies, a federal law requiring the consent of the upper house of parliament (*Bundesrat*) must *inter alia* provide for the continuing supervision of budgetary management of the Federation and the federal states by a so-called Stability Council (*Stabilitätsrat*). According to Paragraph 51(1) of the law on the Stability Council (*Stabilitätsratsgesetz*) the latter examines the macroeconomic and financial assumptions underlying the budget and financial planning namely of the federal, state and local governments, whereby the obligations arising namely from Articles 121, 126 and 136 TFEU have to be taken into account. The Stability Council can make recommendations in this regard.

In the case of Austria, Article 3 TSCG is conceived to complement Article 13(2) of the Federal Constitutional law (*Bundes-Verfassungsgesetz*), which states:

'The Federation, the Laender, and the municipalities must aim at the securement of an overall balance and sustainable balanced budgets in the conduct of their economic affairs. They have to coordinate their budgeting with regard to these goals.'[317]

314. German Report, pp. 351-352.
315. An English language version is available at <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 1 March 2014.
316. German Report, pp. 351-352.
317. An English language version is available at <https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.html> accessed 1 March 2014.

The specific obligations arising from Article 3(2) TSCG have been addressed with an act of parliament, namely the Federal Budget Law 2013 (*Bundeshaushaltsgesetz*).[318]

The Estonia report refers to an envisaged new state budget act that takes into account obligations arising from TSCG.[319] At the same time it is pointed out that 'the balanced budget rule was applied that in practice also before', whereby the new act 'amends the preparatory process of annual budgets and specifies the roles and responsibilities of different institutions in this regards.'[320]

Moreover also both the Dutch and Portuguese reports explain that the obligations arising from Article 3(2) TSCG have been implemented by act of parliament. In Portugal the State Budget Framework Law has been amended in June 2013.[321] In the Netherlands for this purpose the Law on Sustainable Government Finances (*Wet Houdbare Overheidsfinanciën*) has been adopted in December 2013. According to Art. 2(3) of that law:

'the Minister of Finance, when conducting the cyclical budgetary policy, shall take into account the relevant European budgetary norms, among which the country specific MTO prevailing at the moment'.[322]

The corrective mechanism is included in Article 2(4) of the law, which according to the report states that 'the competent Minister will take adequate measures limiting the expenses and/or raising revenues in case the Minister of Finance concludes that the budgetary policy is not in compliance with European budgetary rules and procedures', whereby the corrective measures have to be based on 'a correction plan to be presented to parliament'.[323] In this context reference is made to the Dutch academic literature where it is questioned whether an ordinary act of parliament is sufficient to comply with Article 3(2) TSCG, as the European Commission in its Communication has stated that 'the mechanism should be such that its provisions cannot be simply altered by ordinary budgetary law'.[324]

318. Austrian Report, p. 277.
319. The Polish Report, pp. 494-495, also refers to a planned amendment of the Public Finance Act. This amendment has since taken place by act of 8 November 2013 amending the act on public finances and some other acts (Druk Nr. 1789).
320. Estonian Report, p. 312.
321. Portugese Report, p. 510.
322. Dutch Report, p. 480.
323. Ibid, p. 480.
324. Ibid, p. 481.

The example of Switzerland highlights that the idea of a debt break has also caught on outside the EU. The Swiss report in this context explains that in order to 'secure in the medium-term a balanced federal budget [...] public expenditure are limited across an economic cycle at the level of the revenues'.[325] However, apart from this limitation of the annual new indebtedness (annual deficit), according to the report there is no specific rule on government debt levels.

Finally, several national reports point out that no specific measures have been taken at the national level to implement Articles 4-6 TSCG referred to in question 8.[326]

Question 9

Have the EU or non-EU instruments employed in addressing the euro area debt crisis been challenged before national (highest or constitutional) courts? If so, on what grounds and with what outcome?

1. Background*: new economic governance before national courts*

As has become clear from the discussions on the previous questions the *ad hoc* and structural measures that have been taken inside and outside the Union legal framework as a response to the crisis do not only change the Union legal framework pertaining to economic policy (coordination) inside and outside the euro area, but moreover also have a substantial impact on the national (constitutional) legal orders of the Member States and, as a consequence of the implementation of the new economic policy regime, eventually also on individuals (citizens). It therefore takes little imagination to anticipate that measures, such as the two intergovernmental treaties, and national acts effectuating the new economic governance regime, such as amendments of the national budgetary rules, may become subject to judicial review before national (highest) (constitutional) courts and tribunals.

Indeed, arguably the considerable intervention of the new economic governance regime in the national economic policy space, more so than in the past, makes EMU vulnerable to interventions by national courts, potentially

325. Own translation. Swiss Report, p. 604.

326. See e.g. the Slovenian Report, p. 530, where it is pointed out that this concerns obligations arising from directly applicable Six-Pack and Two-Pack regulations.

opening another chapter to the debate on the judicial dialogue between national and European courts.

2. Responses*: in defences of national constitutional (structural) principles(?)*

The responses to this question provide a mixed picture. At the one end of the spectrum, some national reports state that the economic reform measures have not become subject to any judicial review. At the other end of the spectrum in the case of one euro area Member State there is something of a tradition of judicial review of EMU related Union law, starting with the Treaty on European Union introducing the original legal framework. In the majority of cases reported referring to the economic governance reform measures, the intergovernmental instruments have been the focus of judicial review.

The German report refers to a whole series of judgments by the German Federal Constitutional Court that are directly or indirectly related to EMU, starting with its famous *Brunner* decisions on the constitutionality of the ratification of the 1992 Treaty on European Union by which the legal framework on economic and monetary policy was introduced into to what is now primary Union law,[327] and the subsequent decision on the participation in the third and final stage of EMU.[328] The German rapporteur in particular points to the Court's decision on the constitutionality of the ratification of the Treaty of Lisbon, in which reference is made to an 'inviolable core content of the Basic Law's constitutional identity'.[329] The Court emphasized that European unification may not have as a consequence that no 'sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions', whereby 'Essential areas of democratic formative action comprise, inter alia, [...] revenue and expenditure including external financing'.[330] In this context the Court has made clear that a violation of 'the principle of democracy and the right to elect the German Bundestag in its essential content would occur if the determination of the type and amount of the levies

327. BVerfGE 89, 155.
328. BVerfGE 97, 350.
329. German Report, p. 354. See BVerfGE 123, 267, recital 240. An English language version of the decision is available on the Court's own webpage at <https://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html> accessed 1 March 2014.
330. Ibid, recital 249.

imposed on the citizen were supranationalised to a considerable extent.' What follows from this in the view of the German Court is that:

'The German Bundestag must decide, in an accountable manner vis-à-vis the people, on the total amount of the burdens placed on citizens. The same applies correspondingly to essential state expenditure.'[331]

The establishment of what may be described as core budgetary competences of the German Parliament forms, as the national report emphasizes, an important cornerstone of the subsequent decisions namely on the German participation in the bilateral loans for Greece and the EFSF, as well as more recently on the ratification of the ESM Treaty.[332] In its final decision on the constitutional complains against the financial assistance granted by Germany to Greece[333], the Court has set 'constitutional limits for a German participation in additional stability mechanisms', [334] when observing:

'the Bundestag, as the legislature, is also prohibited from establishing permanent mechanisms under the law of international agreements which result in an assumption of liability for other states' voluntary decisions, especially if they have consequences whose impact is difficult to calculate. Every larger scale aid measure of the Federation taken in a spirit of solidarity and involving public expenditure at international or European Union level must be specifically approved by the Bundestag. Sufficient parliamentary influence must also be ensured with regard to the manner in which the funds that are made available are dealt with.'[335]

The national report points out that in German legal writing this judgment has been interpreted as a 'more or less categorical dismissal of Eurobonds or a debt redemption fund'.[336] In 2012 the Federal Constitutional Court also decided in two cases on the cooperation and information rights of the German Parliament,[337] whereby according to the German rapporteur the Court empha-

331. Ibid, recital 256.
332. German Report, p. 354.
333. BVerfG, 07.09.2011 – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10. The quote is taken from the official Court's English language press release (No. 55/2011) of 7 September 2011, available at <http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html> accessed 1 March 2014. The full judgment is available at <https://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html> accessed 1 March 2014.
334. Own translation. German Report, p. 355.
335. English summary of the judgment of 7 September 2011, section II.
336. Own translation. German Report, p. 356, with further references.
337. BVerfGE 130, 318.

sized that 'the budgetary responsibility of parliament must in principle be exercised by the plenum and may only exceptionally be vested in a parliamentary committee'.[338] Background to this decision formed a federal law that foresaw the transfer of the participatory and information rights of parliament to a committee consisting of members of the permanent budgetary committee. Finally, the report refers to the above mentioned and recently much cited case before the Federal Constitutional Court challenging the ratification of the ESM Treaty and TSCG, as well as against measures taken by the ECB. The national report points out that initially the constitutional complaints focused on 'a violation of budgetary autonomy of parliament', as it was argued that 'the ESM Treaty established an unlimited liability for Germany and that the TSCG restricts the budgetary autonomy of parliament in an unconstitutional fashion'.[339] In the course of the judicial proceedings additional complaints were raised, which namely concerned the announcement by the ECB of the OMT and with it the possibility of unlimited purchases of government bonds. On 12 September 2012 the Court rejected an application for interim relief. As explained in the national report, the Court considered the ratification of the ESM Treaty admissible under the conditions that the German liability in accordance with Art. 8(5) ESM Treaty is limited to its share in the capital of the ESM and, moreover, that the professional secrecy rules included in Articles 32(5), 34 and 35(1) ESM Treaty do not stand in the way of the extensive information rights of the German Parliament.[340] Moreover, the Court did not consider the provisions of the TSCG to constitute a restriction of the budgetary autonomy of parliament, in this context namely pointing to the prior existence of a constitutional balanced budget rule in Germany and arguing that the TSCG constitutes a concretization of the Union legal framework.

In the national report it is pointed out that the Court had decided to leave the question of the ECB measures challenged by the applicants for its decision in the principle proceedings. Since the submitting of the national report, by order of 17 December 2013 the German Federal Constitutional Court has decided to separate the legal challenges brought against the ESM Treaty and TSCG from the one on the OMT.[341] With regard to the constitutionality of the ratification of the two intergovernmental treaties the Court has announced since that it will pronounce its judgment on 18 March 2014 and thus, unfor-

338. Own translation, Ibid, p. 356.
339. Own translation. German Report, p. 357.
340. Ibid, pp. 357-358.
341. BVerfG, 2 BvR 1390/12. Available at <http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html> accessed 1 March 2014.

tunately, after this General report has been handed in. With regard to the challenge of the OMT by order of 14 January 2014 the German Court has suspended the proceedings and referred several questions to the CJEU.[342] This is discussed further in the context of question 11.

The effects of new economic governance on the budgetary rights of national parliament have not only been subject to judicial consideration in Germany. The Estonian report briefly discusses the challenge of the ratification of the ESM Treaty before the Estonian Supreme Court (*Riigikohus*).[343] That Supreme Court focused particularly on the emergency voting procedure provided for in Article 4(4) ESM Treaty and the fact that due to the relatively small number of shares in the authorised capital stock of the ESM Estonia could effectively be outvoted thus indirectly ruling out an involvement of the Estonian parliament.[344] In the decision that was supported by a majority of judges, the Supreme Court first of all observes that this would result in an 'interferes with the financial competence of the Riigikogu [parliament] related to the principle of a democratic state subject to the rule of law and with the state's financial sovereignty'.[345] Nevertheless the majority of judges concluded that a ratification of said Treaty would not be unconstitutional, as its (potential) interference with the Estonian Constitution was 'justified by substantial constitutional values – obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms'.[346] It was considered that 'Article 4(4) [...] provides for an appropriate, necessary and reasonable measure for the achievement of the objective', which the Court describes as being 'to guarantee the efficiency of the ESM also in case the states are unable to make a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area'.[347] Yet, it

342. BVerfG, 2 BvR 2728/13. An English language version of the order is available at <http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr27281 3en.html> accessed 1 March 2014.
343. Estonian Supreme Court, decision no. 3-4-10-6-12 of 12 July 2012, recital 159. An English language version of the decision is available at <http://www.riigikohus.ee> accessed 1 March 2014.
344. Estonian Report, p. 312.
345. Brackets added. Estonian Supreme Court, decision no. 3-4-10-6-12, recital 159.
346. Ibid, recital. 169.
347. Brackets added. Ibid, recitals 209, 179. This is already observed in F. Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground?' in K. Purnhagen and P. Roth, *Varieties of European Economic Law and Regulation*, Springer, Forthcoming 2014.

becomes clear from a study of the several descending opinions that the final decision taken was anything but uncontroversial.

The role of national parliament was also reviewed in Slovenia. Here the national report refers to a case before the Slovenian Constitutional Court (*Ustavno sodišče*) in which the constitutionality of the national act of parliament accommodating for the participation of Slovenia in the EFSF was challenged by a group of MP's. According the Slovenian rapporteurs one of the main claims made was that the act of parliament in question 'would run counter to the [constitutional] principles of the separation of powers [...] and proportionality [...] due to a reduction of the national parliament's powers, with the latter hereinforth only being informed of the Government of the guarantees given'.[348] In what the authors of the national report with reference to the decision describe as the exercise of 'clear judicial restraint in relation with matters of economic policy, which fall within the margin of appreciation of the legislator' the Court did not consider the act of parliament to be unconstitutional.[349]

The implications of the intergovernmental treaties for the national constitutional legal order have also become subject of judicial review in Hungary and Poland. In Hungary the TSCG was submitted to the Hungarian Constitutional Court (*Alkotmánybíróságról*) for review prior to its ratification. Essentially in deciding on whether a constitutional two-third majority was required to ratify the TSCG the Court had to address the question whether the TSCG had to be considered resulting in 'exercising jointly with the institutions of the European Union or with other member states, new competences originating from the Fundamental Law' and thus essentially in the transfer of competences from the national to the European level.[350] Analyzing the TSCG the Court came to the conclusion that 'The Treaty provides for a new obligation for the states parties regarding their budget', arguing in the national context that:

'it is within the scope of competence of the Parliament to adopt an Act on the budget, within the limits specified [in the Fundamental Law]]. The Treaty does not follow these rules':[351]

348. Brackets added. Slovenian Report, p. 533.
349. Ibid, pp. 533-534.
350. Decision 22/2012 (V. 11.) AB on the interpretation of paras (2) and (4) of Article E) of the Fundamental Law, headline no. 1. An English language version of the decision is available at <http://www.mkab.hu/letoltesek/en_ 0022_2012.pdf> accessed 1 March 2014.
351. First two brackets added. Ibid, recital 56.

In the view of the Court, the TSCG:

'widens the scope of application of certain articles of the Treaty on the European Union, of TFEU and of other EU law, and it creates new scope of competence for the European Parliament, the president of the European Parliament, the Council of the European Union, the European Commission and its president and the Court.'[352]

The question of the attribution of new competences also took center stage in two cases before the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*), referred to in the Polish report. The first case dealt with the European Council Decision 2011/199/EU amending Article 136 TFEU.[353] Similar to what has been observed for Hungary, the Tribunal had to determine – albeit in this case in the context of Article 136(3) TFEU – whether this actually amounted to an attribution of new competences onto the supranational level. In such a case a two-third-majority vote in both chambers of parliament would have been required, whereas the act of ratification had actually been based on a simple majority. The Tribunal concluded that this is not the case, mainly because the ESM Treaty does not apply to non-euro area Member States such as Poland. In this context it is interesting to note that the Constitutional Tribunal explicitly refers to the CJEU's findings in *Pringle*, and moreover also mentions the 2012 decision by the German Federal Constitutional Court and the decision by the Austrian Constitutional Court on the same principle issue. It becomes clear from the reasoning of the Tribunal, as is also hinted towards in the national report that a substantive review of the ESM Treaty could result in a different decision in due course. In fact the Tribunal observes that 'the establishment of the ESM has actually changed the architecture of the Economic and Monetary Union.'[354] The second case referred to in the Polish report concerned a constitutional challenge of the ratification of the TSCG.[355] The Polish report points out that this case was dismissed on procedural grounds as the challenge had been brought before the act of ratification had actually been completed.[356]

352. Ibid, recital 56.
353. Polish Constitutional Tribunal, decision of 26 June 2013, Ref. No. K 33/12. An English language summary is available at <http://trybunal.gov.pl/fileadmin/content/omowienia/K_33_12_en.pdf> accessed 1 March 2014.
354. Ibid, section 7.6.1.
355. Polish Constitutional Tribunal, decision of 21 May 2013, Ref. No. K 11/13. Available at <http://otk.trybunal.gov.pl/orzeczenia/teksty/OTKZU/2013/2013A_04.pdf> accessed 1 March 2014.
356. Polish Report, p. 495.

Both the Austrian[357] and Dutch[358] reports also refer to cases in which challenges of the ratification of respectively the ESM and the TSCG remained unsuccessful. Finally, for the sake of providing a complete picture on this issue it is also worth noting that both intergovernmental instruments were also challenged before courts in two countries for which no national reports were available at the time of writing of this general report, namely France and Ireland.[359] Of course for the latter country, it was the Irish Supreme Court, which – in a case brought on appeal from the Irish High Court – initiated the preliminary ruling procedure that resulted in the CJEU's ruling in *Pringle*.[360]

Yet, not only the intergovernmental instruments shaping new economic governance in EMU have become subject to judicial review, as becomes clear from the national reports, but in some instances also the national reform measures aimed at complying with European obligations namely relating to conditionality in the context of financial assistance. In the Greek report, albeit in the context of question 7, it is observed in general terms that 'the courts argued on the necessity of measures adopted by Parliament having an impact on rights guaranteed by the Constitution by evoking the extreme financial problems of the State' and, moreover, that a review of procedural aspects of legislation has not taken place because 'such aspects are considered to constitute 'interna corporis' of the Parliament'.[361] Nevertheless in response to question 9 the authors of the report refer first of all to a decision by the Hellenic Council of State (*Symvoulio tis Epikrateias*), which is considered the Su-

357. Austrian Report, p. 277, with reference to the decision of the Austrian Constitutional Court of 16 March 2013 (SV 2/12-18), available at <https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_20130316_12SV00002_00/JFT_20130316_12SV00002_00.pdf> accessed 1 March 2013.

358. Dutch Report, pp. 482-483, with reference to the decision by the District Court 's-Gravenhage of 1 June 2012 (zaak nr. 419556 / KG ZA 12-523. LJN: BW7242). Available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2012:BW7242> accessed 1 March 2014.

359. Decision no. 2012-653 DC of 9 AUGUST 2012, recital 21. An English language version of the judgment is available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/sample-of-decisions-in-relevant-areas-dc/decision/decision-no-2012-653-dc-of-9-august-2012.115501.html> accessed 1 March 2014. For a brief discussion of these cases in the context of the decision by other highest (constitutional) courts see Amtenbrink, New Economic Governance (supra, n. 347).

360. The Supreme Court, Appeal No. 339/2012, judgment of 19 October 2012. Available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/db079f79be08a50e80257a9c004f4975?OpenDocument> accessed 1 March 2014.

361. Greek Report, p. 392.

preme Administrative Court in Greece,[362] on the constitutionality of a Greek acts of parliament implementing the obligations arising from the memoranda of understanding with the euro area, ECB and the IMF.[363] One main legal question was whether such memoranda amounted to a transfer of competences to an institution or international organization for which, in accordance with the Greek constitution, a three-fifths majority is required. As the authors of the Greek report state, the Council of State rejected this idea.[364] Another main legal question in this case was whether the substantive measures envisaged in the act of parliament were unconstitutional, namely the reduction of salaries and pensions of public servants employees. Yet, for the Greek court neither the constitutional right to property, nor the principles of equality, proportionality or the protection of legitimate expectations gave a constitutionally protected right to a certain level of wages or pensions, as according the Greek rapporteurs above all stood the 'pre-eminent public interest', whereby the measures served 'in principle, both substantial national public interest and, at the same time, the common interest of the Member States of the Eurozone'.[365] Furthermore reference is made in the Greek report to two petitions to the European Court of Human Rights (ECHR) in which it was unsuccessfully argued that the reductions in remuneration, benefits, bonuses and retirement pensions for public servants constitutes a breach of Article 1 (1) of the Additional Protocol No. 1 of the European Convention on Hunan Rights on property rights. In its decision the ECHR rejected the petitions pointing to the reasoning in the decision of the Greek Council of State and not finding any particular hardship.[366] Finally, also the Greek private sector involvement has been challenged before the Council of State.[367]

The Portuguese report very briefly refers to a case in which the Portuguese Constitutional Tribunal (Tribunal Constitutional) had to assess the constitutional validity of the Memorandum of Understanding on specific economic

362. See the description provided by the Council at <http://www.ste.gr/FL/main_en.htm> accessed 1 March 201.
363. Greek Report, pp. 395-396, with reference to decision no. 668/2012
364. Ibid, p. 396.
365. Ibid, p. 396.
366. Koufaki and Adedy v. Greece (dec.) – 57665/12 and 57657/12 Decision 7.5.2013 [Section I]. Available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-7627#{"itemid":["002-7627"]}> accessed 1 March 2014.
367. Greek Report, pp. 398 et seq., with a detailed description of the legal arguments brought forward by the applicants, a minority group of Greek and foreign bondholders.

policy conditionality from 11 May 2010.[368] The Tribunal observed in this context that:

'All these Memoranda are binding on the Portuguese state, to the extent that they are based on international-law and European Union-law instruments – the Treaties that instituted the international entities which are parties to them, one of which is Portugal – that are recognised by the Constitution. These documents require the Portuguese state to adopt the measures they set out, as one of the conditions for the phased fulfilment of the financing contracts entered into by the same parties.'[369]

Yet, while the Tribunal thus considered the conclusion of such memoranda constitutional, it came to a different conclusion as regards some of the measures implementing these agreements as included in the State Budget Law for 2012. This concerned namely the suspension of certain benefits for persons with a salary-based remunerations from public entities and those with a retirement pensions via the public social security system, which were considered unconstitutional 'because they violated the aspect of the constitutionally enshrined principle of equality that requires the just distribution of public costs.'[370] What is more in 2013 the same Tribunal considered parts of the State Budget Law for 2013 unconstitutional, this time with regard to an envisaged suspension or reduction of various work and pension-related benefits for public administration staff and pensioners.[371]

The example of the approach taken by Portuguese Constitutional Tribunal highlights the differences in approaches by national highest (constitutional) courts and tribunals. While the Estonian Supreme Court and the Greek Council of State seem to rely on an overriding public interest, as has been observed elsewhere, the Portuguese judges take a different approach worth commemorating in the present context:

'The Constitution clearly cannot distance itself from economic and financial reality, but it does possess a specific normative autonomy that prevents economic or financial objectives

368. Constitutional Tribunal, decision of 5 July 2012, Ruling No. 353/2012. An English language summary is available on the Court's webpage at <http://www.mkab.hu/letoltesek/en_0022_2012.pdf> accessed 1 March 2014.
369. Taken from the English language summary is available on the Tribunal's webpage at <http://www.tribunalconstitucional.pt/tc/en/acordaos/20120353s.html> accessed 1 March 2014.
370. Ibid.
371. Decision of 5 April 2013, Ruling No. 187/13. English language summary is available on the Tribunal's webpage at <http://www.tribunal constitucional.pt/tc/en/acordaos/20130187s.html> accessed 1 March 2014.

from prevailing in an unlimited way over parameters such as that of equality, which the Constitution defends and with which it must ensure compliance.'[372]

Question 10

What are the specific legal challenges for Member States outside the euro area, that is Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency, of the emergence (mainly subject to Articles 121(6), 126(14), 136 TFEU and intergovernmental treaties) of an ever more detailed economic governance regime for euro area Member States?

1. Background*: in the new regime on economic governance regime in non-euro area Member States*

Next to the euro area Member States two other groups of Member States can be identified for which the which effects of the new economic governance regime can be observed. First, this concerns the Member States in the antechamber to the euro area, the so-called Member States with a derogation that have yet to fulfil the conditions for the adoption of the euro set by the convergence criteria laid down in Article 140(1) TFEU. In short, for this category of Member States Article 139(2) TFEU first of all excludes large parts the provisions pertaining to monetary policy and namely the objectives and tasks of the ESCB and ECB, the acts of the ECB, measures governing the euro, and the provisions applying to national central banks in the ESCB.[373] What is more, Article 139(2) TFEU also excludes in parts the application of the primary Union law on economic policy coordination, namely the more sever part of the excessive deficit procedure laid down in Article 126(9) and (11) TFEU. Moreover, the voting right of these Member States are suspended in the case of the adoption of the measures listed in Article 139(2) TFEU and moreover, in the context of Article 121(4) TFEU, when recommendations are made to euro area Member States in the framework of multilateral surveillance, including on stability programs and warnings, as well as in the case of measures relating to euro area Member States in the context of the excessive

372. Ruling No. 353/12, summary of judgment, as already observed in Amtenbrink, New Economic Governance (supra, n. 347).

373. With the exception of their participation in the General Council of the ECB.

deficit procedure (Article 126(6), (7), (8), (12) and (13)).[374] The same applies in case of the adoption of euro area specific measures based on Article 136(1) TFEU. Interestingly, a similar suspending of voting rights does not exist in the EP for MEP's from Member States with a derogation, something that is observed in several national reports.

A second group is made up of those Member States that have chosen – for the time being – not to join the single currency. In the case of Denmark and the United Kingdom this has been the result of negotiations at the time of the drafting of the Treaty on European Union and the exceptions are laid down in two Protocols annexed to what are now the TEU and TFEU.[375] While not having formally negotiated an exemption and thus in principle falling in the second group of Member States with a derogation, Sweden de facto can also be counted into this category. Following a negative referendum on the euro efforts to meet the convergence criteria and namely participation in the European Exchange Rate Mechanism (ERM II) have been put on hold.[376]

As has already become clear from the discussions in the context of several other questions, the geographic scope of application of the reform measures taken both inside and outside the Union legal framework to enhance economic governance in EMU vary as some of them are addressed to all Member States, some only to euro area Member States and some to those Member States that have agreed on the measures or have signalled their willingness to participate in the new governance regime. Question 10 aims at mapping mainly the influence of the Member States outside the euro area on the new legal regime, as well as the impact the reform measures have on these Member States.

2. Responses*: the effects of the euro acquis on the non-euro area and the Union as a whole*

The national reports confirm the perception that has already emerged from the discussions in the context of other questions, namely that the reform of economic governance as increased the gap between the euro area and non-euro area Member States, whereby a substantial increase in what may be re-

374. Art. 139(4) TFEU.

375. Protocol (No. 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland; Protocol (No. 16) on certain provisions relating to Denmark.

376. For a detailed explanation of the situation see Swedish Report on question 10.

ferred to as the *euro acquis* and at the same time a loss of influence for those Member States remaining outside the euro area is detected or at least feared.

The authors of the Spanish report argue that 'the centre of gravity for the EU has become the euro area', whereby in their opinion the non-euro area Member States 'have abandoned the centre stage of policy-making in the EU'.[377] In a similar vein the Italian report notes 'a risk of a legal and political fragmentation of the EU framework'[378] and a process of further integration of euro area Member States that may leave non-euro area Member States at 'the periphery of the Union.'[379] At the same time the authors argue that the TSCG builds bridges by allowing for the participation on non-euro area Member States and by including a repatriation provision. Somewhat more sceptical on this last point is the Slovenian rapporteurs who argue that the opening of TSCG towards participation by non-euro area Member States 'cannot however wholly remedy the overall impression of further fragmentation and multi-speed progression of the EU legal order.'[380]

Setting somewhat a counterpoint is the Austrian report, where it is argued that while the euro area Member States have agreed upon special procedure as far as economic policy coordination is concerned, this does not form an exception to the obligations resting upon all Member States pursuant to the Articles 119-121 TFEU.[381] Yet, also the Austrian rapporteur acknowledges that that there may be a pressure on the non-euro area Member States to adapt to the new economic governance regime.[382] This point is also made in the Hungarian report, observing that there 'can be a pressure for non-euro area Member States to apply the stricter rules which are legally binding only for the euro area' in order 'to enjoy the benefit coming the enhanced coordination and transparency'.[383] Moreover, it is pointed out that the new economic governance regime for the euro area also has consequences for the conditions under which a Member State can accede to the euro area. The obligations arising from the TSCG and the ESM Treaty are two main examples in this regard. Indeed, as observed in the Spanish report,

377. Spanish Report, p. 568. In a similar vein: Portuguese Report, p. 511, referring to the 'affirmation of a 'two-speed' Europe'.
378. Italian Report, p. 456.
379. Ibid, p. 456.
380. Slovenian Report, p. 536.
381. Austrian Report, p. 278, with reference to relevant literature.
382. Ibid, p. 278.
383. Hungarian Report, p. 430.

'for those aiming to join the euro, they will have to accept the new governance and the new European powers, as these have resulted from the euro area decision-making in the crisis'.[384]

At the same time the fear is, as becomes clear from the Croatian report, that 'smaller Member States have a limited possibility to influence the development of EU rules applicable to the euro area states'.[385]

Some national rapporteurs suggest that the direction which the reform of economic governance has taken could put some Member States with much more fundamental dilemma's linked to European (economic) integration. In the case of Sweden the national report notes:

'The emergence of the [TSCG] thus presented the Swedish government with a choice between joining the 'hardliners' UK and Czech republic, who are unlikely to join the euro in the foreseeable future, or to try to obtain a limited influence by gaining a position somewhat more at the center or 'inside, though still outside'.'[386]

The Spanish rapporteurs predicts that for Member States like the UK and Denmark the increased focus on the euro area 'is unwarranted, as it will not incentivate public opinion to join a caucus where they are late-comers.'[387] Focusing on the consequences of the more stringent budgetary rules, the author of the Polish report argues that:

'joining the euro area may be perilous for the countries with relatively weak macroeconomics foundations (which is the case for Poland), as the membership renders improving price competitiveness particularly difficult (external evaluation must be replaced with the socially much more costly internal devaluation)'.[388]

384. Spanish Report, p. 568.
385. Croatia Report, p. 291.
386. Brackets added. Swedish Report, p. 588.
387. Spanish Report, p. 568.
388. Polish Report, p. 496.

III Monetary policy

Question 11

Has the European Central Bank acted in accordance with its legal mandate laid down in primary Union law in responding to the euro area debt crisis?

1. Background*: the role of the ECB in the crisis*

As has been pointed out in the introduction to this general report, next to the Union and national legislator also the ECB could be seen getting involved in the management and resolution of the European financial and euro area debt crisis, by engaging in non-standard monetary policy measures 'to support financing conditions and credit flows to the euro area economy over and beyond what could be achieved through reductions in key interest rates alone'.[389] For a detailed description reference is made here to the *Cour-Thimann* and *Winkler*, which identify and define five key components in the ECB's initial response to the global financial crisis and its effects in Europe, including fixed-rate full allotment, the extension of the maturity of liquidity provisions (long-term refinancing operations, LTROs), the extension of the list of eligible collateral, the use of currency swap agreements, and the covered bond purchase programme.[390] As the effects of the euro area debt crisis set in, in May 2010 the ECB moreover established a Securities Markets Programme (SMP) and, in September 2012 announced the possibility of OMTs in secondary sovereign bond markets.[391]

With question 11 the rapporteurs were asked to discuss whether and to what extent these measures are compatible with Union law and namely the statutory primary objective of the ECB, the scope of open market and credit operations provided by Article 18.1. Statute ESCB and ECB, the ECB's independent position within the Union institutional framework, as well as the

389. Cour-Thimann and Winkler (supra, n. 7), p. 11.
390. Ibid, pp. 11-12.
391. Decision of the ECB establishing a securities markets programme (ECB/2010/5) (2010/281/EU); ECB, *Technical features of Outright Monetary Transactions*, Press release of 6 September 2012. Available at <http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 1 March 2014. For details see Cour-Thimann and Winkler (supra, n. 7).

prohibition of monetary financing as defined in Article 123 TFEU and Council Regulation 3603/93.[392]

It should be noted that the Questionnaire and literally all responses were completed before the order by the German Federal Constitutional Court of 14 January 2014 suspending the principle proceedings in the challenge of the OMT and referring several questions concerning the compatibility of the ECB's non-standard monetary policy measures to the CJEU for a preliminary ruling.[393] In the words of the German Federal Constitutional Court:

'The subject of the questions referred for a preliminary ruling is in particular whether the OMT Decision is compatible with the primary law of the European Union. In the view of the Senate, there are important reasons to assume that it exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary financing of the budget.'[394]

In first reactions to this order it has been observed that the phrasing of the questions put to the CJEU reveals that the Germany's highest court leans towards the view that the OMT is incompatible with Union law and namely the primary monetary objective of the ECB and the prohibition of monetary financing of state budgets. Indeed, the Court provides strong substantive arguments for its expressly stated inclination 'to regard the OMT Decision as an ultra vires act' and thus incompatible with Union law, albeit the Court is quick to stress that this is subject to the interpretation by the CJEU.[395] To be sure, the Court also states that it considers an interpretation of the OMT in conformity with Union law possible.[396] Yet even here the Court is fairly assertive as to what line of reasoning by the CJEU it would consider feasible:

'The OMT Decision might not be objectionable if it could be interpreted or limited in its validity in conformity with primary law in such a way that it would not undermine the conditionality of the assistance programmes of the EFSF and the ESM, and would indeed

392. 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, OJ 1993, L 332/1.
393. See in the context already the discussion in the context of question 9. BVerfG, 2 BvR 2728/13. An English language version of the order is available at <http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html> accessed 1 March 2014.
394. German Federal Constitutional Court, Press release no. 9/2014 of 7 February 2014, available at <http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html> accessed March 2014.
395. BVerfG, 2 BvR 2728/13 (supra, n. 393), recital 39.
396. Press release no. 9/2014 (supra, n. 394).

only be of a supportive nature with regard to the economic policies in the Union. In light of Art. 123 TFEU, this would probably require that the acceptance of a debt cut must be excluded, that government bonds of selected Member States are not purchased up to unlimited amounts, and that interferences with price formation on the market are to be avoided where possible.'[397]

These considerations by the German Federal Constitutional Court emphasise the relevance of question 11 and the responses provided in the national reports.

2. Responses*: the ECB acting ultra vires or in defence of the single currency?*

Different to the position that the majority of the judges of the German Federal Constitutional Court seem to be inclined to defend, the majority of responses to the Questionnaire by and large support the ECB's role in the crisis management and solution in the European financial and euro area debt crisis. This support is not only based on a legal analysis of primary Union law and namely the limits of monetary policy in the euro area, but also on a somewhat broader duty of the ECB to defend the single currency and even the effectiveness of the ECB's crisis measures.

Turning to the legal evaluation first, the national rapporteurs by and large do not consider the ECB's measures in breach of Union law. This relates first and foremost to a breach of the statutory primary monetary policy objective of the ECB. Broadly speaking it is argued that a positive correlation exists between the ECB's crisis measures and the primary objective of the ECB to maintain price stability that justifies the measures. Thus, for example the Institutional report states:

'The non-standard measures adopted by the ECB, especially the OMT, were justified as necessary to restore conditions for a well-functioning banking system with the aim of delivering price stability in the medium term.'[398]

In a similar vein the Spanish report considers the SMP and OMT as 'designed in order to mitigate exceptional market distortions to the monetary transmission mechanism', and as such 'soundly based on EU primary law' and name-

397. Ibid, Essential Considerations of the Senate, section 4 a).
398. Institutional Report, p. 236.

ly Article 18 Statute ESCB and ECB.[399] At the same time it is pointed out that until now the OMT has not been put into operation and thus amounts to no more than an announcement by the ECB, a view that apparently is not shared by the judges of the German Federal Constitutional Court.[400]

As to the scope of the primary objective of the ECB the Slovenian rapporteurs take the position that:

'As long as prices are stable no legal obstacles exist for the ECB to support other goals as stated in the Article 127 of TFEU.'[401]

Reference is made in several reports to the broad discretion which the ECB has in pursuing its monetary policy objective.[402] The Swedish report possibly takes the broadest approach of all national reports in this regard stating that 'the ECB is its own master in how to achieve the goals set out in Article 127 TFEU.'[403] For the German rapporteur the wide margin of discretion that the ECB has with regard to the conduct of monetary policy stands in the way of a 'strict judicial control by courts that are composed of monetary policy laymen'.[404]

A strong descending opinion on the compatibility of the measures with Article 127(1) TFEU is offered by the Finish rapporteurs, which observe in the context of the discussion of question 1:

'it is difficult to avoid the conclusion that the interpretational limits most likely have been exceeded with regard to the TFEU Articles and the ECB Statute. This concerns a number of measures during the crisis, such as the SMP and OMT programmes, excessive deficit relaxation of the collateral list and even some of the liquidity creating measures to the extent that they could not be defended on the basis of quite narrow monetary policy considerations.'[405]

399. Spanish Report, p. 550. See also Dutch Report, p. 485 with reference to relevant literature and a brief overview of the national political debate; Estonian Report, p. 314; Finnish Report, p. 332, albeit the authors of this report are overall somewhat more critical; Hungarian Report, pp. 431-432.
400. Institutional Report, p. 234.
401. Slovenian Report, p. 538.
402. See e.g. Austrian Report, p. 280; Dutch Report, p. 485, with reference to relevant literature; Institutional Report, p. 236.
403. Swedish Report, p. 588.
404. German Report, p. 367, referring to 'geldpolitische Laien'.
405. Finnish Report, p. 322.

Concerning a possible violation of the prohibition of monetary financing included in Article 123 TFEU, the majority of the reports dealing with this issue also come to the conclusion that the ECB has not acted in violation of Union law. Exemplary in this regard are the observations in the German and Institutional reports, which explain that the purchase of government bonds in the *secondary* market do not constitute a breach of Article 123 TFEU as these debt instruments are not directly purchased from the issuers, i.e. Member States.[406] In the view of the Italian rapporteur such purchases constitute 'a necessary monetary policy instrument for any central banker'.[407] The opposite view can be found in the Finnish Report, which comes to the conclusion that 'both the SMP and announced OMT programmes would seem to be in direct contradiction of prohibition of public finances, independence and even potentially price stability'.[408]

Beyond a direct violation of Article 123 TFEU a number of reports also discuss a circumvention of the prohibition of monetary financing by the ECB. It is subject to debate whether such a prohibition to circumvent derives from Article 123 TFEU or can be deduced from recital 7 of Council Regulation 3603/93, according to which:

> 'Member States must take appropriate measures to ensure that the prohibitions referred to in Article 104 of the Treaty are applied effectively and fully; whereas, in particular, purchases made on the secondary market must not be used to circumvent the objective of that Article.'

Both the German and Swedish rapporteurs question the applicability of this fiat to the situation of the ECB.[409] The Institutional rapporteur leaves in the middle, whether such an obligation exists, but in any event argues that no such circumvention has taken place in the case of the ECB measures.[410] While for the Hungarian report 'It is not clearly defined in which case a secondary market operation can be considered as a circumvention of the direct purchase on primary market',[411] the Institutional rapporteur implicitly pro-

406. See for example Austrian Report, p. 279; German, Report, p. 363; Slovenian Report, p. 517; Swedish Report, p. 589; Institutional Report, p. 241; Hungarian Report, p. 432.
407. Italian Report, p. 459.
408. Finnish Report, p. 333.
409. German Report, p. 363, who argues that the ECB nevertheless has accepted the existence of such an obligation; Swedish Report, p. 589.
410. Institutional Report, p. 241.
411. Hungarian Report, p. 431.

vides a working definition when observing that the ECB's measures do not amount to 'a policy for financing inflationary deficits'.[412] In defence of this position the report *inter alia* refers to the temporariness of the OMT, as well as the fact that the ECB has announced to focus on sovereign bonds with a relative short maturity of between one and three years.[413]

Moreover, both the Institutional as well as other reports point to the fact that the ECB has been careful to make its intervention in the sovereign debt markets conditional on economic reform efforts in the Member States. In fact in the case of the announced OMT the ECB has made this explicit when stating in its announcement of the technical features:

'A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme.'[414]

Extending the reasoning of the CJEU in *Pringle* it may be argued that it is this conditionality that ensures that the SMP and OMT cannot amount to a breach of the prohibition of monetary financing.[415] The Polish rapporteur even argues that 'the legality of ECB's policies will ultimately depend on how effective the macroeconomic conditionality offered in exchange for facilitating access to the ECB's liquidity will turn out to be.'[416]

Be that as it may, for the Swedish rapporteurs the line of unlawful monetary financing would be crossed, if a debt-restructuring would become necessary, whereby the ECB itself would be required to write-off parts of its sovereign debt bond holdings 'to the benefit of the member state involved'.[417] Indeed, as the German rapporteur observes, in the case of the OMT the ECB will not enjoy a preferred-creditor status. Yet, different to what is suggested in the Swedish report, for the German rapporteur this arrangement cannot be construed to be in violation of Article 123 TFEU, as this case is not covered by the wording of this provision and, moreover, any losses resulting from a debt restructuring would have to be considered as 'a risk (reflected in the

412. Footnote omitted. Institutional Report, p. 241, with reference to relevant literature. Somewhat more critical are the authors of the Greek report, p. 414.
413. Ibid, p. 240.
414. ECB, Press release of 6 September 2012 (supra, n. 391). See in this regard also e.g. the Swedish Report, pp. 589-590; Institutional Report, p. 240.
415. Institutional Report, p. 240.
416. Polish Report, p. 497; See also Swedish report, p. 590, which refers to the risks involved in case a Member States does not comply with conditionality.
417. Swedish Report, p. 590.

bond price, the interest rate or, in the case of securities, the risk premium) typically associated with the purchase of securities (as part of open market operations)'.[418] In a similar vein the Institutional rapporteur argues that when it comes to the risk of losses and possible repercussions this may have in terms of 'costs for taxpayers of Member States with sound finances' the OMT 'does not differ from other monetary policy instruments'.[419] In the view of the Slovenian rapporteurs the ECB's purchase of government debt does not bear any financial risks for Member States in the first place, since 'if a net loss remains even after taking into account all provisions and reserves, it could be recorded on the balance sheet as losses carried forward and be offset by any net income in the following years'.[420]

As to the no-bail out clause of Article 125 TFEU, following the Institutional report, in conformity with the CJEU's interpretation in *Pringle*, it can be observed that through its non-standard monetary policy measures the ECB has not liable for the commitments of namely those Member State whose debt bonds it has purchased, 'if the issuing Member State remains solely answerable to repay the debt in question'.[421]

Some national rapporteurs (implicitly) refer to a responsibility of the ECB that is linked to, but at the same time transcending the monetary policy objective of Article 127 TFEU, namely to safeguard the survival of the single currency. The Swedish rapporteurs are even referring to a kind of overriding duty of the ECB:

> 'Whenever the euro comes under pressure, the ECB as its guardian had a constitutional duty to protect it.'[422]

While not putting it in equally absolute terms, several national rapporteurs point out that without the ECB's intervention the future of the euro would have been in the balance. Referring to the ECB's measures the Polish rapporteur states that 'without those interventions the euro would have probably dis-

418. Own translation. German Report, p. 364. See also Dutch Report, p. 485, where it is stated that the risk of losses 'is a characteristic of all monetary policy operations'.
419. Institutional Report, p. 242.
420. Slovenian Report, p. 538, with reference to a statement by former member of the ECB Executive Board Joerg Asmussen. With regard to the specific discussion on the liability issues in case of the split-up of the single currency area arising from the imbalance in the real-time gross interbank settlement (TARGET 2) see German Report, p. 357.
421. Footnote omitted. Institutional Report, p. 242, with reference to relevant literature.
422. Swedish Report, p. 589.

integrated by now'.[423] Many national rapporteurs also point out that the non-standard monetary policy measures have proven to be effective thus justifying the ECB's course of action. Thus, for example, the Spanish report states:

'Spreads differentials progressively diminishing, and the indicator of cross-border money flow, the T2 balances, is slowly reverting to pre-crisis sizes, proving the adequacy of the ECB decisions.'[424]

Question 12

Considering its primary objective laid down in Article 127(1) TFEU, what precisely can the role of the ECB be from a legal point of view in prudential supervision of credit institutions (micro-prudential supervision) and how can this be linked to a role in contributing to the stability of the financial system (macro-prudential supervision)?

1. Background*: the role of the ECB in prudential supervision*

As discussed in the context of question 11, the ECB's primary statutory objective laid down in the TFEU and the Statute of the ESCB and of the ECB is to maintain price stability. At the time of its establishment the ECB was not explicitly charged with macro- or micro-prudential supervisory tasks. At the same time arguably the introduction of today's Article 127(5) and (6) TFEU makes clear that the drafters of the Treaty on European Union did not consider that the tasks of the ECB were in no way related to financial stability and, moreover, did not intent to categorically exclude any future involvement of the ECB in prudential supervision.

Resulting from the reform of European financial supervisory system and the establishment of the ESRB and, very recently, the adoption of Regulation 1024/2013 conferring specific prudential supervisory tasks on the ECB, the latter takes centre stage in macro- and micro-prudential supervision in the internal (financial) market. As Article 127(1) and mainly the primary statutory monetary policy objective of the ECB has remained unchanged, the question arises whether and to what extent these tasks are compatible and what – if any – limits the monetary policy objective of the ECB sets to any supervisory activities. Moreover, what risks, if any, are attached to the pooling of these

423. Polish Report, p. 496. See also Croatian Report, p. 292.
424. Spanish Report, p. 569.

competences at the ECB? In this context it is worth noting that while a number of national central banks in Member States in more recent years have become involved in prudential supervision, in the case of the euro area Member States the situation is different from the ECB, as these central banks are no longer individually in charge of monetary policy.

2. Responses*: should the single European monetary policy authority be in charge of prudential supervision*?

The national reports focus on three main issues, including the scope of Article 127(6) TFEU as legal basis for the conferral of prudential supervisory tasks onto the ECB, the potential conflict of interest between the monetary policy objective and prudential supervisory tasks, as well as accountability issues.

With regard to the choice of legal basis, the German report refers to the discussion in German legal writing on the scope of Article 127(6) TFEU and namely whether this provision covers the extent of tasks foreseen for the ECB in the SSM. In the opinion of the German rapporteur:

> 'The wording of Article 127(6) TFEU does not prohibit a transfer [of supervisory tasks] currently foreseen, as not all supervisory tasks for banks are transferred.'[425]

Nevertheless, the German legislator has explicitly provided for the federal government's right to approve consent to the measures in the Council in an act of parliament, as the exact legal consequence of an application of Article 126(7) TFEU and namely, whether this provisions actually foresees in a transfer of powers onto the supranational level by means of secondary Union law or only the exercise of a competence that already is situated at the Union level, where considered uncertain.[426] The author of the Institutional report acknowledges that 'the Council has given a broad interpretation to Article 127(6) TFEU', pointing mainly to the role of the ECB in supervising so-called significant credit institutions.[427] The authors of the Estonian report seem to be in favour of an even broader interpretation, arguing that neither Article 127(6) TFEU nor Article 25.2 Statute ESCB and ECB limit the transfer of tasks related to macro- or micro-prudential supervision and thus that it

425. Own translation. German Report, p. 368.
426. Ibid, p. 368.
427. Institutional Report, p. 245.

is 'possible for the ECB to carry out either of them or even both', subject to determination by Council Regulation.[428]

A more critical appraisal of the legal basis can be found in the Finnish report where it is argued with reference to the genesis of what is now Article 127 TFEU that this provision 'cannot be the legal basis for broad supervisory functions, be it micro- or macro-prudential supervision'.[429] According to this view, Article 127(6) TFEU only allows for the transfer of 'specific, well-defined and narrow tasks' to the ECB, under the condition that such tasks 'do not in any way hamper the achieving of the primary objective and also taking care of the other tasks'.[430] For the Finish rapporteurs the rather uniquely strong price stability mandate of the ECB cannot easily be combined with other objectives. Moreover, they argue that the rationale for central bank independence for the conduct of monetary policy that has led to the strong independent position of the ECB does not apply equally also to prudential supervision.[431] Overall, the Finish rapporteurs consider a Banking Union with a central role for the ECB 'constitutionally very suspect', arguing that this may result 'in an unstable framework that is prone to fail, either economically, politically or constitutionally'.[432]

As to the compatibility of the new prudential supervisory tasks of the ECB with its monetary policy objective and the potential for conflicts of interest the opinions stated in the national reports differ.[433] At one end of the spectrum the close link between monetary policy and financial market supervision is emphasised in several reports. Highlighting this approach is the Hungarian report, observing that 'the ECB involvement in the supervision could help implementing its monetary policy',[434] and the Polish report that characterizes the ECB as 'a natural banking supervisor for the euro-area, as it is the banker's bank there'.[435] In a similar vein the authors of the Swedish report submit that tasks vested in the ECB 'should not pose any major issue of compatibility', as 'Banking Union should contribute to ensure both monetary and financial stability within the euro zone'.[436]

428. Estonian Report, p. 316.
429. Finnish Report, p. 334.
430. Ibid, p. 334.
431. Ibid, p. 334.
432. Ibid, p. 334.
433. With regard to the monetary policy objective of the ECB see also the discussion in the context of question 13.
434. Hungarian Report, p. 433.
435. Polish Report, p. 498.
436. Swedish Report, p. 593.

On the other side of the spectrum, some national reports, such as the one from Croatia warn of a potential conflict of interest between monetary policy task and prudential supervision.[437] While recognizing that 'macro-prudential stability tools are [...] of extreme importance for the proper functioning of the monetary policy', considering potential advantages and disadvantages, namely the danger of a conflict of objectives and political capture, the authors of the Slovenian report argue in favour of a separation of monetary policy from prudential supervisory tasks.[438]

Such potential for conflicts of interests are also recognized in other national reports, however there it is argued that the legal framework foreseen for the SSM provides sufficient protection. Thus, in the Institutional report it is argued that Regulation 1024/2013 foresees in sufficient safeguards 'in order to avoid cross-contamination', referring to the explicit separation in the SSM Regulation of supervisory tasks from monetary policy *inter alia* resulting from the establishment of the Supervisory Board.[439] For the Polish rapporteur such potential conflicts 'may be handled rather easily (by appropriate internal institutional arrangements and commitments to certain ethics), as it is in the interest of the central bank to mitigate those conflicts in the first place.'[440] Analysing more generally the position that prudential supervision takes in the Union legal order, the Swedish rapporteurs argue that 'the function of prudential supervision will be subordinated to the task assigned to ECB in the field of monetary policy', as different to the monetary policy objective prudential supervision tasks have been regulated in secondary Union law.[441] On a more general note, while recognizing the potential for short-term conflicts of interests, the author of the Swiss report argues that in the long-term price stability should also be to the benefit of financial stability.[442]

The combining of monetary policy with prudential supervision is also questioned for its potential impact on the accountability of the ECB.[443] Discussion the accountability mechanisms foreseen in the context of the SSM, the author of the Institutional report observes that for prudential supervisory tasks:

437. Croatian Report, p. 293. See also Portuguese Report, p. 512.
438. Slovenian Report, p. 539.
439. Institutional Report, p. 250. See also German Report, p. 368, where it is however pointed out that these arrangements have yet to proof their effectiveness.
440. Polish Report, p. 498.
441. Swedish Report, p. 593.
442. Swiss Report, pp. 616-617.
443. See e.g. The Finnish Report, p. 336, in response to question 13 refers to a need for 'enhanced political accountability'.

'a higher standard of accountability than for monetary policy decisions [applies], because of the differences with regard to the goals, means, the personnel and the very nature of the supervisory work and in particular of the higher intrusiveness of supervisory decisions'.[444]

Reference is made in this context to Articles 20 and 21 Regulation 1024/2013 and the interaction of the chair of the Supervisory Board with the EP (Article 20) and the national parliaments of the Member States participating in the SSM (Article 21). While stating that the statutory independence of the ECB guaranteed by Article 130 TFEU does not automatically also extent to its tasks conducted in the context of the SSM, the Institutional rapporteur points out that Article 19 Regulation 1024/2013 SSM regulation establishes independence 'in broadly similar terms.'[445] The Institutional report is also mildly critical of the overall situation with regard to the accountability of the ECB:

'What remains true is that the specific arrangements decided in the SSM Regulation do not solve the biggest issue regarding accountability, i.e. the fact that it is only accountable and not responsible.'[446]

Question 13

How can the statutory objectives of the ECB be redefined?

1. Background*: the overriding monetary policy objective of the ECB*

Currently, according to Article 127(1) TFEU and Article 2.1 Statute ESCB and ECB the statutory primary objective of the ECB is to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union with a view to contribute to the achievement of the Union's objectives. In doing so 'The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119'.

Considering the experience of more than a decade with the conduct of monetary policy by the ECB and, moreover, the role of the ECB in the euro area since the breakout of the European financial and euro area debt crisis,

444. Brackets added and footnote omitted. Institutional Report, pp. 248-249, with reference to relevant literature.
445. Ibid, p. 248, with references to relevant literature.
446. Ibid, p. 250.

the question arises whether the objective of the ECB should be reconsidered. Should the focus on price stability be abolished in favour of an objective that puts more emphasize on the Union's objectives stated in Article 3(2) TEU, that is the sustainable development of Europe that is not only based on price stability, but also on balanced economic growth and the building of a competitive market economy, aiming at full employment and social progress? The U.S. Federal Reserve System may serve as an example for a central bank with multiply objectives, as according to section 2A of the Federal Reserve Act the objective of the Fed is to 'maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.'[447] Moreover, should an explicit lender of last resort function be included for the ECB?

A revision of the statutory objective of the ECB could also be considered in the light of its new tasks in macro- and micro-prudential supervision, especially since today's Article 127(5) and (6) TFEU are rather ambiguous in this regard.

2. Responses*: is the ECB (and EMU) in need of a broader objective?*

With regard to the two scenarios basically discussed, that is the removal of the hierarchy of the objectives stated in today's Article 127(1) TFEU or the introduction of additional/different objectives, the national reports provide a mixed picture as to the desirability and form of such an amendment. The Institutional report discusses several scenarios for an amendment of the statutory objective of the ECB with reference to relevant literature. Yet, overall the author seems rather sceptical about suggestions to remove the hierarchical relationship between the two objectives stated in Article 127(1) TFEU, referring namely to the need for additional accountability arrangements, which may come at the expanse of the statutory independence of the ECB.[448] The same is observed for the introduction of additional objectives pertaining to economic policy.[449]

447. 12 USC 225a. As added by act of November 16, 1977 (91 Stat. 1387) and amended by acts of October 27, 1978 (92 Stat. 1897); Aug. 23, 1988 (102 Stat. 1375); and Dec. 27, 2000 (114 Stat. 3028).
448. Institutional Report, pp. 251-252.
449. Ibid, p. 252.

Equally sceptical about amending the statutory objective of the ECB is the German rapporteur, who considers that the ECB already has a number of secondary objectives, which do not only include the supporting of the general economic policies in the Union, as stated in Article 127(1) TFEU, but also the objectives of the EU as stated namely in Article 3 TEU and Article 119(2) TFEU.[450] With regard to the inclusion of a reference to prudential supervision, it is argued that currency stability and financial stability are preconditions for price stability and such may be pursued by the ECB subject to the observance of its primary objective.[451] The authors of the Italian Report seem to be prepared to take this argument one step further when arguing that 'the ECB is expected to fulfil multiple objectives pursuant to the treaties (price stability is, so to say, the primus inter pares goal, alongside with the support for the general economic policies in the Union)'.[452] While recognizing that financial stability is enshrined in the internal organizational structure of the ECB and can be linked to an effective pursued of the primary monetary objective, the authors of the UK report point out that:

'Neither the TFEU nor the ECB Statute refers expressly to 'financial stability' as an objective, or task of the ECB.'[453]

Only the German report also refers to limits to the amendment of the statutory objective of the ECB set by national constitutional law. According to Article 88 German Basic Law the responsibilities and powers of the German central bank can only be transferred to a European Central Bank that is not only independent, but also committed to the overriding goal of assuring price stability.[454] Thus arguably including a different primary monetary policy objective or otherwise introducing additional monetary objectives that do not rank below the objective of price stability could be highly problematic in this regard.

Focusing on the economic rationale for a different economic policy objective the authors of the Finnish report note:

'The underlying question as to whether a change in the ECB statutory objectives is deemed necessary, is simply whether the economic assumptions concerning monetary policy have

450. German Report, pp. 369-370.
451. Ibid, p. 370. See also Slovenian Report, p. 539.
452. Italian Report, p. 461.
453. UK Report, p. 646.
454. German Report, pp. 370-371.

changed in such a way that new objectives would help to make EMU more successful than has been the case.'[455]

The author doubt that this is the case, observing that 'a more realistic possibility is that indeed the economic assumptions have changed, but in a way that would question the optimality of the currency area rather than the objectives for the common central bank'.[456] The Polish rapporteur argues in a similar direction when arguing:

'All in all, it seems that the current mandate of the ECB – to some extent reinterpreted in the current crisis – has been sufficiently accommodative to undertake necessary actions aimed at maintaining financial stability without excessively endangering the goal of price stability.'[457]

This author also raises doubts as to whether the inclusion of multiple objectives, such as to be found in the Federal Reserve Act, would actually be effective, as in his view the causes of economic difficulties, such as high unemployment rates, 'stem from national social, economic and fiscal policies.'[458]

However, some national reports show more sympathy towards the idea of a revision of Article 127(1) TFEU. Arguably the most far reaching proposal can be found in the Greek report, which argues extensively in favour of an amendment of the statutory objective of the ECB with the aim 'to include at least the output gap and maybe an asset inflation target in the form of a mild net wealth target as a proportion of the disposable income in households, on top of price stability'.[459] In the opinion of the Greek rapporteurs:

'The aim of EMU is to provide a framework in which the peoples of the EU Member States can prosper. This aim can only be served if the central objectives of policy are to promote growth and employment within price stability for all Member States.'[460]

Somewhat less ambitious, the Austrian report proposes an amendment of the wording of Article 127(1) TFEU effectively removing the hierarchy between the primary and secondary objective of the ECB.[461] The authors of the Swedish report find arguments supporting the conferral of a 'dual primary objec-

455. Finnish Report, p. 335.
456. Ibid, p. 335.
457. Polish Report, p. 499.
458. Ibid, p. 499.
459. Greek Report, p. 415.
460. Ibid, p. 414.
461. Austrian Report, p. 281.

tive, namely the stability of the euro and the stability of the financial system'.[462] Drawing on a comparison between the statutory objectives of the ECB and the Fed, the Swedish report concludes that 'the difference [to the Fed] is the prioritisation of the tasks of the ECB under EU law giving greater prominence to price stability'.[463] Ultimately the Swedish report is in favour of an amendment of Article 127 TFEU 'to elevate the role of prudential supervision as another primary task of the ECB'.[464]

Interestingly, both the Austrian and the German report link an amendment of the monetary policy objective of the ECB to the reinforcement of accountability arrangements. Whereas the Austrian rapporteur points out that an amendment of the objective require a review of the current accountability arrangements, the German rapporteur argues that considering the independent position of the ECB and its wide margin of discretion in applying the instruments at its disposal 'the overriding objective of price stability is a indispensable condition' for the judicial review of the activities of the ECB.[465] Apparently in the view of this author multiple objectives would obstruct judicial review.

Finally, several national reports propose that a lender of last resort function should be explicitly recognised, while leaving in the middle whether this should then be included as an ECB objective. The Finnish report observes in this context:

'the most classic LORL function with regard to the banking sector has been fulfilled by the ECB (Eurosystem) from the start of the crisis. It has lent money to solvent but illiquid banks in enormous quantities and with quite relaxed collateral policy by illiquid banks'.[466]

These authors also point to what is referred to as 'a new form of LOLR concept', as a result of the 'need for an ultimate financier of the Member States in the case [of] failure of market financing.'[467] The Swedish rapporteurs are in favour of assigning a lender of last resort function for the sovereign to the ECB.[468] To prevent abuse of this mechanism, it is argued that 'any losses

462. Swedish Report, p. 595.
463. Brackets added. Swedish Report, p. 595.
464. Ibid, p. 593. See also Spanish Report, p. 570.
465. German Report, pp. 330-371 (own translation); Austrian Report, p. 281.
466. Finnish Report, p. 336. See also German Report, p. 370.
467. Brackets added. Ibid, p. 336.
468. Swedish Report, p. 596. See also Italian Report, p. 462. From the Portuguese Report, p. 513, it does not become clear whether this function should also extent to the sovereign.

arising out of such intervention should be jointly and severally guaranteed by the member states of the euro zone'.[469] Both the authors of the Swedish and Institutional report point out that assigning such a task to the ECB would require the abolishing or at least amending the prohibition of monetary financing provided for in Article 123(1) TFEU.[470]

Question 14

What (if any) can the role of the Court of Justice of the European Union be in the interpretation and application of the primary and secondary EU law pertaining to monetary policy?

1. Background*: judicial review of euro area monetary policy*

From Article 263 TFEU it becomes clear that the CJEU has jurisdiction to review the legality of acts of the European Central Bank, other than recommendations and opinions. Moreover, the ECB can become subject to judicial review for a failure to act (Article 265 TFEU). Correspondingly Article 35.1. Statute ESCB and ECB provides that the acts or omissions of the ECB are open to review or interpretation by the CJEU in the cases and under the conditions laid down in the TFEU. Moreover, the ECB can institute proceedings in the cases and under the conditions laid down in the Treaties. Based on Article 263 TFEU the ECB itself can bring an action for the purpose of protecting its prerogatives. Moreover, as is pointed out by the author of the Institutional Report and can be currently observed in the context of the OMT, the ECB's action may become subject to judicial review by the CJEU in the context of preliminary ruling proceedings in accordance with Article 267 TFEU.[471] Finally, as becomes clear from Article 340 TFEU and 35.1. Statue ESCB and ECB, in accordance with the general principles common to the laws of the Member States, the ECB must make good any damage caused by it or by its servants in the performance of their duties (non-contractual liability).

The question is whether and to what extent the current Union legal framework actually allows for the judicial review of the activities of the ECB in the

469. Ibid, p. 596.
470. Swedish Report, p. 596; Institutional Report, p. 252.
471. Institutional Report, p. 253 and see above the discussion in the context of question 9.

sphere of monetary policy and could actually lead to the non-contractual liability of the ECB. In the past, beyond academic debates, in practice judicial review of the ECB has been pretty much limited to the latter's position within the Union institutional legal framework.[472]

Yet, as the discussion in the context of question 10 highlights, the ECB has taken on a rather active role in the management of the European financial and euro area debt crisis. At the same time, as part of the 'Troika', the ECB has been directly involved in the setting up and monitoring of the economic reform programs applicable to euro area Member States that have received financial assistance. The activities of the 'Troika', and thus also the ECB, have raised concerns about the legitimacy and accountability of the European crisis management in these countries.[473] Arguably these developments justify a new debate on the role of the CJEU in the interpretation and application of the primary and secondary EU law pertaining to monetary policy and the judicial review of ECB activities in this regard. In fact with the preliminary reference by the German Federal Constitutional Court to the CJEU regarding the compatibility of the ECB's crisis measures with Union law, this question has become very timely indeed.[474] To be sure, while question 14 is explicitly geared towards the current statutory objective of the ECB as defined in Article 127(1) TFEU, considering the new role of the ECB in the SSM, the same can and must be queried for micro- and possibly even macro-prudential supervision.

2. Responses*: judicial review under conditions of wide margins of discretion*

In response to the question the authors of the UK report observe on a general note:

'Central Banks have traditionally operated in an environment in which litigation is virtually unknown, and where the exact rules and competences were less important than the

472. See case C-11/00, *Commission v ECB* [2003] ECR I-7147; R. J. Goebel, 'Court of Justice Oversight Over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the OLAF Judgment', 29 *Fordham Int'l L.J.* 610 (2005).

473. See e.g. EP Committee on Economic and Monetary Affairs, *Report on the enquiry on the role and operations of the Troika (ECB, Commission, and IMF) with regard to the euro area programme countries* (2013/2277(INI)).

474. See in this regard the discussion in the context of question 11.

standing of the central bank and the weight of its advice. As a general rule, internationally there is no review of monetary policy decisions, though judicial review may be provided for in relation to central bank acting in a supervisory capacity.'[475]

In the case of the ECB, the picture is somewhat more nuanced. Indeed, the UK report with reference to *Smits* acknowledges that, unlike what can be observed for other central banks, 'the decisions and actions of the European System of Central Banks are subject to judicial review,' whereby the rapporteurs observe that 'judicial review of the ECB could extent [...] in principle, to monetary policy decisions and open market operations', since 'the ECB does not enjoy statutory (treaty) immunity from suit, in either national courts or before the CJEU'.[476] Yet, both the UK rapporteurs, as well as several other national reports point out that in practice judicial review of the conduct of monetary policy is limited. The Institutional rapporteur notes in this context:

'In the absence of a strong democratic control over the monetary policy of the ECB, one could expect that jurisdictional control would play an important role as counterbalance, but this has not been the case in practice.'[477]

This limitation does not only derive from the admissibility criteria applicable in the context of Article 263 TFEU and Article 265 TFEU and namely the requirement of a legally binding act or the existence of an obligation on parts of the Union institution in question that has not been fulfilled, but also the very nature of monetary policy decisions involving a wide margin of discretion.

The German report summarizes the different tasks linked to the defining of the monetary policy, including 'the definition of price stability, the decision on the monetary policy strategy (inflation targeting, monetary targeting, interest rate targeting, multi-pillar strategy), as well as the principle usage of certain instruments', including namely 'the determination of the refinancing interest rate [...] the fixing of the minimum reserve requirements and the eligible collaterals, as well as the utilization of other instruments on a case-by-case basis (e.g. bond purchases)'.[478] In the opinion of the German rapporteur with the exception of the decisions on interest rates, such decisions are taken in a formal legal manner and can thus be challenged before the CJEU, as the decisions constitute regulatory acts in the meaning of Article 263 para. 4

475. Footnotes omitted, UK Report, p. 652.
476. Brackets added. Ibid, p. 651 and 653.
477. Institutional Report, p. 254.
478. Own translation. Brackets added. German Report, p. 371.

TFEU.[479] The Dutch rapporteurs state that 'the ECJ can review monetary policy decisions and open market operations (article 132 TFEU, article 18 (1), first indent, Statute of the ESCB and of the ECB)'.[480] It is also observed that open market operations and monetary policy decisions 'can be entangled in practice', pointing to the ECB's open market operations.[481] A somewhat different position on this issue seems to be taken in the Estonian report, where it is argued that monetary policy decisions of the ECB 'are not adopted as formal legal acts, despite being published in the Official Journal [of the European Union]' and, moreover,

'Monetary policy decisions do not produce any legal effect vis-à-vis third parties, but are addressed to the Eurosystem central banks. Similarly, open market operations are conducted as a result of the Governing Council decision and do not produce legal effects vis-à-vis third parties.'[482]

Finally, the author of the Institutional report argues that 'By its very nature monetary policy is based on communication and such communication is rarely amendable to judicial review ...', pointing to the example of the ECB's announcement of the OMT, which – in the view of the author – is not based on a formal decision.[483]

However, even to the extent that ECB engages in legally binding measures in formulating and implementing monetary policy, as is pointed out in several reports; this involves the exercise of a wide margin of discretion. The author of the Austrian report observes in general terms that 'even in the case of apparent and substantial failure to recognize the primary objective of price stability, a violation open to judicial review is hardly conceivable',[484] whereas the Institutional report notes:

'Most ECB acts are adopted on the basis of expert economic assessment and involve complex economic determinations. The standard review is less intensive in such cases. Moreover, monetary policy measures entail a large discretionary power and the necessity to balance conflicting policy considerations.'[485]

479. Ibid, p. 371
480. Footnote omitted. Dutch Report, p. 486, with reference to joined case C-102/12, *Städter v. ECB* [2012] ECR I-nyr.
481. Ibid, p. 486.
482. Footnote omitted. Estonian Report, p. 319.
483. Institutional Report, p. 255.
484. Own translation, Austrian Report, p. 281.
485. Footnote omitted. Institutional Report, pp. 255-256.

The authors of the Italian report take the position that in its open market operations and with regard to the ECB's monetary policy decisions judicial review is limited 'to considering whether the exercise of that discretion contains a manifest error or constitute a misuse of power or whether the institution clearly exceeded the bounds of its discretion'.[486] Yet, both the German and Institutional report emphasize the limits of judicial review in this regard. The author of the German rapporteur observes that it is virtually impossible in abstracto to draw a clear line between a permissible and necessary review of the legal limits of monetary policy by the CJEU and an impermissible review of the substance of monetary policy decisions. For the author the case before the German Federal Constitutional Court inter alia dealing with the legality of the OMT is a case in point.[487] The Institutional report adds to this that:

'because of the complexity of the assessment it appears rather unlikely that a judicial body could qualify ECB's acts as being outside its monetary policy mandate'.[488]

A number of reports also discuss the high hurdle set by the admissibility conditions for action before European courts and namely the strict standing requirements for natural and legal persons pursuant to Article 263 para. 4 TFEU.[489] Pointing to the standing problems of natural and legal persons is for example the Dutch report, which refers to (unsuccessful) examples, including in *von Storch and Others v ECB*.[490] In that case von Storch and 5216 other applicants *inter alia* challenged the ECB's decision of 6 September 2012 concerning a certain number of technical characteristics relating to the OMT, as well as the ECB's decision of 6 September 2012 adopting additional measures intended to maintain the availability of collateral for counterparties in order to maintain their access to Eurosystem transactions to provide liquidity.[491] The applicants considered the ECB's decisions in breach of the primary monetary policy objective pursuant to Article 127(1) TFEU, as well as with Articles 123 and 125 TFEU. On 10 December 2014, after the submission of the Dutch report, the General Court dismissed the action as inadmissible.[492]

486. Italian Report, p. 462. See also German Report, pp. 371-372; Dutch Report, p. 486, referring to 'complex, technical assessments'.
487. German Report, pp. 371-372.
488. Institutional Report, p. 256.
489. See e.g. Austrian Report, p. 281; UK Report, p. 653.
490. Case T-492/12, *von Storch and Others v ECB* [2013] ECR II-nyp.
491. OJ 2013, C 32/18.
492. OJ 2014, C 45/32.

While acknowledging the high admissibility hurdles, the Institutional report suggest that the Lisbon reform of Article 263 para. 4 TFEU and namely the possibility for actions brought by natural and legal persons against regulatory acts that are of direct concern to the applicant(s) and do not entail implementing measures could become a game-changer in this regard.[493] As far as the absence of direct challenges brought by other Union institutions or Member States is concerned the rapporteur observes:

'there is a long-standing practice for Institutions and Member States to discuss monetary policy issues behind closed doors and to solve possible divergence of views via informal political channels rather than going to Court'.[494]

Beyond concrete legal considerations some rapporteurs are rather more sceptical about the role that the CJEU can play in reviewing monetary policy. The Polish rapporteur argues that:

'Monetary policy is certainly not an area in which the ECJ could ever be sufficiently specialised to perform any actual oversight of individual monetary policy actions (the situation is similar in respect to economic policies).'[495]

The authors of the Spanish report seem to be concerned about a possible judicial review of ECB action outside or beyond strictly legal consideration stating that:

'Monetary policy is a science of its own, and very complex and difficult one; a court of justice is ill-placed to assess the correctness of monetary policy decisions, beyond of course the Law.'[496]

Finally, in the Hungarian report the question is raised 'whether the involvement of the ECJ in the political arena of economic policy entails the desired consistency'.[497]

Yet some rapporteurs also see an important role for CJEU in the future, as it may 'contribute to clarify the part to be played by the European Union in responding to the crisis, under EU primary and secondary law, as well as

493. Institutional Report, p. 255.
494. Ibid, p. 254.
495. Polish Report, p. 499. Interestingly, the rapporteur finds evidence in *Pringle* that the CJEU does not want to be in such a position.
496. Spanish Report, p. 571.
497. Hungarian Report, p. 435.

providing the impulse for necessary legislative reforms', and moreover in providing 'legal convergence between the different legal instruments on fiscal and monetary policy'.[498]

Open question

Question 15

What are other main legal concerns at the EU or national level regarding constitutional and institutional aspects of economic governance in EMU that are not covered by any of the previous questions?

1. Background*: what else?*

At the time of the drafting of the Questionnaire for the General Report it was envisaged that due to the high volatility of EU economic governance it could not be ruled out that subsequent developments would raise new legal questions that could not been anticipated at the time.

2. Background*: some general thoughts*

From the very limited responses to this question it becomes clear that national rapporteurs apparently have managed to express all their legal concerns regarding constitutional and institutional aspects of economic governance in answering the substantive questions. Consequently, the present account is limited to some general observations included in the national reports in response to this question.

Focusing on the use of Union and non-Union legal instruments to reform economic governance, the authors of the UK report argue that this approach 'seems [...] difficult to sustain in the middle to long run. The awkward legal relationship with EU law is unsatisfactory, and contrary to constitutional principles'.[499] Somewhat linked to this point the German report observes the inflexibility of the current Union legal framework to introduce necessary ad-

498. Portuguese Report, p. 513; Hungarian Report, pp. 434-435.
499. Brackets added. UK Report, p. 654.

justments to the euro area economic governance. Ruling out closer cooperation as a viable option, this rapporteur proposes the introduction of a special Treaty amendment procedure that allows for the amendment and completion of the provisions referred to in Article 139(2) TFEU, whereby only the euro area Member States would participate in the voting.[500]

Both the Italian and Portuguese rapporteurs raise the question what the future direction of economic policy should be. The Italian report states:

'It cannot be overlooked that, according to its founding principles, the Union's aim is to promote the well-being of European peoples and that democracy is naturally related to the idea of economic development and social welfare, and ultimately to justice.'[501]

In a similar vein the Portuguese rapporteurs stress that 'The current EMU model is outdated – because it rested on pro-cyclical budgetary policies and on the (false) assumption that there was an optimum currency area'.[502] The authors of the report urge:

'We should, therefore, reflect on the European economic model which we want. Here too, we have witnessed an apparent contradiction between the so-called European social model, included in the Constitution of all the Member States, and a neo-liberal view of the European economy expressed in the Treaties.'[503]

The Finnish report warns that 'euro membership could turn out to pose social costs to some members that far exceed the assumed benefits also in the medium to long term.'[504] The author of this report also formulates the question that may be considered the elephant in the room in the context of economic governance in EMU:

'if the euro zone will not be able to cope with the current economic problems in the current form, what will happen?'[505]

500. German Report, p. 373.
501. Footnotes omitted. Italian Report, p. 463.
502. Portuguese Report, p. 513.
503. Ibid, p. 514.
504. Finnish Report, p. 339. See also the Polish Report, p. 500, which points to the asymmetric integration, on the one side, of monetary policy and, on the other side, of economic and social policy.
505. Finnish Report, p. 339.

IV Concluding observations

This general report offers a snapshot of the main legal issues as they were raised in response to the Questionnaire. While the national reports show many similarities, it is mainly where they differ in their focus and legal assessments that they provide clues to the broad range of legal, but also political and economic issues that the *ad hoc* and structural measures taken in response to the European financial and euro area debt crisis mainly to strengthen economic governance in EMU have raised.

In fact, similar to the crisis itself it is difficult to exaggerate the impact of the measures that have been taken, as they go way beyond the concrete functioning of EMU as has become clear from this general report. The near-structural utilization of intergovernmental instruments (bilateral loans, TSCG, ESM, SRF) to essentially pursue Union objectives, the allocating of tasks to Union institutions by such instruments, the aggravation of budgetary discipline through the introduction of a balanced budget rule, automatic correction mechanisms and a budgetary surveillance cycle that reaches far beyond the monitoring of the implementation of European broad economic policy guidelines and the avoidance of government deficits, are all developments that raise fundamental questions both in the Union and Member State context.

At the Union level the Six-Pack, Two-Pack, TSCG and ESM first of all raise the question whether the quasi-constitutional basis of the Union, mainly the TEU and TFEU, still adequately reflects the main legal and economic assumption underlying economic governance in EMU in its current state. As the Finish rapporteur has put it: 'an objective and interest free discussion on the underlying economic paradigm of the EMU would deserve a proper chance'.[506] At the same time the legal presumption that economic policy in the Union is predominantly a national domain in which the Union only enjoys a coordinating competence hardly seems to adequately describe the distribution of power in the new economic governance framework. In this context one may wonder, whether the more or less strict delineation in the euro area of the economic policy as a predominantly national domain and monetary policy as an exclusive Union competence can actually still be upheld given the ECB's role in crisis management and solution. Moreover, the experience of the euro area debt crisis, as well as the introduction of a permanent European financial assistance mechanism, may call for a reassessment of the

506. Finnish Report, p. 337.

market logic paradigm underlying Articles 123-125 TFEU and emphasised by the CJEU in *Pringle*.

The utilization of intergovernmental instruments to pursue Union objectives challenges the Community method. While this is certainly not the first instance in the history of the supranational order, the scale at which this takes place and the significance of the measures taken in this context is arguably unparalleled. Indeed, considering the near-impasse that has resulted from the continues enlargement of the Union and despite the flexibilisation of the Treaty amendment procedures by the Treaty of Lisbon, for some the reform of economic governance in EMU may be an object lesson in 'semi-intergovernmentalism' as the future main integration mode. This intergovernmentalism is used in a rather pragmatic way not only to fill competence gaps at the supranational level that cannot be swiftly addressed by means of Treaty amendment, but also as an instrument for differentiation, whereby – as can be seen with the TSCG and ESM – the dividing line in economic governance can no longer simply be drawn between euro area and non-euro area Member States.

Much more so than in the past this differentiation between Member States potentially comes at the expanse of the unity of the supranational legal order and solidarity among Member States. That this unity is indeed under pressure also outside the EMU legal framework is highlighted by the developments in the sphere of financial market regulation and supervision.

Finally, it can be observed on a general level that the structural economic governance reform measures, as well as the new prudential supervisory regime have as a consequence a shift in the inter-institutional balance that arguably distorts the previously existing delicate legitimacy and accountability arrangements. Yet, does the future lie only in the reinforcement of the existing channels of legitimacy and accountability, such as through an increase of the role of the EP, or also in new forms, such as quasi-contractual relationships between Member States and the Union or a direct involvement of national parliaments at the Union level after all?

At the level of the legal orders of the Member States it has become clear from the general report that the measures that have been taken to address the European financial and euro area debt crisis have also had a considerable impact. Rather than to refer to a loss of sovereignty, a term that in its absoluteness may have been somewhat misplaced for some time considering the state of European integration, it may be more helpful to consider the impact of new economic governance on national policy space. It can hardly be contested that the latter is shrinking considerably as a result of the above-mentioned shift in economic governance. These developments do not only challenge the free-

dom of national executive governments to determine economic policy free from any European intervention, but also the position of parliaments in the national constitutional order, namely in deciding on budgetary matters. The several cases before national highest (constitutional) courts and tribunals highlight that with (parliamentary) democracy at issue this touches upon structural principles of the constitutional orders of the Member States that cannot simply be put aside and, at last in the instance of the German Basic Law, include a core that arguably cannot be altered at all. At the current state of integration there is no ready alternative to the preserving of national democratic structures and namely a meaningful role for national parliaments, as the latter may be considered a *conditio sine qua non* for the subsistence of the multidimensional constitutional legal order as which the EU may be described.[507]

These and other general lines of analysis identified throughout the general report need to be subjected to further deep and careful analysis in the months and years to come. This is not only important in order to fully understand the consequences of new economic governance for the Union legal order and the legal orders of the Member States, but also in order to initiate a broader debate on what direction economic governance, but also European integration at large should take. The European Commission's *Blueprint* and the *Four President's Report* only make suggestions for some general directions in this regard leaving many fundamental questions unanswered.

Overall, in conclusion it is hardly an exaggeration to observe that – at least for the time being – new economic governance has changed the face of European integration.

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507. F. Amtenbrink, 'The Multidimensional Constitutional Legal Order of the European Union – A Successful Case of Cosmopolitan Constitution-Building?', *Netherlands Yearbook for International Law*, Vol. XXXIX 2008, pp. 3-68 with further refernces.

Institutional report

Jean-Paul Keppenne[1]

Introduction

No one would deny that the law relating to Economic and Monetary Union has undergone dramatic changes since the beginning of the economic and financial crisis of 2008. European Union law is no longer what it was before; the crisis has not only affected the content of this specific area of EU law, but has had wider implications for EU law as a whole. The fact is that, beyond mere technical issues, the institutional and constitutional balance of the European Union has been irreversibly affected, for better or worse.

Never before have the EU Member States engaged in such a degree of collective action, moreover in areas that touch closely upon their sovereignty. However, much of this collective action took place outside the normal 'Community Method'. Time alone will tell whether this is the prelude to a stronger European Union or the beginning of its dissolution, in favour of other forms of integration.

The author of this report has been directly involved in these events as a member of the Commission's Legal Service and this inevitably means that the analysis which follows is the product of seeing matters from a certain institutional viewpoint. However, he has tried to compensate, by referring as widely as possible to the views expressed in academic circles, in the hope of arriving at a balanced and objective presentation.

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Economic policy

This chapter covers questions 1 to 5 of the questionnaire at the 'European' level only and without entering into much discussion with regards to the national legal orders of the Member States. Given the very high number of legal issues that were listed by the General Rapporteur, some choice has been made in terms of emphasis.

Question 1: The legal framework of the EMU and the validity of the instruments adopted in response to the euro area crisis

Questions 1 and 2 relate to the measures taken until now and are an invitation to discuss both their validity and their constitutional and institutional consequences.

Both EU and non-EU instruments have been adopted in response to the euro area crisis.[2] These instruments can be classified in two categories ('Carrot and Stick Approach'). On the one hand *financial assistance mechanisms* have been set up, mostly outside the EU framework and targeted for the euro area Member States: pooled bilateral loans, EFSM, EFSF, ESM.[3] On the other

2. We will use the term 'euro area crisis' throughout the report to cover the crisis that started in the euro area in 2010 as a follow up of the economic and financial crisis of 2008. The term is supposed to cover all aspects of the crisis (banking, sovereign, structural). We avoid the term 'euro crisis', since the value of and confidence in the euro itself was never affected.
3. The European Financial Stability Mechanism (EFSM) was set up within the framework of the EU Treaties, on the basis of Article 122(2) TFEU through the adoption of Council Regulation (EU) No. 407/2010, [2010] O.J. L118/1. For the rest, this expression of financial solidarity has been based on intergovernmental mechanisms. These mechanisms have taken three forms, namely bilateral support (pooled bilateral loans) granted by one or several Member States, support from a private law company created by the euro area Member States and support from a public international organisation set up by the euro area Member States. Bilateral support was given through pooled bilateral loans from other Member States. Such a solidarity mechanism was activated in support of Greece in 2010 following a political decision from the euro area Member States in May 2010 in response to the Greek authorities' request submitted in April 2010. The second type of assistance took the form of financial assistance from other Member States through a private law vehicle, the European Financial Stability Facility (EFSF). It is a limited liability company, incorporated under Luxemburg private law in June 2010. The EFSF is a temporary instrument. The EFSF was activated first in the case of Ireland in November 2010 (together with the EFSM) and

hand, *surveillance, monitoring and harmonizing measures* have been agreed on in the field of economic and fiscal policies, both within and outside the EU framework: Six-Pack, TSCG and Two-Pack.[4] These measures are twofold.

thereafter by Portugal. The supplementary assistance that was requested by Greece in 2012 was also granted via the EFSF. The third response to the financial instability of the euro area took the form of a permanent mechanism, i.e. the setting up of an international financial institution (IFI), the European Stability Mechanism (ESM) in February 2012. It has gradually subsumed the role of the EFSF and has intervened in favour of Spain and Cyprus. The ESM Treaty, which is available at: http://www.esm.europa.eu/pdf/esm_treaty.en .pdf , entered into force on 27 September 2012 following ratification by 16 Euro Area Member States. Estonia's ratification followed on 3 October 2012.

4. Within the EU framework the legislator adopted the so-called *Six-Pack* in 2011, a set of five Regulations and one Directive, to reinforce and enlarge the surveillance of the economic and fiscal policy of the Member States (OJ [2011] L 306). Two Regulations amend the preventive and corrective arms of the Stability and Growth Pact, i.e. Regulations 1466/97 and 1467/97. A third Regulation sets up a new 'excessive imbalance procedure'. Two other Regulations [(EU) No. 1173/2011 and No. 1174/2011] are addressed to euro area Member States only. They create new mechanisms of financial sanctions against euro area Member States in order to reinforce the effectiveness of the surveillance of their economic and budgetary policies. Financial sanctions are imposed in a gradual way, from the preventive arm to the latest stages of the excessive deficit and excessive imbalance procedures, and may eventually reach 0.5% of GDP. A reversed-qualified-majority voting (RQMV) is introduced for the adoption of most sanctions, therefore, increasing their likelihood. RQMV implies that a recommendation or a proposal by the Commission is considered adopted in the Council unless a qualified majority of Member States votes against it within the Council. Finally a Directive provides certain provisions for the fiscal framework of the Member States. Outside the framework of the EU Treaties, 25 Member States have also concluded in 2012 a *Treaty on Stability, Coordination and Governance in the EMU* ('the TSCG') whose most important aspect is the so-called 'Fiscal Compact' by which contracting States agreed to incorporate a budget-balanced rule in their national legal framework. In 2013 the EU legislator adopted the *Two-Pack*, two additional Regulations which apply only to the euro area Member States (Regulations No. 472/2013 and No. 473/2013, OJ [2013] L 140). The two-pack aims at further strengthening and better coordination of the surveillance mechanisms in the euro area, through the whole panel of situations a Member State can find itself in. It thus includes, first, provisions concerning all euro area Member States, to improve their budgetary frameworks and better coordinate the surveillance of their annual budgetary planning. Second, Member States in excessive deficit are subject to increased surveillance to make sure the correction of the excessive deficits is timely and long-lasting. Finally, Member States experiencing, or at risk of experiencing financial difficulties, and those receiving external financial assistance are subject to new provisions, including during a transition period after their exit from the programmes.

First, the mechanisms of *external surveillance* by the Union of the policies of the Member States have been reinforced and their material scope expanded (reinforcement of the Stability and Growth Pact as far as budgetary discipline is concerned, creation of the macro-economic imbalances procedure, streamlining of the European Semester, preventive control of the draft budgetary plan of the euro area Member States, etc.). Second, the Union and Member States have embarked on a new policy of *harmonization of national laws* in the budgetary field (Directive on national fiscal frameworks, Fiscal Compact, etc.).

This section concerns the compatibility with primary Union law of the above-mentioned measures. Two different issues are discussed below. The first concerns the adequacy of the legal basis relied upon for the adoption of *EU acts and instruments*. Sections 1.1 to 1.5 discuss the different legal bases that have been used over the last years. The other issue relates to the respect of *prohibitions contained in primary EU law*, in particular the no-bail out clause of Article 125 TFEU. It is discussed in Sections 1.6 and 1.7. The more general question of the compatibility with Union law of the recourse to intergovernmental actions in the field of economic policy is discussed in the answer to Question 2.

1.1. Legal basis of the EU Action

1.1.1. The measures that have been adopted by the EU since 2010 are numerous.[5] We concentrate our analysis on the reforms in the area of economic policy coordination (Articles 121 to 126 TFEU and Article 136 TFEU), and not banking law and monetary instruments. The measures adopted by the ECB will be discussed under Question 11. EU Instruments related to financial market regulation and supervision will be very briefly discussed under Question 5 only. The discussion of Article 127(6) TFEU will also be left for Question 12. Finally, political statements and declarations by the various EU institutions and bodies are not covered. Even if they sometimes had a decisive importance for the markets, in particular the conclusions of the European

5. For a general presentation see de Streel, The evolution of the EU economic governance since the Treaty of Maastricht: an unfinished task, Maastricht Journal, 2013: 336-362; de Streel, La gouvernance européenne réformée, Revue trimestrielle du droit européen, 2013: 455-482.

Council and the numerous statements of the Eurogroup or its President, the question of their compatibility with primary law is in principle not relevant.[6]

1.1.2. The EU instruments can be broadly classified in two categories; the provision of financial assistance, i.e. the setting up of the EFSM,[7] on the one hand, and the reinforcement of the surveillance and monitoring of the economic policies of the Member States, i.e. the Six-Pack and the Two-Pack,[8] on the other hand. As it is often pointed out, the EMU suffered from disequilibrium since its inception. While monetary policy was exclusively in the hand of the Union, and in particular the ECB, economic policies of the Member States were only remotely coordinated through the so-called 'open method of coordination'. Moreover, because of the conviction that all Member States would quickly adopt the euro, the coordination of economic policies was envisaged for the whole of the Union, without procedures for further coordination within the euro area. The Lisbon Treaty has not fully remedied this situation. Its changes were rather minor with the notable exception of the inclusion of a new provision specific to the euro area, Article 136 TFEU. When the euro area crisis erupted, strong measures of solidarity and reinforced coordination within the euro area were felt necessary, but the Union was cruelly missing adequate legal basis for their adoption. The pressure of events and strong legal creativity were, therefore, crucial for moving forward.

1.2. Article 122(2) TFEU and the EFSM

1.2.1. The measures for the provision of Union financial assistance to Member States in difficulties are to be found mainly in Regulation No. 407/2010 setting up the EFSM[9] and its implementing acts, namely decisions addressed

6. See, however, the actions for annulment made against statements of the Eurogroup related to the assistance to Cyprus (pending cases T-328/13, Tameio Pronoias Prosopikou Trapezis Kyprou c/ Commission et ECB, and others).
7. See footnote 3.
8. See footnote 4.
9. See footnote 3. The EFSM was constituted on 9 and 10 May 2010, during an extraordinary meeting of the ECOFIN, at a time of sudden aggravation of the euro area crisis. An immediate answer was considered indispensable to reassure the markets. It is a financial assistance of the European Union which is part of the larger package of financial assistance that was set up in favour of the euro area at that time (EFSM, EFSF and IMF assistance). The EFSM has been activated twice, in favour of Ireland (autumn 2010) and Portugal (spring 2011). The EFSM is a temporary mechanism for financial assistance in the form of a loan or a credit line in favour of Member States

to Portugal and Ireland[10] (and their accompanying Memorandum of Understanding). The choice of a regulation as legal instrument for setting up the EFSM seems to indicate that it is an act of a general nature (See Article 288(2) TFEU). However, if the General Court has judged that an individual, acting as a citizen of the Union, was not « directly concerned » (in the sense of Article 263 TFEU) by the EFSM Regulation, it has avoided to decide whether it was or not a regulatory act in the sense of Article 263(4) TFEU.[11]

1.2.2. One should also recall that, as far as financial assistance for non-euro area Member States is concerned, a specific mechanism is envisaged by Article 143 TFEU complemented by Regulation No. 332/2002 (the so-called 'balance of payment assistance').[12] This mechanism has been activated a number of times since 2008. It will not be discussed further in this report.

1.2.3. The EFSM Regulation was adopted on the basis of Article 122(2) TFEU. This provision, in its current version, is the result of a long evolution. Article 108 of the Rome Treaty already envisaged the granting of 'mutual assistance' by Member States in favour of a Member State in difficulties as regards its balance of payments. In 1992, the benefit of this provision was limited to non-euro-area Member States (current Article 143 TFEU). As compensation, the Maastricht Treaty included the solidarity clause of Article 122

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experiencing, or seriously threatened with a severe economic or financial disturbance, attached to strict economic policy conditions. The EFSM is a « back to back » mechanism, i.e. the loans that are disbursed are financed by borrowings of the Union on the markets. This implies that the global amount used has to stay within the limit of the payment credits available under the own resources ceiling. The available amount was, therefore, of around 60 billion euros. The EFSM is in theory available to all Member States. However, it must be used 'taking into account the possible application of the existing facility providing medium-term financial assistance for non-euro-area Member States' balances of payments' (Article 1). This seems to imply that in practice only euro area Member States would benefit for the EFSM. Indeed only Portugal and Ireland have been granted assistance from the EFSM, while the non-euro-area Member States in difficulties have benefitted from the balance of payment assistance mechanism.

10. Council Implementing Decisions No. 2011/77/EU of 7 December 2010 on granting Union financial assistance to Ireland, [2011] O.J. L30/34, and No. 2011/344/EU of 17 May 2011 on granting Union financial assistance to Portugal, [2011] O.J. L240/8.
11. Order Tribunal 15 June 2011 (Ax v Council, T-259/10), not published, paragraph 25.
12. Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] O.J. L53/1.

TFEU (first article 103A TCE, then 100 TCE after renumbering). Article 122(2) was inserted into the Treaty together with Articles 120 to 126 whose objective is to make sure that, even within a monetary union, Member States remain fully responsible for their economic policies and subject to the discipline of the market. Therefore, Article 122(2) cannot be interpreted in a way that would go against this constitutional framework. At the same time it cannot be disputed that this provision is grounded on a notion of solidarity between Member States which makes it very specific.

1.2.4. Recourse to the legal basis of Article 122(2) is possible only where specific circumstances are present, i.e. « Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disaster or exceptional occurrences beyond its control ». An objective situation must, therefore should be duly motivated and which is amenable to judicial review. The power of the Council for assessing whether these objective factors are present seems large given the complexity of the economic and political factors to be taken into consideration. It is, however, not a totally discretionary power.

1.2.5. The *first condition* for having recourse to Article 122(2) is that the Member State is in difficulties or is seriously threatened with serious difficulties. This second possibility allows a preventive intervention of the Council in order to avoid the appearance of the difficulties at least if the threat is sufficiently proven. The provision does not specify the nature of these difficulties. They should logically be of an economic nature: budgetary problems, liquidity crisis (possibly because of a balance of payment disequilibrium), severe macro-economic problems, etc. Article 122(2) offers more flexibility than Article 143 TFEU which envisages only difficulties as regards to the balance of payments. The *second condition* of Article 122(2) is that these difficulties (or threats) must be caused by natural disasters or exceptional occurrences beyond the control of the concerned Member State. The notion of exceptional occurrences is not defined. According to its usual meaning this should cover events that happen rarely and derogate from the normal course of events. Nevertheless occurrences remain exceptional even if they concern all the Member States as it was the case for the economic and financial crisis that erupted in 2008. The occurrences must also be 'beyond the control' of the Member State. The idea is to avoid that a Member State does not act rationally to prevent difficulties simply because it could be rescued by the Union or the other Member States ('moral hazard'). This condition was the most problematic regarding the setting up of the EFSM. It could have been considered

that the budgetary difficulties of the Member States were at least for a large part nothing else, but the consequence of the inadequate management of their public finances in the past. Instead of benefitting from financial assistance they should therefore have been sanctioned under the excessive deficit procedure of Article 126 TFEU. The Council has, however, developed, quite reasonably, a less rigorous interpretation. It considered that the crisis was 'unprecedented' and was of such a magnitude that it could in itself be considered as an exceptional occurrence beyond the Member States control.[13] It was, therefore, not necessary to assess the past budgetary behavior of those Member States any more. The Council also considered that the condition of serious threat with severe difficulties was also fulfilled as long as the financial crisis persisted. It is, however, not entirely clear from the text of the Regulation whether the condition of the existence of an 'exceptional occurrence beyond the Member States' control should be considered as fulfilled as long as the EFSM remains alive or whether the existence of this condition should be controlled again whenever a specific assistance is granted to an individual Member State. We tend to consider that the first option is the correct one and that the only condition to be established in case of activation of the mechanism is the existence or serious threat of severe difficulties for the concerned Member State.[14] The Council has not taken position on the degree of gravity of a crisis situation that was needed to be qualified as an exceptional occurrence. More than on an evaluation of the gravity of the crisis it appears from the text of the Regulation that the position of the Council was mainly based on the consideration that 'the financial stability of the European Union as a whole' was at threat.[15] This idea that beyond the criteria of Article 122(2) stands the higher principle of the financial stability of the Union is fully in line with the position taken by the EU Court of Justice in the Pringle judgment.[16]

13. Regulation 407/2010, Recitals (2) to (5).
14. Contra: Ruffert, The European debt crisis and European Union law, Common Market Law Review, 2011: 1777-1806, p. 1787.
15. Regulation 407/2010, Recitals (4), (5) and (8) and Article 1.
16. Judgment of the EU Court of Justice of 27 November 2013 in Case C-370/12, Thomas Pringle v the Government of Ireland, Ireland and the Attorney General (not yet published; hereafter 'the Pringle judgment' or 'the Pringle case'), paragraph 135. This case arose from a preliminary reference made to the Court of Justice by the Supreme Court of Ireland. The Supreme Court was seized, on appeal, with a challenge by Mr. Thomas Pringle (a member of the Irish Parliament), regarding the validity under EU and national law of the ratification by Ireland of (a) the European Council Decision of

1.2.6. In the Pringle case the Court of Justice confirmed that Article 122(2) does not confer the power on the Union to establish a permanent stability mechanism.[17] This is the logical consequence of the fact that recourse to this provision is possible only when exceptional factual conditions are present. It follows from this that the EFSM is by its very nature a temporary mechanism whose existence is closely linked to the persistence of the euro area crisis.[18] For this reason Regulation 407/2010 contains in its Article 9 a Review Clause. The Commission must regularly review and report on the continuation of the exceptional occurrences that justified the adoption of the Regulation (recital 8 and Article 9). The first report was done six months after the entry into force of the Regulation.[19] Other reports are required 'where appropriate,' but no reports have been issued since the first one. This means that the disappearance of the circumstances that justified the setting up of the EFSM would oblige the Commission to propose its termination. Moreover, the individual decisions granting a specific support to an individual Member State must state the availability period of the assistance.[20]

A strict reading of Article 122(2) could even lead to the conclusion that only individual assistance measures may be adopted on that basis. However, a more flexible interpretation could also justify a temporary mechanism like the EFSM which makes a specified budget available for certain Member States during a specified period of time. By creating the EFSM the Council considered that the adoption of a general legal framework, albeit temporary, was indispensable as a first step before individual decisions. Such a two-step approach is not explicitly envisaged by Article 122(2) TFEU, but nothing in the wording of this Article prevents it. It should be considered as justified taking into account the prevailing market conditions at the time. The mere adoption of the Regulation could as such be considered the granting of a 'precau-

25 March 2011 amending the Treaties by introducing a paragraph 3 to Article 136 TFEU (on this provision see below section 1.7), and (b) the ESM Treaty. The Irish Supreme Court rejected Mr. Pringle's claim based on the Irish Constitution and also his interim claim, thus paving the way for Ireland's ratification of the ESM Treaty on 1 August 2012. Nevertheless it considered that the case before it raised questions of EU law, and referred three such questions to the Court of Justice, among which the question on interpretation of the EU Treaties and general principles of EU law in order to assess whether a Treaty such as the ESM Treaty is in line with EU law.

17. Pringle Judgment, paragraphs 65 and 105.
18. Contrary to the assistance mechanism applicable to non-euro-area Member States by virtue of Article 143 TFEU and Regulation No. 332/2002.
19. COM(2010)713 final.
20. Regulation 407/2010, Article 3, paragraphs (3)(a) et (4)(a).

tionary financial assistance' from the Union in favour of all its Member States.[21]

The Member States have expressed their willingness not to have recourse any more to the EFSM. It can, therefore, be expected that the loans granted to Ireland and Portugal will remain its sole cases of application.[22] Formally speaking though the Regulation is still of application.

1.2.7. In the Pringle case the Court of Justice has clarified that the use of Article 122(2) TFEU was not affected by the existence of parallel intergovernmental assistance mechanisms in favour of the same beneficiaries. Speaking in the context of the assistance granted by the ESM the Court wrote that 'The exercise by the Union of the competence conferred on it by [Article 122(2)] of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM'.[23] In the same vein the new paragraph 3 was added to Article 136 TFEU in 2013 by a simplified revision procedure that confirms the possibility for the euro area Member States to assist each other under certain conditions and does not impact on the possibility to have recourse to Article 122 TFEU. Conversely the competence attributed to the Union by Article 122(2) TFEU is not exclusive and, therefore, does not prohibit intergovernmental mechanisms. As confirmed by the Court, 'nothing in Article 122 TFEU indicates that the Union has exclusive competence to grant financial assistance to a Member State.'[24]

1.2.8. It is explicitly provided for in Article 122(2) that the Union financial assistance may be granted « under certain conditions » that are defined or otherwise circumscribed. It is difficult on that basis to conclude whether the Council is always required to impose such conditions. The answer to the question could probably be negative if one considers that Article 122(2)

21. A mechanism of 'precautionary assistance' has been developed in the framework of Regulation 332/2002 for non-euro area Member States. It means that the assistance is in principle at the disposal of the concerned Member State, but will be disbursed only at its request (see Council Decisions No. 2011/288/EU of 12 May 2011 providing precautionary EU medium-term financial assistance for Romania, [2011] O.J. L132/15, and No. 2013/531/EU of 22 October 2013 providing precautionary Union medium-term financial assistance to Romania, [2013] O.J. L286/1).
22. See also the first recital of the Preamble to the ESM Treaty according to which the ESM 'will assume the tasks currently fulfilled by the EFSF and the EFSM'.
23. Pringle Judgment, paragraphs 104 and 119.
24. Pringle Judgment, paragraph 120.

TFEU allows to derogate from Article 125 TFEU.[25] By contrast, if one considers that assistance under Article 122(2) must comply with the no-bail out clause as interpreted by the Court of Justice in the Pringle case, then strict conditions appear warranted.[26] In practice the activation of the EFSM was always linked to such conditions. It is for the Council to decide on these conditions and it has a large margin of appreciation.[27] In principle, these conditions must be of such a nature that they permit the Member State concerned to restore its public finances and its ability to finance itself on the markets.

1.2.9. How Article 122(2) TFEU relates to the no-bail out clause of Article 125 TFEU is indeed open to interpretation. In declaration No. 6 adopted by the intergovernmental conference of the Nice Treaty on Article 100 [now 122 TFEU], the Conference refers to 'decisions regarding financial assistance, such as are provided for in Article 100 and are compatible with the 'no bail-out' rule laid down in Article 103 *[now 125 TFEU]*'.[28] For the rest the preparatory works of the Maastricht Treaty reveal that the simultaneous inclusion of these two provisions is the result of a compromise between different Member States. Even if Article 122(2) is not formulated explicitly as an exception to Article 125(1), one could consider that it is nevertheless an implicit derogation to the 'no bail out'. The Court of Justice has confirmed that Article 125 TFEU has the ultimate goal of preserving the financial stability of the monetary union,[29] and the Council when setting up the EFSM has considered that the same goal could justify recourse to Article 122(2). I therefore believe that the EFSM is not bound by Article 125 TFEU.

1.3. Article 136(1) TFEU and euro area measures

1.3.1. Article 136(1) refers to the adoption of measures specific to the euro area Member States. It is drafted in a very tortuous and ambiguous way, probably reflecting opposite views expressed during the works of the Con-

25. On Article 125 TFEU, see below section 1.6.
26. According to some authors such conditions are indispensable to reconcile Article 122(2) with Article 125 TFEU (De Gregorio Merino, Legal developments in the economic and monetary union during the debt crisis: the mechanisms of financial assistance, Common Market Law Review, 2012: 1613-1646, p. 1634 ; Louis, The no-bail out clause and rescue packages, Common Market Law Review, 2010 : 971-986, p. 985).
27. Order Tribunal 15 June 2011 (Ax v Council, T-259/10), not published, paragraph 23.
28. [2001] O.J. C80/78.
29. Pringle Judgment, paragraph 135.

vention.[30] For these reasons a literal interpretation does not allow us to fully grasp its scope. The determination of its scope raises fundamental issues related to the very nature of the euro area: Is Article 136(1) TFEU only a modality of the usual method of open coordination envisaged in Article 121 TFEU? Or does it confer more intrusive competences to the Union as regards the euro area Member States? In the affirmative, how far can the Union intrude into national sovereignty?

1.3.2. In the academic circles the majority has so far advocated a *literal, hence restricted, interpretation* of Article 136(1).[31] As a consequence of this reading this provision is nothing more than a kind of enhanced cooperation between the euro area Member States. This enhanced cooperation would marginally differ from the 'normal' enhanced cooperation regulated by Article 20 TEU and Articles 326 to 334 TFEU. First, it automatically covers all euro area Member States and not only those willing to participate. Second, it can be applied immediately and not as a last resort. To support this restrictive interpretation one could refer to the fact that the Council may act only 'in accordance with the relevant provisions of the Treaties'. The voting modalities within the Council are also very similar to the one provided for by Article 330 TFEU. Article 136(1) TFEU would, therefore, be a mere procedural provision, simply facilitating within the euro area the use of existing Union competences. It would not be a proper legal basis allowing the adoption of additional measures.

1.3.3. This restrictive interpretation is, however, disputable because it leaves Article 136(1) without much added-value. Most of the measures envisaged under Articles 121 and 126 TFEU are individual measures addressed to a specific Member State and enhanced cooperation for such measures does not make much sense. Moreover other Treaty provisions already regulate the voting right within the Council for measures addressed to euro area Member

30. See successive versions in documents CONV 727/03, CONV 805/03, CONV 802/03 et CONV 850/03.
31. Ruffert, The European debt crisis and European Union law, Common Market Law Review: 1777-1806, 2011, p. 1800 ff.; Calliess, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, p. 103.

States.[32] Therefore, also because the euro area crisis required urgent response, the Union institutions have made a more *dynamic and teleological interpretation* of this provision. They considered that Article 136(1) was a proper legal basis allowing the adoption of measures of a new nature, which could not have been adopted otherwise.[33] This interpretation can be supported by the objective of the provision (ensuring the proper functioning of EMU) and the nature of the envisaged measures (to *strengthen* the coordination and surveillance of the budgetary discipline of euro area Member States). Binding measures going further than what is envisaged by Articles 121 and 126 are, therefore, possible on that basis provided they remain adequate and proportionate. All this is thus based essentially on letter a) of Article 136(1) TFEU. Letter b) of this provision remains largely useless (the term 'orientations' indicates that no binding measures can be based on that part of Article 136(1) TFEU).

1.3.4. Article 136 TFEU is also pretty unclear regarding the *procedure* to follow for the adoption of the measures it allows. The first paragraph is quite exceptional since it does not provide for a specific procedure, but refers to an adoption 'in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14)'. The notion of 'relevant procedure' is not clear, especially if one considers that Article 136(1) allows the adoption of measures that could not be adopted on the basis of Articles 121 or 126. The institutions have, therefore, considered that they were allowed to choose the procedure that could reasonably be considered the most appropriate taking into account the objective and the nature of the act to be adopted. For measures of a general nature it was considered appropriate to have recourse to the ordinary legislative procedure referred to in Article 121(6) TFEU.[34] By contrast, binding acts ad-

32. Articles 139(2), letters (a) and (b), and 139(4) TFEU already restrict the voting rights within the Council in favour of the euro area Member States as regards the adoption of these measures.
33. In favour of an extensive interpretation, see the European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)).
34. This means that the literal wording of Article 136(1) which refers to an adoption by the Council alone had to be disregarded in order to allow the participation of the European Parliament. This creates, however, an asymmetry between the two institutions. Within the Council only the euro area Member States have the voting right, in accordance with paragraph 2 of Article 136 while all members of the EP may vote whatever their country of election. The EP takes the view that this asymmetry 'is fully coherent with the principles of differentiation and does not reduce but, on the con-

dressed to specific Member States were adopted following the procedure of Article 126(6) TFEU which is the only provision which is a basis for the adoption of a decision. Much flexibility is thus left to the institutions as regards the choice of the procedure.[35] However, this choice should not be considered as arbitrary and could probably be controlled by the Court of Justice.

1.3.5. The above-mentioned large interpretation of Article 136(1) has allowed the adoption of individual measures as well as measures of a general nature. As regards the *measures of general scope*, four regulations were adopted by the legislator by ordinary legislative procedure, two of them in 2011 as part of the Six-Pack and two others in 2013 ('the Two-Pack').[36]

1.3.6. It is interesting to note the complex relationship that exists between the Two-Pack and the measures agreed by the Member States outside the framework of the EU Treaties. Regulation 473/2013, which is part of the Two-Pack, incorporates elements of the TSCG into EU law, such as the creation of independent forecast authorities, the obligation for Member States in excessive deficit to draw economic partnership programmes detailing structural reforms necessary to ensure an effective and lasting correction of the deficit, and the ex ante coordination of debt issuance plans. As far as Regulation 472/2013 is concerned, it repatriates within the ambit of EU law most of the management of the conditionality linked to intergovernmental financial assistance programmes and previously carried out by the 'Troika' without clear legal framework. If on the basis of this Regulation the Council decides that the beneficiary Member State does not comply with policy requirements contained in the adjustment programme, this EU decision would dramatically impact on the disbursement of assistance to that Member State under the intergovernmental programme. We explain later how this relationship constitutes, together with other elements, what we call a 'semi-intergovernmental method'.[37]

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trary, enhances the legitimacy of those measures' (European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), § 30).

35. It is not the only provision of the Treaties that gives some discretion with regards to the choice of the procedure. For example Article 352 TFEU permits to choose between a legislative and a non legislative procedure.
36. On these measures, see footnote n° 4.
37. See below Section 2.1.

1.3.7. Individual decisions directly addressed to specific euro area Member States have also been adopted by the Council directly on the basis of Article 136(1) TFEU. Such decisions were adopted towards Greece,[38] Spain[39] and Cyprus.[40] These decisions are very far-reaching. They directly intrude into the budgetary and economic sovereignty of the concerned Member State and take control of most of its policies for a limited period of time. Once again, there is a clear link between these decisions and the intergovernmental assistance provided to the concerned Member States. The Union considered that, although no financing was coming from the Union budget, the conditionality associated with the intergovernmental assistance nevertheless had to be framed by the Union and could not be decided solely by the lenders. For this reason the broad lines of the EFSF and ESM programmes were first adopted by the Council through such individual decisions. For the future, when similar decisions are needed they will be adopted on the basis of Regulation 472/2013 and no longer directly on the basis of Article 136(1) TFEU. (See, for instance, as regard Cyprus, Decision No. 2013/463/EU replacing Decision No. 2013/236/EU).

1.4. Article 121 TFEU and the Six-Pack

Apart from the two Regulations based on Article 136(1) TFEU, the Six-Pack also contains a few other interesting innovations. For the first time a Regulation based on Article 121 TFEU does not cover fiscal surveillance, but macroeconomic surveillance with the creation of a new Macroeconomic Imbalance Procedure. Also in the fiscal field, the Six-Pack operationalizes the debt criterion, so that an Excessive Deficit Procedure (EDP) may also be launched on the basis of a debt ratio above 60 % of GDP which would not diminish towards the Treaty reference value at a satisfactory pace (and not only on the basis of a deficit above 3 % of GDP, which has been the case so far). This new provision is based on the assumption that the obligation for Member States to avoid 'excessive government deficits' of Article 126(1) TFEU must be understood as covering both deficits and debts. This appears to be a justified interpretation, since paragraph 2 of the same Article makes clear that the budgetary discipline is based both on a deficit criterion and a debt criterion. Consequently the notion of 'deficit' throughout all the paragraphs of Article

38. Decisions No. 2010/320/EU, [2010] O.J. L145/6, and No. 2011/734/EU, [2011] O.J. L296/38.
39. Decision No. 2012/443/EU, [2012] O.J. L202/17.
40. Decision No. 2013/236/EU, [2013] O.J. L141/32.

126 should be understood as referring to the deficit and/or the debt of the concerned Member State.

1.5. Article 126(14) TFEU and the secondary law of the excessive deficit procedure

1.5.1. Article 126(14) TFEU is a basis for the adoption of provisions relating to the implementation of the excessive deficit procedure. Its second subparagraph allows the adoption of provisions replacing the Protocol on the excessive deficit procedure annexed to the Treaties, by unanimous decision of the Council. According to its third sub-paragraph detailed rules and definitions may be adopted for the application of the provisions of the said Protocol. Both subparagraphs were activated for the adoption of the Six-Pack, respectively for Council Regulation (EU) No. 1177/2011 and Council Directive 2011/85/EU.

1.5.2. It is interesting to note that Regulation 1467/97 which is one of the components of the Stability and Growth Pact was adopted on the basis of the second subparagraph of the then Article 104c of the Treaty, establishing the European Community even if it did not replace the Protocol, but was only 'speeding up and clarifying the implementation of the excessive deficit procedure'. For this reason, when as part of the Six-Pack it was decided to amend this regulation, the same procedure requiring unanimity within the Council was followed.[41]

1.5.3. Council Directive 2011/85/EU lays down detailed rules concerning the characteristics of the budgetary framework of the Member States. As stated in its Article 1 these rules were considered necessary to ensure the Member State's compliance with the excessive deficit procedure. The use of Article 126(14), third subparagraph as a basis for the adoption of a Directive is an interesting element. It was indeed not obvious that this provision was a sufficient legal basis for harmonizing national budgetary procedures with the goal of assuring 'uniform compliance with budgetary discipline' (recital 28 of the Directive). It is also striking that the United Kingdom was exempted from the obligation to have in place numerical fiscal rules because of its partial exemp-

41. Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97.

tion as set out in Protocol No. 15 to the Treaties (recital 17 and Article 8 of the Directive).[42]

1.5.4. After this discussion of the different EU legal basis used over the last years, the two following sections analyse the main prohibition contained in the EU Treaties, i.e. the no-bail out clause and the associated provision of Article 136(3) TFEU.

1.6. The intergovernmental assistance mechanisms and the prohibition of Article 125 TFEU[43]

1.6.1. The prohibition, as laid down in paragraph 1 of Article 125 TFEU and commonly referred to as the 'no bail out clause' as it prevents in principle a Member State from relying on the possibility of a bail out by other Member States and/or the EU, is an important basis for the proper functioning of the monetary union.[44] Together with Article 123 TFEU and 124, it aims to establish a certain degree of market discipline. Indeed, jointly these three provisions aim to discipline individual Member States through the markets, to keep their budgets within acceptable parameters. When the markets lose confidence in the policies of a Member States this should result in higher risk premiums on government bonds.[45] The traditional view[46] was that in such circumstances governments whose behaviour was financially irresponsible were indeed not allowed to 'free ride' on the credit worthiness of other Member States and the EU. However, since 2010 the euro area crisis forced the other Euro Member States and the EU to provide them with financial assistance, granted through a variety of sophisticated instruments and facilities developed both inside and (mostly) outside the EU legal order. In parallel, opinions

42. The United Kingdom has recently managed to be exempted from quite a number of EU legislation, for reasons that are not always easy to justify from a legal point of view (see for example the exemption from macroconditionality in the Structural Funds Regulation) (On macroconditionality, see foodnote 110).
43. This section relies extensively on Keppenne and Smulders, Artikel 125 AEUV, Kommentar zum EUV-/AEUV-Vertrag Von der Groeben/Schwarze (Ed.) (Nomos Verlagsgesellschaft, Baden Baden, 2014).
44. Smits, The European Central Bank. Institutional Aspects, (Kluwer Law International, The Hague 1997), pp. 77-78.
45. Borger, The ESM and the European Court's predicament in Pringle, German Law Journal, 2013: 113-140, p. 124.
46. See for a survey, Louis/Lastra, European Economic and Monetary Union: history, trends, and prospects, Oxford Yearbook of European Law, 2013: 1-150, p. 43.

on the precise scope of the prohibition, *ex* Article 125(1) TFEU started evolving, but it was only the ECJ's judgment in the Pringle case at the end of 2012 that brought the necessary clarification and thus legal security in this respect. Since that judgment, the public discussion on the enhancement of the financial stability in the euro area has been focussed on more sophisticated forms of financial assistance, ranging from Eurobonds (or Stability bonds), Eurobills[47] to 'redemption funds',[48] as a means of tackling the euro area crisis, each triggering complex questions as to their compatibility with Article 125(1) TFEU. Already in 1990, the predecessor of the Economic and Financial Committee, i.e. the Monetary Committee, working on the Maastricht treaty, had defined the ratio legis of the no bail-out clause as follows: 'Budgetary discipline is a necessary condition for stable prices and a stable currency. It must, therefore, be one of the foundation stones of the EMU. The Treaty should lay down (...) that neither the other Member States, nor the Community stand behind any Member State's debts (...). The Member States will follow budgetary policies which respect the principle of budgetary discipline. In the view of the Monetary Committee these principles include the following (...): Each member State must bear the responsibility for its own debt management and must ensure that it is in a position to honour its engagements (...). This no bail-out rule would ensure that the financial markets exercise a degree of discipline on any Member State pursuing unsound budgetary policies, by imposing differential terms on its paper and ultimately by refusing to lend (...).'[49] In the Pringle case, the Court drew rather general conclusions

47. See for a description of such bonds and a (negative) assessment under Article 125(1) TFEU in so far as the common issuance by Member States of such bonds were to imply their joint and several liability, the Commission Green Paper on the feasibility of introducing stability bonds, document COM 818 (2011) of 23 November 2011 and the Commission Blueprint on a deeper and genuine EMU (hereafter 'the Blueprint'), document COM 777 (2012) of 30 November 2012.
48. This proposal, developed by the German Council of Economic Experts in 2012, involves the establishment of a fund into which Member States could deposit debt exceeding the reference value of 60 % of their GDP. The Fund would finance its operations by issuing bonds for which the participating Member States would be jointly and severally liable. In other words, each participating Member State must individually provide a guarantee for the amount of bonds issued by the Fund. Conversely, in case the Fund were to default in relation to payment obligations under the bonds, bondholders can turn to any of the participating Member States and have a legally enforceable right under the guarantee to claim the full amount due under the bonds.
49. See De Gregorio Merino, Legal developments in the economic and monetary union during the debt crisis: the mechanisms of financial assistance, Common Market Law Review, 2012: 1613-1646, p. 1625.

from the history of the Maastricht treaty: 'It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy [...]. The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.'[50]

1.6.2. It follows from paragraph 1 of Article 125 that the prohibition is addressed in the first place to, on the one hand, the Union, and on the other hand, Member States, as potential *creditors* in the sense of legal persons being liable or assuming liability in the sense of Article 125(1). There is nothing in the wording or in what follows from the *ratio legis* of Article 125(1) which would suggest that as far as Member States are concerned, for the purposes of the application of the prohibition, a distinction should be made between the situation where they act individually or jointly. It should also be clear that the addressees of Article 125(1) TFEU cannot circumvent the prohibition enshrined therein by acting through a private limited liability company such as the EFSF or through an international financial institution established under public international law such as the ESM which they control.[51] Concerning the potential *debtors* affected by that provision, they include central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States. This list corresponds with the list of potential beneficiaries of monetary financing in Articles 123(1) TFEU and of privileged access in 124 TFEU with the exception of the Union institutions, bodies, offices and agencies which are not mentioned in Article 125 TFEU.[52]

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50. Pringle Case, paragraph 135.
51. See e.g. paragraph 110 of the Advocate General's view in the Pringle case and compare also paragraph 175 of the Court's judgment in the same case, where, for the purposes of Article 273 TFEU, it equated the ESM with the participating Member States. Moreover, if Article 125 TFEU would only be addressed to the Member States individually and not to Member States acting collectively through an institution having its own legal personality under public international law like the ESM, the whole analysis carried out by the Court in the *Pringle* case on the conformity between the ESM Treaty and Article 125 TFEU would have been unnecessary.
52. According to Council Regulation (EC) Nr 3604/93, based on Article 104b(2) EC (now Article 125(2) TFEU) 'public undertaking' shall be defined, for the purposes of

1.6.3. In order to understand the scope of the bail out prohibition *ratione materiae* the interpretation of two notions used in Article 125(1) are key: 'shall not be liable for' and 'assume the commitments' of a Member State in all its branches. The *first notion* ('shall not be liable for') implies that if a Member State has a debt, neither the Union or another Member State are liable *vis-à-vis* the creditors of the former Member State for the reimbursement of that debt. In other words, these creditors have no right to the reimbursement *vis-à-vis* any other State than the Member State which has borrowed from them. Article 125(1) TFEU is thus a warning to the creditors that bailing out is not a right they can claim from the Union or the other Member States. The *second notion* used in Article 125(1) ('assume the commitments of') means that the Union and the Member States may not directly engage their financial responsibility *vis-à-vis* the creditors of a Member State. Therefore, guarantees may not be issued to creditors of the debt of a Member State nor are other Member States or the Union allowed taking over a debt and thus committing themselves directly *vis-à-vis* the creditors to reimburse them. Article 125(1) TFEU, therefore, prohibits the Union and its Member States to issue directly any kind of guarantees to other Member States' creditors. This literal interpretation of Article 125(2) TFEU is not put into question by the Court's judgment in the Pringle case. Indeed, in paragraphs 136-138 of that judgment the Court was only able to consider the assistance, to be granted to a Member State on the basis of an arrangement such as provided for by other Member States in the context of the ESM Treaty, as compatible with Article 125 TFEU *after* having noted that in such a case the former Member State remained responsible for its commitment to its creditors, and the other Member States did not act as guarantors of the debts of the recipient Member State. Nevertheless the Pringle judgment makes it clear that some other types of assistance, be it from the Union or Member States, to another Member State could also amount to a violation of Article 125 TFEU unless they fulfil certain conditions. The Court reached that conclusion following a combination of a literal, historical and teleological (or purposive) interpretation of that provision. As pointed out by Borger,[53] adopting a *purposive* interpretation of the no bailout clause, the Court acknowledged that Article 125 TFEU aims to achieve budgetary discipline on the side of Member States by subjecting

Article 125 TFEU, as any undertaking over which the State or other regional or local authority may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein or the rules which govern it.

53. See Borger, The ESM and the European Court's predicament in Pringle, German Law Journal, 2013: 113-140, p. 130.

them to the logic of the markets.[54] According to the Court, the no bailout clause, therefore, prohibits the granting of assistance which diminishes the incentive of the recipient Member State to pursue budgetary prudence. In addition to this *purposive* reading of the no bailout clause, the Court adopted an *ultima ratio* interpretation, stating that maintenance of budgetary discipline contributes to a higher objective, namely, the maintenance of the financial stability of the monetary union.[55] Financial assistance by means of a stability mechanism such as the ESM, the Court explained, is permitted when this is indispensable for safeguarding the financial stability of the euro area as a whole.[56]

1.6.4. Arguably, future case law may be needed to further clarify the scope of the prohibition in relation to more sophisticated financial instruments, the problem of the Court's judgment in the Pringle case being that in examining the compatibility of the assistance under the ESM Treaty with Article 125(1) it does not always make it unambiguously clear whether the conditions under which that ESM assistance is given are a *condition sine qua non* and, therefore, need to be met also by any other form of assistance. The author of this report takes the view that although in the Pringle case the Court was only called to examine the compatibility of an arrangement like the ESM with the treaty and not to issue a general opinion on Article 125 TFEU, there would be little point for it in mentioning the conditions for ESM assistance if they had no legal consequences for the applicability or not of the prohibition enshrined in Article 125(1) TFEU. With that proviso, it seems warranted to conclude first that on the basis of a literal interpretation of Article 125(1) TFEU, a Member State must remain exclusively liable *vis-à-vis* its own creditors, that is to say a financial assistance mechanism cannot allow such creditors to turn to other Member States or the EU in order to enforce their claim on the first Member State. The consequence thereof is that any financial arrangement providing not only for joint, but also several liability between Member States is caught by the prohibition *ex* Article 125(1) TFEU. This interpretation is in line with the *ratio legis* of the prohibition, which is to expose any Member State, pursuing unsound budgetary policies, to a degree of market discipline. By extension, given the same *rationale* of the no-bail out prohibition, a financial assistance mechanism cannot be construed so as to completely disconnect a Member State from that market discipline. Concretely, this means that such

54. Pringle Judgment, paragraph 135.
55. Ibidem, paragraph 136.
56. Ibidem, paragraph 137.

mechanism should not provide automatic assistance, but must be subject to a discretionary decision of the other Member States or the EU. Moreover, the grant of assistance must be subject to strict conditionality in order to ensure that the Member State pursues a sound budgetary policy and its activation must be indispensable for the safeguarding of the financial stability of the euro area as a whole.[57]

1.7. Article 136(3) TFEU and the ESM

1.7.1. A new paragraph 3 was added to Article 136 TFEU by a decision of the European Council acting in accordance with the simplified revision procedure provided for in Article 48(6) TEU:[58] 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.' This decision entered into force on 1st May 2013.[59] Its validity was confirmed by the Court of Justice in the Pringle judgment.

Article 136(3) TFEU is not a legal basis conferring a new competence to the Union.[60] It does not confer competence or authorization to the Member States for doing something that was previously prohibited. It only confirms (or clarifies) that the euro area Member States are allowed, under certain conditions, to set up between themselves a stability mechanism without violating Union law and in particular Article 125 TFEU.[61] It is therefore a mere declarative and not constitutive provision. For this reason the Court of Justice con-

57. Ibidem, paragraphs 135 and 143.
58. Decision No. 2011/199, [2011] OJ L 91/1.
59. Following the last ratification, by the Czech Republic, on 23 April 2013. See: http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database.aspx?command=details&id=&lang=en&aid=2011030&doclang=EN%22
60. Pringle Judgment, paragraph 73.
61. Contra: The BVerfGE considers that the adoption of Article 136(3) TFEU represents a fundamental change (grundlegende Umgestaltung) of the existing EMU because it departs from the principle of independence of national budgets that prevailed until now (Urteil des Bundesverfassungsgerichts vom 12. September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, BvR 1440/12 und BvE 6/12).

sidered that the ESM treaty could validly enter into force before the entry into force of this amendment to the EU Treaties.[62]

1.7.2. Article 136(3) refers to two peculiarities that should be present in an assistance mechanism for euro area Member States. Firstly, any mechanism should be activated only if indispensable to preserve the stability of the euro area as a whole. Secondly, the provision of financial assistance will be linked to strict conditionality. The use of the future simple 'will' and not 'shall' (»wird« in German, «sera» in French) seems to indicate that these are simple modalities and not indispensable conditions. However, in the Pringle Judgment, the Court of Justice decided that these two modalities were needed in order to guarantee the compatibility of any assistance mechanism with Article 125 TFEU.[63] Any intergovernmental mechanism that would not respect these two conditions would therefore be incompatible with the prohibition of Article 125 TFEU.

Question 2: Constitutional and institutional implications of the recent reforms of the economic governance in the EMU

The recent reforms of the EMU economic governance have many important institutional and constitutional implications. There is an inevitable element of subjectivity in their identification. I will emphasize some of them by regrouping them into *five categories*. The two first batches of implications of the reforms concern the development – and consequences – of what I would call a 'semi-intergovernmental method' and of a 'euro filière' within the euro area. The third category relates to the evolution of the institutional balance between the institutions within the Union framework. Fourthly, I will briefly touch upon institutional equilibrium within the Member States. Last, but not least, I will discuss the change of nature of economic policy at EU level and its constitutional implications.

2.1. A 'semi-intergovernmental' method for the euro area

2.1.1. The dialectic between Union law measures and intergovernmental instruments has a long history, and the EMU is not the first area where it is at stake. Intergovernmental action has nevertheless developed dramatically in

62. Pringle Judgment, paragraphs 184-185.
63. Pringle Judgment, paragraphs 72 and 136.

the EMU field over the last years,[64] with important institutional implications. The reasons for this development are well known, mostly the need for very quick action, the lack of legal basis within the EU Treaties, and the veto of the United Kingdom against further Union competences. I will hereafter recall the legal limits to any intergovernmental action, explain why the new method in the EMU area should, in my view, be qualified as 'semi-intergovernmental' and finally discuss the negative consequences of this approach, hence my conclusion that it was justified as an urgent reaction to the crisis, but should remain transitory.

2.1.2. Intergovernmental action may be considered in principle an acceptable option from a legal point of view, at least if it respects the primacy of EU law, does not encroach on exclusive EU competences, and does not set up competing institutions.[65] In particular the conclusion of international treaties between some Member States is allowed under EU law as long as the parties respect their EU obligations. In the Pringle case the Court of Justice has clarified that the ESM Treaty was compatible with EU law because of the absence of provisions in the EU Treaties conferring a specific power on the Union to establish a stability mechanism similar to the ESM.[66] As regards the TSCG, most of its provisions contain additional commitments, like the Fiscal Compact, that do not interfere with the coordination of national economic policies within the Union institutions. I consider, however, that the Member States could not use the TSCG provisions to enter into a day-to-day coordination of their policies because that would inevitably lead to contradictions with or circumvention of the Community method.[67] Moreover, the intergovernmental arrangements should not create any disruption of the EU decision-making

64. On this trend see Chiti and Gustavo Texeira, The constitutional implications of the European responses to the financial and public debt crisis, Common Market Law Review, 2013: 683-708.
65. Idem, p. 693.
66. Pringle Judgment, paragraph 64.
67. We do not share the views of Callies who believes that the coordination competence of the Union does not deprive the Member States of any of their competences and that, as a consequence, the task to coordinate could be exercised exclusively at intergovernmental level (see Callies, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, p. 105).

process. From that point of view, the legality of the voting arrangements contained in Article 7 of the TSCG might be questioned.[68]

2.1.3. What we have seen in the area of EMU is the emergence of what could be called a form of '*semi-intergovernmental' method*.[69] It is intergovernmental in the sense that it takes place outside the institutional framework of the Union, using instruments of private (EFSF) or public international law (ESM, TSCG). At the same time a number of factors indicate a strong link and even interdependence with Union law.[70] *Firstly*, the degree of exercise by the Union of its competence in the same field has increased so dramatically in parallel that all the measures adopted by the Member States had to be clearly and explicitly related to the coordination of economic policies done at the level of the Union. In particular, primacy of Union measures was recognized, often explicitly,[71] and consistency with Union policy was pursued. *Secondly*, there is a high degree not only of participation of EU institutions in intergovernmental actions, but also of intergovernmental bodies in EU actions. The Union Institutions are involved in the negotiation, adoption and/or implementation of intergovernmental instruments. In particular the Commission holds the pen during the negotiation of the ESM Treaty; the Commission, ECB and the Court of Justice play important roles in the functioning of the EFSF, the ESM, and in the implementation of the TSCG. This presence of the EU institutions is based on a set of different and sometimes complex legal constructions. As far as the Court of Justice is concerned, the Member States have limited themselves to rely on the possibility offered by Article 273 TFEU.[72] In contrast, the tasks performed by the Commission sometimes were based on

68. For a defense of the legality of Article 7 of the TSCG, see Callies, Ibid., p. 108.
69. See also section 11.4 of this report for a more detailed assessment of the role of the Commission and ECB in the framework of financial assistance programmes.
70. In national legal orders these intergovernmental measures are also often treated as concerning EU matters (for Germany, see Berner, Sovereignty of parliament under the *Grundgesetz*: How the German Constitutional Court discovers parliamentary participation as a means of controlling European integration, European Public Law, 2013: 249-262, p. 255; for Finland see Leino and Salminen, The euro crisis and its constitutional consequences for Finland: is there room for national politics in EU decision-making?, European Constitutional Law Review, 2013: 451-479, p. 458).
71. EFSF Framework Agreement, Preamble; ESM Treaty, Article 13(3), 2d sub-paragraph; TSCG, Article 2. This primacy of EU law over agreements between Member States derives both from EU law itself and from principles of international law (Article 26 of the 1969 Vienna Convention).
72. See, however, the very creative use of Article 273 made in the TSCG (see below point 4.4.4).

an explicit so-called 'Bangladesh mandate' based on a decision of the representatives of the governments of the 27 EU Member States[73] (EFSF, ESM) and some other times were considered as part of its normal EU law competences (TSCG).[74] In the Pringle case, the Court noticed that the tasks entrusted to the Commission in the ESM were 'outside the framework of the Union,' but at the same time that, '[b]y its involvement in the ESM Treaty, the Commission promotes the general interest of the Union'.[75] As regards its own competence under Article 273 TFEU, the Court stated that 'a dispute linked to the interpretation or application of the ESM Treaty is likely also to concern the interpretation or application of provisions of European Union law'.[76] In the TSCG the link is even closer since it is believed that the tasks performed by the Commission under this Treaty are 'within the framework of its powers, as provided by the TFEU, in particular Articles 121, 126 and 136 thereof'.[77] Interestingly, the frontier between intergovernmental and Union bodies tends to disappear. The most striking example is the Eurogroup Working Group (EWG) which is used as preparatory body for the (rather intergovernmental) Eurogroup while being formally a sub-group of the Economic and Financial Committee set up by Article 134 TFEU. Its president used to be an official from a national administration, but is now employed by the EU institutions. Another example is the president of the Euro summits (who happens to be also president of the European Council for the time being). The function was created by the TSCG which provides that he has to report to the European Parliament after each Euro Summit. *Thirdly*, there are an increasing

73. This decision should probably be seen as an agreement in simplified form.
74. For a very critical assessment of this role of the Union institutions, see Craig, Pringle and the use of EU institutions outside the EU legal framework: foundations, procedure and substance, European Constitutional Law Review, 2013: 263-284. This analysis, however, is based on some exaggeration of the powers entrusted to the EU institutions by the ESM Treaty, on a misconception of the TSCG (which is not based on a 'Bangladesh mandate'), and on a failure to recognize that there was no explicit legal basis within the EU treaties (and therefore no basis for enhanced cooperation) for building the ESM within the Union.
75. Pringle Judgment, paragraphs 158 and 164.
76. Pringle, Judgment, paragraph 174.
77. See recital 10 of the TSCG. For a similar conclusion based on an analysis of the powers entrusted to the Commission, see Callies, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, pp. 112-113. This explains why a 'Bangladesh mandate' was not considered necessary for the TSCG, thus avoiding any discussion as to whether the unanimous agreement of all Member States was needed or not for such mandate (UK was not ready to agree on it, this time).

number of cross-references between the substantive provisions of the intergovernmental acts and those of the EU instruments, thus creating strong interdependent legal relations between them.[78] If we take the example of the ESM the Court of Justice has emphasized that 'the conditions to be attached to the grant of [ESM stability] support to a Member State are, at least in part, determined by European Union law'.[79] As noticed by R. D'Sa, the intergovernmental agreements 'may become, over a period of time, so closely connected with EU issues strictly so-defined that it might no longer be possible effectively to distinguish one from the other'.[80] *Fourthly*, the participation of Member States in these intergovernmental mechanisms is directly connected to their status within the Union. In particular a Member State that enters the euro area is also supposed to join the ESM[81] and, in order to benefit from ESM assistance, it must thereafter ratify the TSCG ... *Finally*, a possible repatriation of intergovernmental instruments within the ambit of EU law is sometimes explicitly envisaged.[82]

From all that, it can be concluded that, while the intergovernmental method is often seen as a threat to the 'Community method', this Community method also invades the intergovernmental scene: In other words, the contamination plays in both directions.[83] Recourse to the intergovernmental method was never based on a willingness to exclude the Union institutions. From a positive angle, we even see the development of this semi-intergovernmental method in the EMU as an expression of the duty of sincere cooperation to which both the Union and its Member States are bound by virtue of Article 4(3) TEU.[84]

78. See for instance Articles 3(2) and 13 of the TSCG, referring to EU law and in particular the Stability and Growth Pact. In the other direction, see Regulation 472/2013 (Two-Pack) which constantly refers to the financial assistance instruments of the EFSF and ESM. The economic partnership programmes have been first envisaged by the TSCG and thereafter set up by Regulation 473/2012; etc.
79. Pringle Jugment, paragraph 174.
80. D'Sa, The legal and constitutional nature of the new international treaties on economic and monetary union from the perspective of EU law, European Current Law Issue, 2012: xi-xxv, p. xv.
81. See Preamble, para. 7, ESM Treaty.
82. See Article 16 of the TSCG.
83. Viterbo and Cisotta, quoted by Louis and Lastra, European Economic and Monetary Union: history, trends, and prospects, Oxford Yearbook of European Law, 2013: 1-150, p. 142.
84. Callies, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, p. 106. See also the

2.1.4. This evolution is nevertheless a source for concern because of its negative institutional consequences at the European level.[85] *Firstly*, the intergovernmental mechanisms imperil the delicate balance upon which the EU model rests. The balance between the European Parliament, the Council and the Commission serves to provide checks and balances and acts as a last-instance guarantee ensuring that EU process is the product of equilibrium or settled consensus between particular actors in order to ensure legitimacy and stability.[86] This balance is lost when finance ministers agree between themselves, without a Commission's proposal and using alternative voting arrangements on fundamental questions related to redistributive policies throughout the Union (The issue of democratic accountability is discussed further down under section 4.2. See in particular point 4.2.2 on the efforts to repatriate the work of the Commission and ECB within the EU framework).[87] *Secondly*, and possibly more importantly, the creation or reinforcement of *permanent* intergovernmental bodies constitutes a long term threat for the unity and homogeneity of the Union. The ESM being established as a permanent body, its operational budget and staff have started to grow in size and ambition. The temptation to intrude in the territories of EU competences might grow at the same speed. The Euro Summits have also received an official recognition in the TSCG and have even adopted their own rules of procedure. The EWG has been reinforced, inter alia with a full-time president. With the development of such bodies, *institutional rivalry* could be a danger in the near future. The functioning of the EU institutions could be affected.[88] *Thirdly*, another danger associated with the intergovernmental mechanisms is that they induce a 'participation à la carte' of the Member States, with all the ensuing inconsistencies, lack of clarity, priority given to the defense of national interests, etc. The

promotion by Chancellor Merkel of the 'Unionsmethode' as a mix of governmental coordination and the old 'Community method', in her speech on the occasion of the opening of the Academic year of the College of Europe in Bruges, 2 November 2010.

85. On the fact that the choice of the intergovernmental method may also affect the intensity of the parliamentary and/or jurisdictional control at *national* level, see below point 4.1.2.
86. Dawson and De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, p. 829.
87. For an analysis of the consequences of the intergovernmental method in the EMU sector see Ponzano, Méthode intergouvernementale ou méthode communautaire : une querelle sans intérêt?, Les brefs de Notre Europe, 23, 2011.
88. See for example the impact of Eurogroup's meetings on the work of the ECOFIN and the voting commitments adopted under the TSCG for EDP decisions to be taken within the Council.

field of intergovernmental economic governance has become the place where a *multi-speed Europe* is standard practice. All measures are restricted to a sub-group of Member States, usually euro area Member States, sometimes open for the voluntary participation of willing non-euro-area Member States. This pattern has started to contaminate the EU framework (SSM, SRM), thus making the enhanced cooperation mechanism de facto nearly obsolete.[89]

2.2. The Euro-filière

The move towards more intergovernmental methods takes place in parallel with a progressive, but continuous reinforcement of the so-called 'eurofilière', both within and outside the EU framework (Euro Summits, Eurogroupe and EWG). It is striking to note that this evolution has been mostly limited to the *executive* power. Experience of the crisis has shown that there was a need for strong bodies at that level, because the euro area is, and will remain different from the whole EU for a very long period. In the absence of formal euro area institutions, Euro Summits and especially the Eurogroup have de facto played a crucial role, in particular for negotiating financial assistance packages. This tendency was reinforced by the fact that the composition of the ESM Board of Governors is similar to the Eurogroup's composition. The Euro Summits were even granted a formal recognition in the TSCG and therefore 'internationaly institutionalised'.[90] By contrast there has been no parallel reinforcement of control mechanisms over the work of these bodies. *Parliamentary* control has remained largely fragmented between national assemblies, even if some dialogue between the EP and the President of the Eurogroupe is now formally envisaged in EU legislation.[91] *Jurisdictional* control remains very limited since the Eurogroup is a purely political body, legal acts being adopted in other fora. This has also left the Commission in a position that could become uncomfortable in the long term. On the one hand it must act for the Union as a whole; it is composed of members for the whole Union and its

89. One has to recognize, however, that the Treaty-based enhanced cooperation mechanism is not an adequate instrument for setting up measures for the euro area. In the long term, a revision of Article 136 TFEU would be desirable in order to expand the scope of what can be set up for the euro area only. Another useful amendment would be to permit the adoption of specific measures for Member States that are close to entering the euro area.
90. Callies, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, p. 109.
91. Article 2-ab of Regulation 1466/97, as amended by the Six-Pack; Article 15 of Regulation 473/2013 (Two-Pack).

functioning is based on the principle of collegiality. On the other hand, it must act more and more to defend the specific interests of the euro area. As a temporary solution the competences of the Commissioner responsible for economic and monetary affairs have been increased.[92] Some additional limited changes are also envisaged in the Commission's Blueprint.[93]

2.3. The institutional balance within the Union: a contrasted evolution

2.3.1. It is probably too early to make a final assessment in regards to evolutions in the balance between the different EU institutions. Some evolutions can nevertheless be identified. They reveal diverging trends depending on whether they concern the establishment of the EMU governance or its implementation. As far as *establishment of the governance* is concerned, there has been a clear shift in favour of the European Council throughout the crisis. This institution has more and more tried to assume the role of legislative initiator to the detriment of the Commission.[94] The existence of a permanent presidency has played a major role in this evolution. While this way of acting was possibly acceptable during the most difficult moments of the crisis, in order to achieve consensus within very short deadlines, it is worrying to see that the European Council keeps acting the same way even for less urgent files.[95] This pattern is detrimental to the work of both the Commission and, more importantly, the European Parliament.

2.3.2. The evolutions are less clear regarding the day-to-day *implementation of the governance*. Failure of the Commission and especially the Council to fully adhere to the rules of the Stability and Growth Pact has led to the introduction of *more automaticity in the EU decision-making process*, especially within the Council. The reversed qualified majority voting procedure was created for facilitating the adoption by the Council of the Commission's proposals for financial sanctions.[96] The application of the same procedure be-

92. See Blueprint, footnote 24.
93. Idem.
94. Dawson and De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, p. 830-831.
95. See the recent direct involvement of the European Council in the setting up of the Single Supervisory Mechanism and Single Resolution Mechanism and in the functioning of the European Semester.
96. Articles 4(2), 5(2) and 6(2) of Regulation 1173/2011, and Article 3(3) of Regulation 1174/2011 (Six-Pack).

tween the Contracting Parties of the TSCG was agreed upon in the framework of the excessive deficit procedure.[97] The Council is also bound by a new 'comply-or-explain' principle in the EMU field that makes any amendment to the proposals and recommendations of the Commission more difficult.[98] Even within the Commission new internal procedures have been put in place in order to protect the objectivity of the analytical base that supports the Commission's proposals from political interference. All these evolutions are in principle positive since they have the objective of making the EU decision-making process more effective. At the same time it should be recognized that this shift of power from the Council to the Commission will probably require more direct political control by the Parliament on the action of the Commission.

2.3.3. Views are contrasted among commentators regarding the evolution of the role of the *European Parliament* in the implementation of the economic governance. Some argue that there was a decrease of power of the EP which has been relegated as mere observer into a forum of limited accountability.[99] The author of this report does not share that view. As explained later in section 4 dedicated to the issue of democratic legitimacy, it can be considered that the EP has gained influence over the last years by comparison with its nearly total absence in EMU affairs at the time of entry into force of the Maastricht Treaty.[100]

2.3.4. The emerging *multi-speed Europe* that has appeared with the intergovernmental instruments (see above point 2.1.2) has also started to contaminate the EU. Some measures still apply to all Member States, but in many other fields measures are restricted to a sub-group of Member States and the growing tendency is neither the application to the euro area Member States only, nor the activation of the enhanced cooperation mechanisms: The main evolution takes the form of mechanisms to which all euro area Member States participate, but that remains at the same time open for voluntary participation of willing non-euro-area Member States. The TSCG model was thereafter replicated in the Regulation establishing the SSM[101] and the Commission has pro-

97. Article 7 of the TSCG.
98. Article 2-ab(2) of Regulation 1466/97 (as amended by the Six-Pack).
99. Dawson and De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, p. 833.
100. See below point 4.2.2.
101. On this Regulation, see below answer to Question 12.

posed a broadly similar approach for the Single Resolution Mechanism.[102] This flexibility allows the Union to move forward, but creates a high degree of complexity in the EU system and makes it much less transparent. It also goes against the basic principle that the EU is a global project and not a menu to pick and choose from.

2.4. The balance of powers within the Member States

2.4.1. Another institutional implication of the recent reforms of the EU economic governance is that *within the Member States the balance between the different national authorities is affected*. This is an indirect consequence of the attempt made by the Union and its Members to reinforce the national ownership of the economic governance. There has indeed been a shift from a system of purely *external* control on the Member States (excessive deficit procedure, European Semester etc.) towards an obligation for the Member States to adopt rules and put in place controls *within their own national system*. This move was initiated in 2011 with the Directive on budgetary frameworks which requires Member States to specify which national institution is responsible for producing macroeconomic and budgetary forecasts.[103] The Two-Pack has reinforced this evolution by requiring euro area Member States to have in place structurally or functionally independent bodies responsible for the production of macroeconomic (and if possible budgetary) forecasts.[104] In the same vein Article 3(2) of the TSCG also forces its contracting parties to have in place independent institutions at national level who are responsible for ensuring compliance with the balanced-budget rule of the Fiscal Compact. Our view is that as a whole this evolution rather *reinforces the role of national parliaments* vis-à-vis governments in the concerned Member States.[105] They have independent bodies at their disposal for helping them to effective-

102. See below answer to Question 5.
103. Article 4(5) of Directive 2011/85/EU (Six-Pack).
104. Article 2(1)(a) of Regulation 473/2013.
105. For Finland, see Leino and Salminen, The Euro Crisis and its Constitutional Consequences for Finland: Is There Room for National Politics in EU Decision-Making?, European Constitutional Law Review, 2013:451-479, p. 471. *Contra*: Dawson and De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, who consider that 'the austerity drive [...] sidelines national parliaments from the budgetary control that constitutes their most traditional and symbolic prerogative' (p. 827) and that 'the time constraints imposed by the European Semester make it all but impossible for national parliaments to control their own executives.' (p. 834).

ly control the economic and fiscal action of the government. They also receive, before the adoption of the annual budget, the Commission's opinion on the draft budgetary plan prepared by their government and they may invite the Commission to come and present its opinion directly to them.[106] These new mechanisms have started to function only recently and it is probably too early to judge their effects, but it certainly goes in the direction of a better functioning democratic control within each Member State.

2.4.2. The reforms of the EU economic governance have also had an impact on the internal organization of federal Member States. The Directive on national budgetary frameworks obliges Member States to have in place a budgetary framework that guarantees consistency across all sub-sectors of general government. They must establish appropriate mechanisms of coordination across these sub-sectors. The budgetary responsibilities of public authorities in the various sub-sectors of general government must be clearly laid down.[107] Similar requirements have been addressed to some Member States in the framework of specific excessive deficit procedures.[108] All these requirements could help central governments to regaining some powers internally at a moment when they lose some at the EU level.

2.5. A new nature for the EU competence in regards to economic policy?

2.5.1. Even if it remains implicit, there has been a *gradual change in nature of the Union competence regarding economic policy*. The Treaties are still based on the assumption that the EU is competent only for coordinating national policies and that the real decisions are made at national level only. However, it becomes more and more difficult to maintain that economic governance is based only on mere coordination. The power has moved from the national to the European level, even if gradually. In particular there was a *shift from soft law measures without binding consequences toward a binding framework*. Firstly, as explained before, the governance instruments remain largely non-binding, but financial sanctions may be imposed in case of non-respect of these instruments.[109] In the same vein, the granting of financial assistance was made conditional to the implementation of reforms that were previously only recommended. De facto, the troika had a major influence on

106. Article 7(3) of Regulation 473/2013.
107. Articles 12 and 13 of Directive 2011/85/EU.
108. See, for Belgium, Article 2(3) of Council Decision 2013/370/EU of 21 June 2013.
109. See footnote 4.

the main public policies of assisted Member States. Even the use of the Union Structural Funds is now dependent on a mechanism of so-called 'macroconditionality' through which commitments or payments of Union funds are to be suspended vis-à-vis a Member State if it does not comply with its obligations under the economic governance framework.[110] Finally it is envisaged to set up contractual agreements between the Union and its Member States and the correct implementation of the reforms agreed on in these agreements would activate a solidarity mechanism using loans, grants or guarantees.[111] All this opens the question of the evolution towards a Genuine EMU with all the ensuing legal developments (see our answer to question 3 below).

2.5.2. There is a general recognition by economists that this change is necessary, at least within the monetary union, and it has generated – and will continue to generate- an evolution of the institutional framework within the Union. When the Maastricht Treaty entered into force the European Parliament was largely excluded from the field of economic coordination. The Lisbon Treaty has initiated some change by imposing the use of the ordinary legislative procedure in Article 121(6) TFEU. The Six-Pack has created an additional mechanism of Economic Dialogue which makes the Council and the Commission more accountable to the Parliament. Even the President of the European Council and the President of the Eurogroup are involved in this Dialogue. This evolution remains an ongoing process.

Question 3: A genuine EMU and the need for amendment of Union law

3.1. We will concentrate this section on a brief discussion about possible amendments of EU law as a result of the reforms put on the table. Whether amendment of national law of the Member States will be required as well will not be discussed, since this task will be achieved through the national reports. A number of plans have been recently tabled in order to deal with the euro

110. Article 23 of Regulation (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L347, 20.12.2013, p. 320.
111. See the Communication of the Commission on 'the introduction of a convergence and competitiveness instrument' (COM(2013)165).

area crisis and to move towards a deep and genuine EMU. The EU institutions have launched the debate with the Blueprint and the four Presidents report. These moves were followed by an ever increasing number of alternative proposals by the civil society and academics.[112] The need for amendment of EU law will of course depend very much on political choices that remain to be made. It is, therefore, largely premature to engage in a thorough legal analysis when all the options are still under discussion. Some broad lines can nevertheless be emphasized.

3.2. The starting point is that what has been achieved both under EU law and through the intergovernmental method since the beginning of the crisis has gone more or less to the limits of what is permissible under the current Treaties. As recalled by the Court of Justice in the Pringle case, as far as economic policy is concerned the competences of the Union are of coordination only while the policies themselves remain national. The extensive use of Article 136 TFEU allowed going further than the open method of coordination that was used until then on the basis of Article 121 TFEU. However, Article 136 TFEU is not a basis allowing the Union to exercise its own economic policy, and the institutional framework in place is in any case not robust and democratic enough to support a transfer of economic policy at the level of the Union.

3.3. Two underlying policy choices will impact on the importance of the legal changes that will be required. The first choice is between setting up an integrated economic policy at EU level or keeping a decentralized model, but with reinforced harmonization of the rules, along the line of the TSCG. *Building up an integrated economic policy at EU level* is the model advocated for the long term in the Commission's Blueprint.[113] It is based on the assumption that a common currency union needs a centralized budget with redistributive features and some fiscal power. It would require deep and major Treaty changes, in order to allow some form of debt mutualization (redemption fund, Eurobills or Eurobonds, etc.), EU veto power on national budgets, a sizable euro area budget, the integration of the ESM in the EU, etc. That would in turn require an enlarged budgetary power, with taxation powers. From an institutional point of view, this would probably require the establishment of a European Monetary Fund that would substitute the current ESM.

112. See the Report of the 'Tommaso Padoa-Schioppa Group', the Euro treaty called for by the Glienicker Gruppe, the 'Schuman Compact for the euro area' proposed by A. Mody, etc.

113. See section 3.3.2 of the Blueprint.

The second alternative would preserve the current *decentralized model*, but reinforce its effectiveness. The main idea is that implementation of economic and fiscal policy would remain national, but that more discipline and more stringent common rules would frame the political agendas. The model of the directive on national fiscal frameworks and of the TSCG could be expanded by creating legal basis at the EU level for exhaustive harmonization of the national budgetary frameworks and of the fiscal targets. Another option would be to promote further intergovernmental agreements by which the Member States would agree on common principles for their national policies.[114] This second model might be politically more attractive in the short-term. However, it raises strong questions in relation to its democratic desirability. Targets for budget deficits cannot be harmonized the same way as harmonization has taken place in the EU in relation with the free movement of goods or workers ...

3.4. The other issue that will play a major role for framing possible amendments of the EU legal order is the *dialectic between the European Union and the euro area*. Two rather conflicting visions of the EMU have been advocated in this regard. The *first* one insists on the fact that all Member States (except UK and DK) will join the euro area sooner than later and that the current situation is a transitory one. It should be seen as a multi-speed integration, in which States seek to achieve the same goal according to different timeframes. There would, therefore, be no need to proceed to major institutional changes. Only small limited adaptations are needed. A good example of such adaptation is the current rule reserving to euro area members a voting right within the Council for a number of decisions that concern only the euro area.[115] It is believed that this solution is to be preferred to any reinforcement of the Eurogroup. In the same vein, the EP could create its own internal euro committee and the Commission could delegate some of its competences to a dedicated commissioner in charge of the economic governance of the euro area, etc. This view is broadly speaking the view of the current Commission as expressed in the Blueprint as well as of the European Parliament.[116] It was also the view of the drafters of the Maastricht Treaty who constructed the EMU 'in such a way as to harmoniously fit within the institutional framework of

114. See Mody, A Schuman Compact for the Euro Area, Bruegel 2013.
115. Articles 136(2) and 139(4) TFEU.
116. European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), especially §§ 64-66.

the EU'.[117] Different legal mechanisms have been used until now to preserve this model while accommodating the sometimes uneasy coexistence of the euro area and the Union (Among many examples one could think of the setting up of the Supervisory Board within the ECB, the extension to non-euro area Member States of euro area measures through the use of Article 352 TFEU, agreements concluded between the ECB and the NCBs,[118] etc.). The EP envisages other instruments: use of Article 352 TFEU in conjunction with Article 20 TEU, the bridging clause of Article 48(7) TEU, an interinstitutional agreement 'of a binding nature' ...[119] These mechanisms represent a pragmatic way of reconciling the Union and the euro area, but they progressively increase the complexity and even the opacity of the EU decision-making process.

By contrast, under the second vision, it is considered that equating the Union and the euro area, even in the long term, is not realistic. Using Sweden as an example, some say that entering the euro area is actually voluntary, even in legal terms.[120] Others believe that the UK will not allow the euro area to evolve or even to function properly. Consequently, they favor more radical changes through the creation of a 'euro filière'. This line is already behind the TSCG where euro summits are institutionalized. The ESM is also trying to reinforce its position in the field of economic governance. A group of German academics, the so-called Glienicker Group, recently promoted a Euro-Treaty setting up a Euro-government and a Euro-Parliament: The Euro-government would have reinforced intrusive powers into the national budgetary autonomy; it would have a budget for conducting its policy; the Euro-Parliament would be composed of deputies from the EP or from members of national parliaments. The creation of competing new institutions whose relations with the Union Institutions would be complex might nevertheless open a Pandora's Box for the future.

117. Chiti and Gustavo Texeira, The constitutional implications of the European responses to the financial and public debt crisis, Common Market Law Review, 2013: 683-708, p. 693.
118. Usher, The evolution of economic and monetary union – some legal issues, in: Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs, 2008: 297-300, pp. 305-306.
119. European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)).
120. Usher, Proportionality in the context of economic and monetary union, Legal Issues of Economic Integration, 2008: 245-256, p. 251; Usher, The evolution of economic and monetary union – some legal issues, in: Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs, 2008: 297-300, p. 303.

Question 4: Democratic legitimacy and accountability of economic governance in EMU

This section summarizes the discussions that are taking place concerning the possible requirement for legal modifications at the EU level to improve democratic legitimacy and accountability of economic governance in EMU, including jurisdictional control.[121] While the functioning of EMU was considered for a long time as a mere technocratic issue, largely relying on the expertise of the independent ECB, the euro area crisis and in particular the need for financial solidarity between the members of the euro area has put economic governance issues back at the center of the political agenda both at national and European level. 'In brief, the EMU has turned into genuine politics.'[122] (We will not discuss the accountability of the ECB which is envisaged below in the Chapter on Monetary policy[123]).

4.1. Democratic control at a national level

4.1.1. Even if this topic will be extensively covered by the national reports, it nevertheless seems useful to start this section with a brief discussion of the merits and limits of the democratic control exercised at *national level* over the measures adopted at European level to deal with the euro area crisis (Cooperation between national parliaments, which is sometimes seen as a way to remedy the weaknesses of the fragmented national control, is discussed further down at point 4.3.1). The starting point is that there is no harmonized framework in this regard.[124] It is up to each Member State to organize itself in order to allow its elected assemblies to effectively control and review the position taken by their government at European level. The intensity of this control varies greatly from one Member State to another. Sometimes it is also

121. On this issue see de Witte, Héritier and Trechsel (eds.), The euro crisis and the state of European democracy, European University Institute, 2013.
122. Leino and Salminen, The euro crisis and its constitutional consequences for Finland: is there room for national politics in EU decision-making?, European Constitutional Law Review, 2013:451-479, p. 455.
123. See below point 12.8.
124. As we have seen above (section 2.3), the Two-Pack introduced a few provisions relating to national parliaments but that remains marginal.

different depending on whether it relates to 'EU affaires' proper or to parallel intergovernmental arrangements.[125]

4.1.2. To ensure the legitimacy of decisions adopted at *Union level*, this fragmented democratic control at national level, albeit important, was considered insufficient, especially where qualified majority applies within the Council for adoption of the concerned measures. This explains the progressive reinforcement of the competences of the European Parliament. Over the last years, however, the move towards *intergovernmental decision-making* in the area of economic governance (EFSF, ESM, TSCG) has prevented effective control by the European Parliament, raising the question of the adequacy of the national procedures on their own. From a theoretical point of view, it could be considered that this national control is in principle sufficient in so far as decisions taken at European level are adopted by unanimity of the participating States, thus giving a power of veto to each of them. Experience has shown, however, that this individual veto power was less effective than qualified majority in front of the collective dynamics of the decision-making process except as far as the largest Member States are concerned.[126] As far as financial assistance is concerned, the effectiveness of national control was also weakened by a de facto division between the parliaments of creditor and debtor Member States.[127]

Moreover, regarding *creditor Member States* the unanimity rule has proved too burdensome in case of urgency and has sometimes been replaced by specific majority rules. One thinks in particular of the 85 % majority rule that applies in the emergency voting procedure provided for by Article 4(4) of the ESM Treaty. In practice it means that only Germany, France and Italy dispose of an individual power of veto against an ESM decision to grant or implement financial assistance in case of urgency. Even for less important decisions, voting arrangements within the ESM favour the richer Member

125. For example, as far as Finland is concerned, see Leino and Salminen, The euro crisis and its constitutional consequences for Finland: is there room for national politics in EU decision-making?, European Constitutional Law Review, 2013:451-479.

126. Crum, Saving the Euro at the cost of democracy?, Journal of Common Market Studies, 2013: 614-630, p. 622; Ginter and Narits, The perspective of a small Member State to the democratic deficiency of the ESM, Review of Central and East European Law, 2013: 55-76, p. 63.

127. Chiti and Gustavo Texeira, The constitutional implications of the European responses to the financial and public debt crisis, Common Market Law Review, 2013: 683-708, p. 701.

States not only because they are based on capital contributions[128] (this calculation departs substantially from the more balanced qualified majority rules within the Council[129]), but also because in practice the richer States are the key players. Democratic accountability at national level is, therefore, dramatically different depending on the weight and richness of the concerned Member State. The fragmented control at the national level is further affected by both a lack of transparency of decision-making at the level of the Eurogroup[130] and the ESM,[131] and a very tight timetable for making decisions.

The same constraints of urgency and lack of information affect the parliaments of *debtor Member States*. The latter were also largely excluded from the negotiation of the conditionality with the Troika and were left with the impossible choice of endorsing pre-negotiated deals or rejecting them with all the ensuing negative consequences[132] (the only case where a deal was rejected by a national Parliament was in Cyprus).

The combination of all these elements has made national control weak, be it by the lenders or the borrowers.[133] The situation was slightly better in regards to the negotiation process of the TSCG, which was longer and more transparent (with participation of the European Parliament, the Commission and the ECB in the negotiation), but where control by national parliaments

128. The ESM key is broadly similar to the ECB key (see Article 29 of the ESCB and ECB Statute).

129. The ESM would be able to make some decisions even without the support of 12 of its 17 members (Dawson/De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, p. 839). See also Ginter, Constitutionality of the European Stability Mechanism in Estonia: Applying proportionality to sovereignty, European Constitutional Law Review, 2013: 335-354, p. 350; Ginter and Narits, The perspective of a small Member State to the democratic deficiency of the ESM, Review of Central and East European Law, 2013: 55-76, p. 65.

130. As an informal body distinct from the Council, the Eurogroupe is not submitted to the transparency rule of Article 16(8) TEU.

131. The ESM Treaty does not contain any provision on publicity.

132. Crum, Saving the Euro at the cost of democracy?, Journal of Common Market Studies, 2013: 614-630, p. 622.

133. For a similar assessment see Dawson and De Witte, Constitutional balance in the EU after the euro-crisis, The Modern Law Review, 2013: 817-844, p. 833. Some German authors fail to accept any parallelism between the parliaments of creditor Member States and those of debtor Member States. See, for instance, C. Callies who considers crucial the blocking minority of Germany in the ESM while judging that parliaments of debtor Member States can be deprived of all their rights because 'when the only alternative is a sovereign default, the budgetary sovereignty has already been lost' (From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, p. 115 and 117).

remains unsatisfactory. This tendency towards executive-dominated federalism has been largely recognized.[134]

4.2. Democratic legitimacy and accountability under the current Treaties

4.2.1. The current level of democratic legitimacy and accountability of the EU institutional model is generally considered adequate in relation with the current attribution of competences to the Union. There is, therefore, no democratic deficit and this applies in particular in the field of EMU. The Union model is based on a strong and efficient system of checks and balances involving the European Parliament, Council and Commission. The Commission is responsible before the EP, each member of the Council is under the supervision of its own national parliament, and finally the EP itself directly represents the citizens of the Union. At the level of the Union the EP is the central piece for legitimacy: It ensures democratic accountability for any decisions taken at EU level, particularly by the Commission.

4.2.2. Moreover during the last years the flexibility of the Union framework has permitted over that any strengthened role for the Council and Commission was accompanied, albeit with a short-time lag, with a commensurate involvement of the European Parliament. The most striking example concerns the control of the so-called troika Commission/ECB/IMF in devising macroeconomic adjustment programmes for Member States seeking financial assistance. At the inception of the crisis there was no legal framework in place for guiding the Commission and ECB in this task. They were invited to participate in the functioning of the EFSF and ESM through innovative legal procedures (Bangladesh mandate), but it was unclear whether the normal political accountability of the Commission vis-à-vis the EP fully applied and there was an obvious lack of transparency and dialogue, since the ESM Treaty did not – and probably could not – foresee any accountability to the EP. These initial weaknesses have since then been largely addressed with the successive adoption of the Six-Pack and the Two-Pack. As a first step a general 'economic dialogue' was set up involving not only the Parliament, the Council and the Council, but also, where appropriate, the European Council and the Eurogroup.[135] In 2013 the Two-Pack fully reintegrated in the EU framework

134. Crum, Saving the Euro at the cost of democracy?, Journal of Common Market Studies, 2013: 614-630, p. 622; Prüm, L'Union européenne en crise face au dogme de l'efficience des marchés financiers, EUI Working Papers, RSCAS 2013/01, p. 23.

135. Regulation No. 1466/97, as amended by Regulation (EU) No. 1175/2011.

the work of the Commission and ECB. It now provides for a transparent procedure for the preparation of the macroeconomic adjustment programmes of Member States seeking financial assistance. The Commission must inform the European Parliament during the preparation and implementation of the programme. Approval of the programme by the Council is also required. Exchanges of views between all parties may be organized both before national and European parliaments.[136]

The additional reform that could be envisaged in the short term would be the creation within the EP of a dedicated subcommittee composed of Members from the euro area Member States only in order to better adjust an increased role for the EP in euro area matters.[137]

4.2.3. By contrast other recent developments could not be accompanied with a parallel increased role of the European Parliament. In particular we think of the development of the semi-intergovernmental action identified before in this report. It raises problems in term of democratic legitimacy and, for this reason, should be seen only as a transitory solution. It bypasses the EU decision-making process normally needed and that comes with its checks and balances. This applies not only at the moment to adoption of new principles or setting up of new institutions, but also in the day-to-day implementation of these principles and in regards to the functioning of these institutions.[138] In particular the EP cannot properly control intergovernmental action. This applies to the work of the ESM as well as the actions envisaged by the TSCG. Such action should, therefore, ideally be repatriated within the EU framework since, as seen above, the current system of fragmented parliamentary control by the national parliament of each participant is not satisfactory. Moreover the fact that some EU Institutions including political ones like the Commission have more and more various tasks both under EU law and under international law (ESM Treaty, TSCG) seems rather negative for the democratic legitimacy. It is unclear whether the political control by the Parliament extends to the tasks performed by the Commission (and ECB) under a so-called 'Bangladesh mandate' and this system also creates complexity and uncertainty regarding the responsibilities for the decisions taken.

136. Regulation No. 472/2013, Article 7.
137. See Blueprint; European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), § 31.
138. de Streel, The evolution of the EU economic governance since the Treaty of Maastricht: an unfinished task, Maastricht Journal, 2013: 336-362, p. 357.

4.3. Democratic legitimacy and accountability for a deep and genuine EMU

4.3.1. The problems common to the euro area Member States will not disappear and need common solutions. In the long term, either the EMU will be reformed within the EU framework or the euro area Member States will have no other choice than building common solutions in an alternative framework. The author believes that the EU Treaties should be amended as a matter of priority in order to reinforce the governance of the EMU. If that is the case, the current democratic system will have to be reassessed. In multilevel governance systems, accountability should be ensured at the level where the respective executive decision is taken, whilst taking due account of the level where the decision has an impact.[139] If and when more competences are moved from the national to the Union level, increased legitimacy mechanisms should be built up. Since budgetary policy is a core State function going to the heart of the political self-determination, its exercise at the EU level should entail strong institutional changes.

4.3.2. In the *short-term*, during a transitory phase some form of *inter-parliamentary cooperation* between the EP and the parliaments of euro area Member States might be the most efficient way forward. This was promoted by the European Council which envisages a conference for discussing EMU-related issues.[140] Article 13 of the TSCG combined with Protocol No. 1 to the EU Treaties have set the bases for an inter-parliamentary conference for economic and financial governance along the lines of the current COSAC.[141] However, it may only organize hearing and adopt non-binding conclusions. As pointed out by the Commission and the EP,[142] such a conference is not sufficient to ensure democratic legitimacy for EU decisions since it does not take votes.[143] According to another scenario, representatives from the lower houses of the Parliaments of the euro area Member States could meet on a regular basis together with a representation from the EP so as to be informed

139. Blueprint, point 4.
140. See European Council conclusions on completing EMU of 14.12.2012, paragraph 14.
141. See Kreilinger, The new inter-parliamentary conference for economic and financial governance, Notre Europe 2013.
142. Blueprint; European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), §32.
143. Blueprint, p. 35.

about, and discuss, the operation of the Eurozone.[144] The EP is, however, strongly opposed to any differentiation of its members with regard to their origin.[145] In the *medium term*, the next step could be the creation of a Parliament composed of two chambers, the current European Parliament, on the one hand, and a chamber composed of delegations from the national parliaments, on the other hand. Another avenue would be a mixed assembly composed of members directly elected under the European elections and delegations from national parliaments along the Swiss model.[146] As long of the economic governance of the EMU remains shared between national governments and EU institutions, such a model could ensure an adequate democratic control of decisions. In the *longer term*, when all economic and budgetary competences would be moved to the European level, one could envisage some form of 'democratic federalism'[147] with the creation of a body entrusted with the economic governance of the euro area with enough accountability vis-à-vis elected people. The most obvious avenue would be to grant more control and competence to the EP. This body could enter into a dialogue with the ECB in a comparable way with the dialogue between the Federal Reserve and the President of the United States.[148]

4.3.3. As far as *competences* are concerned, many reforms could enhance the democratic legitimacy: the attribution of a right of initiative to the EP; a closer control on the Commission (election of the president etc.), the application of the co-decision procedure for the adoption of the Union multiannual priorities; co-decision for requiring a revision of a national budget; integration of the ESM in the EU framework; vice-president within the Commission with some decision-making power (based on the model of the Council today) ... The increased reliance on quasi-contractual relations between Member States and between Member States and the Union could also improve the legitimacy and ownership of the decisions, since it allows both the national and the Union authorities to endorse their content. This is already the case with the Two-

144. de Boissieu, de Bruijn, Vitorino and Wall, Remaking Europe: Framework for a Policy, Synopia, September 2013.
145. European Parliament resolution of 12 December 2013 on constitutional problems of a multitier governance in the European Union (2012/2078(INI)), §29.
146. Franck, L'euro et l'union politique, Revue générale, 2012 : 17-28, p. 27.
147. Term proposed by Crum, Saving the Euro at the cost of democracy?, Journal of Common Market Studies, 2013: 614-630, p. 623.
148. Louis, Indépendance des banques centrales, séparation des pouvoirs et démocratie, Mélanges en hommage à Michel Waelbroeck – Vol. 1 / sous la direction de Dony M. – Bruxelles : Bruylant, 1999: 459-481, p. 480.

Pack which provides for adjustment programmes to be devised at national level, and then approved by the Council.[149] The same would be valid for the quasi-contractual arrangements envisaged by the Commission (see COM (2013)165).

4.3.4. Apart from these institutional developments there will also be a need for further developing a culture of political debate at the European level. As pointed by P. Leino and J. Salminen, 'The more fundamental concern relates to the way in which many problems in the EU are not thought of in a genuinely political way, as problems to be decided through debate between protagonists sharing different opinions, values and preferences between options that have uncertain consequences. In the EMU context, usually only one option has been tabled after extremely limited consultations with the Member States, one that has been strongly recommended by experts and supposedly required by the markets, while any political debate about its desirability has been experienced as threatening, even dangerous, and always linked with the threat of serious consequences by way of market reactions'.[150] The recent development of the Economic Dialogue between the European Parliament and the other European institutions and bodies certainly goes a long way into improving democratic accountability.

4.4. EU Jurisdictional control

4.4.1. The issue of EU jurisdictional control[151] is briefly discussed under this section, separately from the other elements of accountability. Our view is that the scope and intensity of jurisdictional control should be, to the extent possible, similar throughout all the Union policies and that specific provisions applying in dedicated fields are negative for the efficiency and transparency of such control. This implies that EMU should be treated as any other field of

149. Regulation 472/2013.

150. Leino and Salminen, The euro crisis and its constitutional consequences for Finland: is there room for national politics in EU decision-making?, European Constitutional Law Review, 2013:451-479, p. 478.

151. We do not discuss the jurisdictional control at national level, especially by the Constitutional Courts, which is covered by the national reports. Various judgments have been taken by national courts in the EU on the measures taken in response to the crisis, including on the ratification of the ESM Treaty and the TSCG. It is disappointing to see that the cases were not referred to the European Court of Justice, except in the case of Ireland (Pringle case), thus creating a risk of diverging case-law.

the EU as far as jurisdictional control is concerned. We underline two consequences of this view.

4.4.2. Firstly, it is necessary *de lege ferenda* to examine the current Article 126(10) TFEU which excludes the competence of the Court under the infringement procedure for most measures under the excessive deficit procedure. At the time this system was set up, it was considered that the specific set of sanctions provided under this excessive deficit procedure was sufficient and that it was more appropriate to reserve its activation to political institutions like the Commission and Council. A complementary control by the Court was, therefore, considered superfluous if not inappropriate. However, experience has showed that the political institutions could not establish a credible practice of use of these sanctions. The idea of restoring full competence for the Court of Justice is, therefore, envisaged by some, including the Commission.[152] Many arguments would go in favour of such a change. It is worth noticing, firstly, that, when new mechanisms of financial sanctions – based on the EDP model – have been set up by the Six-Pack for the euro area Member States, particularly for the macro-imbalances procedure, nobody considered that there was a problem of running such sanctions together with the normal competence of the Court of Justice. Secondly, when negotiating the TSCG, the participating Member States also considered it necessary to confer strong power to the Court of Justice similar to the normal infringement procedure provided by Articles 258-260 TFEU. All in all, compliance with budgetary discipline is not longer considered an issue to be discussed at political level only. These evolutions make clear that a full jurisdictional control is considered normal and appropriate in the field of EMU. Deletion of paragraph 10 of Article 126 TFEU should, therefore, be envisaged, if and when the treaties are amended. It would contribute to enhanced legitimacy of the decisions adopted in this field.

4.4.3. Secondly, the limited role of the Court in intergovernmental mechanisms also raises questions. In all three cases (EFSF, ESM, TSCG), the Court's competence is based on Article 273 TFEU.

As far as the *EFSF* is concerned, disputes between the EFSF and a euro area Member State are left to the courts of Luxemburg. Only disputes between euro area Member States arising out from, or in the context of the

152. See section 4.3 of the Blueprint.

EFSF Agreement, are to be submitted to the Court of Justice.[153] This attribution of jurisdiction to the Court seems to be based on Article 273 TFEU, even if there is no explicit mentioning of this provision. Some have argued that the 'special agreement' mentioned in Article 273 TFEU should be a formal treaty governed by public international law and not an agreement signed by the (private) EFSF and the euro area Member States,[154] but it is difficult to find any basis for this restrictive interpretation of Article 273 TFEU.

4.4.4. The Parties to the *ESM* Treaty have also limited themselves to make use of Article 273 TFEU with a limited, albeit slightly larger competence for the Court. According to Article 37 of the ESM Treaty, the Court is competent, not only for disputes between ESM Members, but also for disputes between a Member and the ESM (the Court of Justice has accepted this in its Pringle judgment). The consequence of such systems is that the competence of triggering judicial review lies with the initiative of the participating Member States only and after a decision of the Board of Governors has first been requested.[155] The European Parliament is excluded; the Commission cannot act as 'guardian of the Treaty' by using the infringement procedure; the individuals do not have any recourse against these bodies, and national judges cannot use the preliminary ruling procedure. Moreover it is unclear whether the Court of Justice could directly assess the conformity of ESM's conduct or of its treaty with EU law.[156] This situation is probably the inevitable consequence of the intergovernmental nature of these mechanisms, but it nevertheless represents a serious diminution in the degree of jurisdictional control.

4.4.5. The TSCG is also governed by Article 273 TFEU. R. D'Sa questioned whether it could be considered that this treaty relates to the subject matter of the EU Treaties because of its nature of international agreement,[157] but the

153. EFSF Framework Agreement, paragraph 16(2).
154. Bianco, The new financial stability mechanisms and their (poor) consistency with EU law, EUI Working Paper, 2012: 1-15, p. 8.
155. Ginter and Narits, The perspective of a small Member State to the democratic deficiency of the ESM, Review of Central and East European Law, 2013: 55-76, p. 67.
156. For a negative answer, see Bianco, The new financial stability mechanisms and their (poor) consistency with EU law, EUI Working Paper, 2012: 1-15, p. 11. After the Pringle judgment, however, it cannot be excluded that the Court would adopt a more proactive stance by judging that the ESM falls broadly within the EU framework.
157. D'Sa, The legal and constitutional nature of the new international treaties on economic and monetary union from the perspective of EU law, European Current Law Issue, 2012: xi-xxv, p. xviii.

Court of Justice has, in the Pringle case and concerning the ESM Treaty, implicitly confirmed that such a legal instrument could indeed be used for activating Article 273 TFEU. When the scope of the Court's competence is concerned, limitations similar to those of the ESFS and ESM apply. In particular the Commission itself does not have the right to bring an action before the Court.[158] The Contracting Parties were, however, more creative than in the ESM. Relying once again on the possibility of Article 273 TFEU, they have created a kind of parallel infringement procedure for controlling the transposition of the Fiscal Compact, i.e. Article 3 of the Treaty: the Commission is invited to present a report on the transposition by the Parties and the Parties may go to the Court which would be competent to decide on the correct transposition and, in a second instance, to impose fines or penalties on failing Member States. Moreover, by a protocol to the treaty concluded on 2 March 2012 on the occasion of the signing of the treaty, the Parties agreed that such an action would always be initiated by 3 Members States within 3 months of a negative Commission's report. If this clause is ever activated, it will be interesting to see the position of the Court as regards whether this system falls within the scope of Article 273 TFEU.[159]

Question 5: Financial Market Regulation and Supervision: The legal questions surrounding the Single Resolution Mechanism

5.1. Once again we will use some discretion in the choice of the legal issues that are at the center of the current reflections, this time in the area of financial market regulation and supervision. Using this discretion, this brief section will be mainly focused on the Single Resolution Mechanism (SRM) that is currently under discussion by the EU legislator. Legal questions related to the setting up of the Single Supervisory Mechanism are discussed further down under Question 12.

In July 2013 the European Commission presented a proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single

158. D'Sa, The legal and constitutional nature of the new international treaties on economic and monetary union from the perspective of EU law, European Current Law Issue, 2012: xi-xxv, p. xviii.

159. For a positive assessment, see Callies, From Fiscal Compact to Fiscal Union: New Rules for the Eurozone, Cambridge Yearbook of European legal studies, 2011-2012: 101-117, pp. 111-112.

Resolution Mechanism and a Single Resolution Fund.[160] The proposal was based on Article 114 TFEU. This mechanism is due to apply the substantive rules of the Bank Recovery and Resolution Directive in a coherent and centralized way, ensuring consistent decisions for the resolution of banks by a Single Resolution Board. It was supposed to include common resolution financing arrangements, including a Single Resolution Fund.

The proposal made by the Commission in July 2013 has been substantially amended since then. A general approach was agreed on by the ECOFIN Council on 18 December 2013.[161] At the same time the representatives of the euro area Member States adopted a sui generis decision by which they commit to establish an intergovernmental agreement specifying the channeling of funds to the SRF and gradual mutualisation.[162] The European Parliament voted its own position. An informal trilogue has started in January 2014.

In this section we limit ourselves to briefly list the main legal issues that are at the core of the current discussions. The texts are clearly not stabilized enough to permit any in-depth analysis. These main legal issues relate to the compliance with the Meroni case-law of the Court of Justice; the use of Article 114 TFEU for the setting up a Mechanism; the restricted scope of application of the Mechanism; last but not least, the interaction between the SRM Regulation and the envisaged Intergovernmental Agreement.

5.2. According to the *Meroni case-law*,[163] no discretionary powers implying a wide margin of discretion can be delegated to EU bodies other than institu-

160. COM(2013) 520 final.

161. Council Document 18070/13 of 19.12.13.

162. Council Document 18134/13 of 20.12.13.

163. CJEU 13 June 1958 (Meroni v High Authority, 9/56), [1957 and 1958] ECR 133. In the Meroni judgment, the Court pointed out that the High Authority of the European Coal and Steel Community could delegate to a body having a distinct legal personality 'clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority'. The Court specified that a delegation of powers is not permissible where it 'involves a 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'. The Court pointed out, in this respect, that 'the balance of powers which is characteristic of the Institutional structure of the Community is a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies. To delegate a discretionary power, by entrusting it to bodies other than those which the treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective'.

tions. This would be contrary to the principles of conferral of powers and institutional balance. As regards in particular, executive functions, Articles 17 TUE and 291 TFEU do not exclude that the EU legislature or the Commission may, in principle, delegate executive powers to a separate body. Articles 263 and 267 TFEU even now confirm, implicitly, that 'bodies, offices or agencies of the Union' may adopt legally binding acts the legality of which shall be submitted to the jurisdictional control of the Court of Justice. Nevertheless, such a delegation of executive decision making powers is not unlimited. Using the wording of Meroni, a delegation to a separate body/agency may not replace the policy choices of the delegator by the choices of the delegate.

According to the general approach agreed by the ECOFIN, however, resolution decisions would be decided by a Resolution Board composed of representatives from the participating Member States and the Council would only have the right, on proposal by the Commission, to object or to require amendments to the decisions of the Board within a period of 24 hours. Moreover the power of objection of the Council would be limited by a closed list of reasons that could be flagged. It is unclear whether this degree of involvement of the Council is sufficient to consider that a discretionary power has not been given to the Board. The placing of an entity under resolution is indeed by definition of a discretionary nature. Until now, the most far reaching powers that have been given to agencies are the ones given to the European Supervisory Authorities, but these authorities only had the power address to the Commission draft technical standards and the ultimate decision was still taken by the Commission. During the ECOFIN of 18 December 2013, the Commission made a declaration regretting the drafting agreed by the Council which is considered reducing to the discretion of the Council to an extent which is not compatible with the Meroni case law.

5.3. The second legal issue is whether Article 114 TFEU permits to set up an authority with enforcing powers towards market participants. In its judgment of 2 May 2006, UK/European Parliament and Council, case C-217/04, the Court confirmed that by using the expression 'measures for the approximation' in Article 114 TFEU, the authors of the Treaty intended to confer on the EU legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, in regards to the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features. It follows that the measure itself is not required to approximate the national provisions provided that it is essential for the achievement of the objectives in connection with the establishment

and functioning of the internal market. In the same judgment the Court pointed out that the EU legislator may deem it necessary to provide for the establishment of EU bodies responsible for contributing to the implementation of a process of harmonisation. In this respect the Court emphasized that the establishment of such bodies and the tasks conferred on them may be regarded as 'measures for approximation' within the meaning of Article 114 TFEU if they are closely linked with the act approximating the laws, regulations and administrative provisions of the Member States, they facilitate its application, and directly contribute to ensuring the homogenous implementation of the harmonising instrument. The Court clearly pointed out, therefore, that under Article 114 TFEU the EU legislature can establish agencies, the tasks of which are directly contributing to ensuring uniform implementation of harmonising measures.

The question which arises is whether a total centralization of resolution at European level falls within this case-law. Is it possible to consider that the Resolution authorities to be set up are only contributing to a process of harmonisation?

5.4. Article 114 TFEU concerns in principle the harmonization of the national laws of all the EU Member States to facilitate the functioning of the internal market. However the SRM will apply only to banks established in the Member States that are part of the SSM, i.e. not all of them. This raises the question whether it is legally correct to restrict the scope of application of a Regulation based on Article 114 TFEU to a certain group of Member States. In order to provide a positive answer to this question it can be argued that the (future) Regulation indeed legally applies to the whole Single Market and that it is only its effective application that is suspended in Member States that are not part of the SSM. Moreover, this restrictive scope is based on objective criteria (link with the SSM) and potentially the SRM Regulation could apply to all Member States provided they join the SSM.

5.5. During the ECOFIN of 18 December 2013 the Member States decided to remove the funding elements from the Regulation and to organize these aspects through the conclusion of an intergovernmental agreement supplementary to the (future) SRM Regulation. For its part, the Commission made a declaration regretting that the application of a Union law Regulation was made dependent on conditions laid down in an international treaty. This situation, if confirmed, raises important legal issues regarding the possibility for the Member States to act collectively outside the framework of the Union. It is unclear whether Member States are allowed to decide collectively in an area

which is shared competence of the Union and the Member States, especially in case there is a parallel Regulation to be adopted. All the questions that we raised regarding the development of intergovernmental action in the field of coordination of economic policies are also relevant in this context.[164] The legal doubts are even bigger since we are in an area of shared competence where the power of the Union is stronger than it is for the coordination of economic policies. The basic conditions are that there should be no interference and no contradiction with the EU provisions. But it is unclear whether that suffices to make the intergovernmental action EU compliant. It could be considered that it rather represents a circumvention of the normal EU decision-making process, excluding the role of the European Parliament and the normal voting rules within the Council. It also limits the jurisdictional control of the Court of Justice, which would be competent only on the basis of Article 273 TFEU. This could therefore be seen as a breach of the duty of loyal cooperation by the participating Member States.

Monetary policy

Question 11: The ECB response to the euro area crisis

11.1. The ECB and the Monetary Union

11.1.1. The creation of the ECB is the direct consequence of the setting up of a Monetary Union by the Maastricht Treaty in 1991.[165] The ECB, which after Lisbon is one of the seven Union's institutions,[166] 'falls squarely within the Community framework'.[167] It nevertheless differs from the other institutions

164. See above answer to question 2.

165. For a description of the history of EMU, see Louis and Lastra, European Economic and Monetary Union: history, trends, and prospects, Oxford Yearbook of European Law, 2013: 1-150; Usher, Legal background of the Euro, in: Beaumont and Walker (eds), Legal Framework of the Single European Currency, 1999, Hart Publishing; Usher, The Evolution of Economic and Monetary Union – Some Legal Issues, in: Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs, 2008: 297-300.

166. Article 13(1) TEU.

167. ECJ, Case C-11/00 (hereafter 'the OLAF case'), paragraph 93. On the academic discussions that took place before the OLAF Judgment see Goebel, Court of Justice

notably by its *independence* and linked to it, its separate legal personality.[168] Full independence is guaranteed to the ECB in the exercise of the powers conferred to it by the Treaties.[169] The traditional justification for this independence is that an independent central bank guarantees better price stability than an institution submitted to short term approval by political forces;[170] in other words an autonomous central bank will favour the long term over the short term in its monetary policy decisions.[171] This independence which will be discussed more extensively later in this chapter goes hand in hand with some degree of *accountability* vis-à-vis the political institutions of the Union. Accountability refers to the fact that the institution is more or less responsible, directly or indirectly, to the people who are affected by its decisions.[172] To the extent necessary for the implementation of its tasks the ECB has the power to make regulations, decisions, recommendations, and deliver opinions.[173] In principle, these acts apply only within the euro area.[174]

Under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, and the definition and con-

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oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945; Smits, The European Central Bank. Institutional Aspects, (Kluwer Law International, The Hague 1997); Ziolili and Selmayr, Recent developments in the law of the European Central Bank.

168. Article 282(3) TFEU.
169. Article 130 TFEU, Article 282(3) TFEU and Article 7 of the ESCB Statute.
170. Louis, Indépendance des banques centrales, séparation des pouvoirs et démocratie, Mélanges en hommage à Michel Waelbroeck – Vol. 1 / sous la direction de Dony M. – Bruxelles : Bruylant, 1999 : 459-481, p. 463.
171. Randzio-Plath and Padoa-Schioppa, quoted by Athanassiou, Financial sector supervisors' accountability – a European perspective, ECB Legal Working Paper Series, 2011:1-53, p. 39.
172. 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, 2000, p. 20. At the moment, as regards monetary policy, the accountability of the ECB takes the following forms: the President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the ECB Governing Council (Article 284(1) TFEU). The ECB must also address annual reports to the other institutions and the EP may hold a general debate on that basis (Article 284(3) TFEU). In addition, the ECB has also decided to reply to the MEP written questions. Furthermore, the President is attending the ECON hearings on a quarterly basis.
173. Articles 132(1) TFEU and 34 ESCB Statute.
174. Article 139(2)(e) TFEU.

duct of a single monetary policy.[175] This policy is in the hand of the ECB which, together with the national central banks (NCBs), constitute the European System of Central Banks (ESCB). The ECB and the NCBs of the euro area Member States, which constitute the Eurosystem, are to conduct the monetary policy of the Union.[176] Ultimately, it is the ECB Governing Council that formulates this monetary policy.[177]

11.1.2. As recognized by the Court of Justice, monetary policy is defined in the Treaties by its *objectives* rather than by its instruments.[178] The primary mandate of the ESCB is to maintain price stability (Article 127(1) TFEU, first sentence). There are no quantitative criteria in the Treaty for assessing the achievement of price stability and thereby permitting some flexibility.[179] It is up to the ECB to fix its own inflation target.[180]

Without prejudice to this objective, the ESCB shall also support the general economic policies in the Union (Article 127(1) TFEU, second sentence), which are themselves decided by the political institutions of the Union.[181] This drafting leaves some room for interpretation by creating a link between monetary policy and economic policy. Since the duty of sincere cooperation with the other Union institutions applies to the ECB[182] (this explains the participation of the president of the Council[183] and a Member of the Commission in the meetings of the Governing Council[184]), the second sentence of Article 127(1) TFEU could possibly be seen as advocating a dialogue between them.

175. See also Article 3(1)(c) TFEU.
176. Article 282(1) TFEU.
177. Article 12.1 ESCB Statute.
178. Pringle Judgment, paragraph 53.
179. 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, 2000, p. 2.
180. The ECB Governing Council sets a target of consumer price inflation below 2 % within the Eurozone. In that sense the ECB has therefore not only operational independence but also, to some extent, goal independence.
181. Goebel emphasizes that the general economic policies in the Union are determined by the European Council and the Union political institutions (Goebel, Court of Justice oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945).
182. Zilioli and Selmayer, Recent developments in the law of the European Central Bank, Yearbook of European Law, 2006: 1-89, p. 39.
183. In practice it is the president of the Eurogroupe.
184. Article 284(1) TFEU.

This ambiguity of the Treaty should probably not be seen as a defect. As Lastra rightly put it, when discussing the role of the ECB as a potential lender of last resort for the banks, 'a degree of 'constructive ambiguity' is desirable in the case of crisis management, and ambiguity is what the EC law provides.'[185] Finally it should also be recalled that Article 127(6) TFEU allows for new objectives to be specified by the Council for the performance of the supervisory tasks envisaged in this paragraph.[186]

11.1.3. The objectives assigned to the ECB have to be pursued using different tasks and instruments. The basic *tasks* of the ECB are listed in Article 127(2) TFEU while the instruments to be used are listed in Articles 18 to 20 of the ESCB Statute.

11.2. Non-standard measures

11.2.1. In normal times the main monetary policy tools for achieving price stability are in substance interest rate policy, short-term liquidity management and communication.[187] The euro area crisis has led the ECB to initiate 'non-standard' measures beyond its traditional monetary policy instruments in order to preserve the very existence of the EMU.[188] The main actions conducted by the ECB (and NCBs) as part of this 'unconventional' or 'non-standard' monetary policy can be summarized as follows.[189] *First*, the ECB has adopted a number of measures in order to provide euro area banks with all the needed liquidity (enhanced credit support). Concretely the access to liquidity was extended, rules on collateral were softened, and the maturity of liquidity operations was extended several times. The ECB even conducted long term refinancing operations (LTROs) with maturities of three years, totaling

185. Lastra, The governance structure for financial regulation and supervision in Europe, Columbia Journal of European Law, 2003: 49-68, p. 57. See also 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, 2000, p. 6: 'It is practical for the members of the Executive Board that both the objective and accountability of the ESCB have been left blurred and fuzzy as the solution leaves a wide margin of appreciation.'
186. See below Question 12.
187. Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013, p. 3.
188. All major central banks have adopted broadly similar non-standard measures.
189. For a description see Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013.

around one trillion euro. Emergency Liquidity Assistance (ELA[190]) was also provided by NCBs to solvent banks in difficulties, under the surveillance of the ECB's Governing Council.[191] *Secondly*, the ECB has also set up government bond purchasing programmes, the SMP and the OMT. The SMP (Securities Market Programme) consisted of limited purchases of euro area countries' sovereign bonds on the secondary market.[192] The OMT (Outright Monetary Transactions) was certainly the most controversial ECB measure during the crisis, but also the most effective. On August 2, 2012, the ECB President announced that the ECB would be willing to buy government bonds without limits on the secondary market under certain circumstances, in particular the imposition of strict conditionality towards the concerned Member State. The modalities for undertaking OMT's were decided by the Governing Council on 6 September 2012.[193] The OMT has not been activated so far, but its announcement has succeeded in calming down the markets.

11.2.2. This short and very rough description of the ECB's policy since 2010 does not give justice to the efforts made by the ECB. Most of the ECB's policy actually evades legal analysis since it is a matter of communication which normally cannot be subject to judicial review.[194] A leading example is certainly the pronouncement from M. Draghi in July 2012 that ECB will do 'whatever it takes' to save the euro.[195] Another major part of the ECB's achievement is also to be found in what it did *not* do. The ECB resisted any dramatic deviation from its mandate while being confronted with huge political pressures.

190. It is disputable whether ELAs should be considered as conventional or unconventional monetary policy instruments.
191. ELA can be performed by the NCBs unless the Governing Council finds, by a majority of two thirds of the votes casts, that it interferes with the objectives and tasks of the ESCB (Article 14.4 of the ESCB Statute).
192. SMP covers also eligible marketable debt instruments issued by private entities incorporated in the euro area.
193. ECB Monthly Bulletin September 2012.
194. Except in exceptional circumstances (see for instance, as regards declarations by national authorities, case A.G.M.-COS.MET, C-470/03).
195. The cases in the German BVerfG nevertheless relate to the OMT and the question of admissibility will be dealt with in the forthcoming judgment.

11.3. Legal analysis of non-standard measures

11.3.1. The new unconventional monetary policy measures adopted by the ECB raise a number of questions, not only for economists,[196] but also for lawyers. It is not a purely speculative exercise since these measures have been challenged both before the ECJ and before national courts.[197] This report limits itself to discuss the *issues of EU law* without entering into the debates related to national constitutional law. Neither will we dwell on the opinions of those who advocate in a prescriptive way that at the time of extraordinary crisis, political institutions should be able to regain control over the final determination of fundamental monetary policy.[198]

11.3.2. First it has to be assessed whether these new tasks do not go beyond the *mandate of the ECB*. In accordance with the principle of conferral, the ECB must act within the limits of the powers conferred to it by the Treaties (Article 13(2) TEU). The Treaties do not provide for any extension of the competence of the ECB with the exception of specific tasks relating to prudential control to be conferred by the Council acting unanimously in accordance with Article 127(6) TFEU.[199] As put by Advocate General Jacobs in the OLAF case, 'The ECB is [...] subject to the rule of law. It is thus required not only to pursue price stability and contribute to the aims of the Community in accordance with Article 105 EC, but also to conduct its affairs lawfully [...].'[200] This implies not only that the ECB cannot widen its competence

196. Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013.
197. For the ECJ, see below Section 14.2. For the national courts see in particular the German Constitutional Court which is currently reviewing the legality of some of these measures (On the German Constitutional Court case see Wolff, The ECB's OMT Programme and German Constitutional Concerns, Think Tank 20, 2013: 26-31; Siekmann and Wieland, The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability, Working Paper, 2013:1-14).
198. Lastra, quoted by Goebel, Court of Justice oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945, p. 913.
199. On prudential control see below question 12.
200. Case C-11/00, point 174 of the conclusions.

through its power to adopt acts of a general scope,[201] but also that its day-to-day measures must stay within the ambit of its competence.

The non-standard measures adopted by the ECB, especially the OMT, were justified as necessary to restore conditions for a well-functioning banking system with the aim of delivering price stability in the medium term. To achieve that objective, measures were adopted to repair the monetary transmission mechanism since exceptionally high risk premia embodied in government bond prices for some Member States were hindering the transmission of the monetary policy signals sent by the ECB. Other unconventional measures aimed at supporting financial stability within the EMU by backing up fragile banks. *Repairing the monetary transmission mechanism* is clearly part of the monetary policy albeit indirectly.[202] If interest rate decisions taken by the ECB are not being passed on by banks to borrowers in some Member States, the ECB cannot properly influence the interest rates for the Eurozone. By restoring functional markets the OMT is supposed to allow the ECB, in a second stage, to conduct an effective monetary policy. As seen above, the ECB has a broad margin of discretion as regards the choice of the most appropriate instruments to achieve this purpose. Most economists agree that monetary transmission did not function properly during the crisis. They also agree that the SMP and OMT have played a useful role in that respect.[203] Ex post it is also clear that the announcement of the OMT has reduced financial fragmentation in the euro area and, therefore, allowed the ECB to help ensuring more similar monetary policy conditions throughout the Eurozone.[204]

11.3.3. Some have questioned whether the alleged objective was the real one, and argued that the ECB was rather trying to save the concerned Member States from bankruptcy and acting as a 'Lender of Last Resort'. They point to the fact that these operations were targeted at specific regions of the euro area, or at specific credit institutions, while standard open market operations are

201. 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, 2000, p. 30.
202. From the board, Stumbling blocks and corner stones in building a deep and genuine EMU, Legal Issues of Economic integration, 2013:95-104.
203. See Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013; Wolff, The ECB's OMT Programme and German Constitutional Concerns, Think Tank 20, 2013.
204. See Wolff, The ECB's OMT Programme and German Constitutional Concerns, Think Tank 20, 2013: 26-31.

opened to all.[205] The ECB could, therefore, be seen as redistributing amongst the euro area members the risks and costs resulting from national budgetary decisions.[206] It is not disputed that this evolution departs from the original principle that monetary policy has to be implemented 'in a uniform manner throughout the Member States whose currency is the euro'.[207] There is, however, hardly evidence to support a possible illegality. The OMT program seems suitable to achieve the desired effect, as well as necessary and proportionate.[208] Targeting specific regions appears justified if conventional monetary measures become largely ineffective vis-à-vis those regions. Whether or not it was the best policy option is not a legal issue. Provided it does not lead to an unacceptable level of inflation, the course of action of the ECB appears justified from a legal point of view.

11.3.4. The non-standard measures adopted by the ECB have to rely on the *instruments* listed in Articles 18 to 20 of the ESCB Statute. The bond buying programmes were simply based on Article 18(1), which allows the ECB to buy and sell outright marketable instruments. Some have argued that the government bonds concerned were actually in practice not marketable, but this opinion is rejected by most commentators.[209] Other instruments have been enacted notably on the basis of Article 20 of the ESCB Statute which allows the ECB Governing Council, by a majority of 2/3 of the votes, to decide 'upon the use of such other operational methods of monetary control as it sees fit', while respecting the objectives of the ESCB. This last provision, therefore, permits the use of any kind of instrument provided that it relates to 'monetary control'. In this regard it can be considered that the ECB disposes of a discretionary power which entails a limited judicial review (see below point 14.2.5).

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205. Siekmann and Wieland, The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability, Working Paper, 2013: 1-14.
206. Editorial comments, Debt and democracy. 'United States then, Europa now?' CMLR 2012: 1833-1840, p. 1838.
207. Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem [2000], OJ L310, p. 1.
208. For a detailed analysis, see Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013: 13-21.
209. For a summary of this discussion, see Beukers, The new ECB and its relationship with the Eurozone Member States: Between Central Bank independence and central bank intervention, Common Market Law Review, 2013: 1579-1620 , p. 1612.

11.3.5. The *independence* of the ECB in the conduct of its monetary policy is an element that can play a role both in favour and against the validity of the non-standard measures. On the one hand this independence calls for a very cautious approach in terms of putting into question the validity of the adopted measures. In principle, it is up to the ECB alone to make its own judgment without any pressure. On the other hand the ECB's independence implies a degree of exemption from democratic control which is justified only in order to perform its limited monetary policy task.[210] It is, therefore, particularly important that this institution stays within its mandate and does not engage into solidarity or redistributive policies.[211] We are of the view that it was the case here that the ECB stayed within its mandate.

11.3.6. The larger objective of most of the unconventional measures adopted by the ECB was to maintain the *financial stability of the monetary union*. Central bankers' duties towards the maintenance of 'financial stability' typically refer to maintenance of the safety and soundness of the banking system.[212] This objective, not to be confused with supporting price *stability* (i.e. low inflation), is usually considered as falling within the secondary objective laid down for the ECB in Article 127 TFEU of 'support[ing] the general economic policies in the Union' in view of the higher objective of preserving the EMU, which is one of the objectives listed in Article 3 of the TEU.[213] The mere fact that the ECB actions also had some (indirect) effect on the fiscal or economic position of the concerned Member States does not mean that the measures taken by the ECB should be considered as acts of economic policy as such, an area still reserved for the Member States.[214] For instance, providing liquidity to the financial sector during the crisis was crucial to avoid its collapse. This has also created a subsidy for the banking system and a tempo-

210. Dashwood, quoted by 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, 2000.
211. Editorial Comments, Debt and democracy: 'United States then, Europe now?', CMLR 2012: 1833-1840, p. 1838-1839.
212. Lastra, The governance structure for financial regulation and supervision in Europe, Columbia Journal of European Law, 2003: 49-68, p. 56.
213. See Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013:13-21. Maintaining the stability of the monetary union was also considered by the ECJ as a 'higher objective' beyond the logic of the no-bail out clause of Article 125 TFEU (Pringle judgement, paragraph 135).
214. Beukers, The Euro Zone Crisis and a Changing Institutional Landscape: the Case of the New European Central Bank, Outline CMLRev conference 26/27 April 2013.

rary support for the government bond markets, but these aspects can be considered as ancillary to the main objective of financial stability. It follows from a consistent line of decisions of the Court of Justice that, if examination of a Union measure reveals that it pursues a twofold purpose, or that it has a twofold component, and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.[215] Since the ECB has a broad marge of discretion in the conduct of its monetary policy, its policy choices and the choice of the instruments should be left to its discretion unless it can be established that there was a manifest error of appreciation or a misuse of power.[216]

11.3.7. The action of the ECB must be without prejudice to the higher objective of price stability. From a legal point of view, this means that it is only if it could be established that the measures taken by the ECB would inevitably lead to an unacceptable level of *inflation* that the primacy of the price stability objective would be circumvented.[217] This appears doubtful since economists have divergent views on the question.[218] It would therefore be difficult for any court to substitute the ECB's assessment for its own.[219] Moreover, this appears not to have been the case so far. Experience shows that the non-standard measures taken by the ECB have not had a side-effect on the inflation rate. On the contrary, inflation appears to have been too low recently.[220]

11.3.8. The OMT raises a specific issue because it can be seen as 'monetary policy under (indirect) *conditionality*'. The buying of bonds under the OMT framework was indeed made conditional to the activation of an ESM/EFSF

215. See the judgment in Case C-42/97 Parliament v Council [1999] ECR I-869, paragraphs 39 and 40.
216. As an hypothetical example of misuse of power, see the statement of the Court of Justice in the Pringle judgment according to which 'The grant of financial assistance to a Member State [...] clearly does not fall within monetary policy.' (paragraph 57).
217. Until now the German Constitutional Court has not judged the ECB's bond purchasing program contrary to the objective of price stability.
218. Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013: 13-21, p. 16.
219. Beukers, The new ECB and its relationship with the Eurozone Member States: Between Central Bank independence and central bank intervention, Common Market Law Review, 2013: 1579-1620 , p. 1615.
220. Moreover it is for the Governing Council of the ECB to fix the acceptable level of inflation. There is no fixed level in primary law.

programme. Some have questioned whether this conditionality was consistent with a purely monetary policy objective.[221] This conditionality indeed makes a link with the coordination of the economic policies and it was argued that this link makes the ECB act beyond its strict monetary policy field. It also makes its monetary policy decisions dependent on other actors pursuing different objectives. This link with the ESM/EFSF could finally be seen as supporting the idea that the OMT is close to monetary financing because it is targeted at specific Member States in financial difficulties. To this the following can be answered. First, the submission to conditionality is only indirect (the direct link is with ESM assistance) and it represents a necessary element guaranteeing the temporary nature of the ECB's intervention. Second, it follows from the Pringle judgment that the reference to a strict conditionality as a condition for financial assistance (in the new Article 136(3) TFEU) is instrumental for guaranteeing the compatibility of such assistance with Article 125 TFEU.[222] By analogy, the link with conditionality made within the OMT also guarantees that it is not pure monetary financing. Neither does this link appear to prejudice the ECB's independence even if the ECB relies on conditionality decided otherwise:[223] The activation of the OMT program is still at the discretion of the ECB and is reversible at any point of time. Finally, in legal terms the link with the EFSF/ESM could be seen as an expression of the duty of sincere cooperation of the ECB with the Member States.

11.3.9. As regards the *prohibition of monetary financing*, Articles 123(1) TFEU and 21(1) of the ESCB Statute prohibit the ECB or NCBs from granting credit facilities to governments and from 'directly' purchasing debt instruments of Member States. The purpose of this prohibition is to force governments to seek financing on a competitive basis at market-determined pri-

221. See Wolff, The ECB's OMT Programme and German Constitutional Concerns, Think Tank 20, 2013: 26-31; Siekmann and Wieland, The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability, Working Paper, 2013: 1-14. More generally T. Beukers has shown that many other measures adopted (or not!) by the ECB could be seen as putting pressure on the Member States, individually or collectively, for engaging into economic reforms (Beukers, The new ECB and its relationship with the Eurozone Member States: Between Central Bank independence and central bank intervention, Common Market Law Review, 2013: 1579-1620).
222. See Pringle Judgment, paragraphs 142-143.
223. Siekmann and Wieland, The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability, Working Paper, 2013: 1-14.

ces as well as to avoid inflation. The scope of this prohibition is elaborated in Regulation 3603/93 whose seventh recital states that '[...] purchases made on the secondary market must not be used to circumvent the objective of [Article 123 TFEU]'.[224] It is submitted that there is no element to sustain that the non-standard measures were undertaken by the ECB to circumvent Article 123 TFEU. For the purpose of this assessment, one should distinguish the purchasing of government's bonds and the provision of liquidity to banks. As far as *government bonds* are concerned, it could be that, from an economic point of view, they are 'on the borderline with debt monetisation'[225] because the investors on the primary market anticipate that they will be able to sell these bonds to the ECB. The pre-announcement may, therefore, have the same effect as a direct acquisition of bonds by the ECB from the governments on the primary market. However, this anticipation of the market is not a legal one, but an economic one. In case of activation of the OMT, ECB's counterparties would not be governments, but instead private investors.[226] Moreover the concrete details of the SMP and OMT do not support the argument that Article 123 TFEU is circumvented. The fact that only rather short term bonds are concerned and that there is a link with conditionality, confirm that this policy is not a policy for financing inflationary deficits.[227] The fact that the measures are in principle temporary is also important. Therefore, it can be argued that temporary policies of purchase conducted on the secondary markets do not violate the prohibition of monetary financing enshrined in Article 123 TFEU. What matters is that these operations are conducted in view of monetary policy objectives. It is only if a misuse of power could be proved that the actions of the ECB could be quashed.[228] There is, however, no evidence in this regard. The German Constitutional Court seems to have followed the same reasoning in its ruling of 12 September 2012,[229] in which it states that ECB's

224. See also German Constitutional Court decision of 12 September 2012 (see Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013: 13-21).
225. Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013.
226. Article 18(1) of the ESCB Statute allows the ECB to buy marketable instruments on the financial markets including bonds issued by euro area Member States.
227. Yiangou, O'Keeffe and Glöckler, 'Tough Love': How the ECB's monetary financing prohibition pushes deeper euro area integration, Journal of European Integration, 2013: 223-237, p. 234.
228. Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013:13-21, p. 18.
229. Bundesverfassungsgericht, Case No. 2 BvR 1390/12 *et al.*, Sept 12, 2012 (Ger.).

purchasing on the secondary market is only prohibited as a circumvention of the prohibition of monetary financing if it is *aimed* at financing national economies independent from the capital markets, which we consider is clearly not the case.[230] Finally, as far as *banks* are concerned, from an economic point of view cheap lending to the banks may induce them to purchase governments bonds. However, legally speaking there is no causal link that would allow for concluding that there was some form of indirect monetary financing.

11.3.10. Another legal issue which is debated (e.g. in Karlsruhe) is the potentially unlimited amount of the purchases of the OMT mechanism. It is argued that this might create incalculable *costs for the taxpayers* of Member States with sound finances without involvement of their parliaments. It is correct that losses of the ECB would be shared by National Central Banks and ultimately Member States in accordance with their contribution to the capital of the ECB (Article 33.2 ESCB Statute). However, the OMT does not differ from other monetary policy instruments from that angle. Many actions taken by a central bank may have fiscal consequences. In other words the ECB has the authority to engage in activities that involve the risk of losses.[231]

11.3.11. Concerning the *no bail out clause* of Article 125 TFEU, the Court of Justice clarified in its Pringle judgment, that the purchase of government bonds on the secondary market by the ESM was not contrary to Article 125 TFEU if the issuing Member State remains solely answerable for repaying the debts in question.[232] The same reasoning can be followed regarding the purchase of bonds by the ECB.[233]

230. Contra: Ruffert, The European debt crisis and European Union law, Common Market Law Review, 2011: 1777-1806. In its previous judgment of 7 September 2011 on the EFSF the Constitutional Court rejected a similar complaint as inadmissible because the challenged acts were not sovereign acts of German State authority.
231. Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013: 13-21, p. 19.
232. Pringle Judgment, paragraph 141.
233. Echinard and Labondance, La politique monétaire européenne : entre principes et pragmatisme, Revue de l'Union européenne, 2011: 174-178, p. 174.

11.4. ECB role in the framework of financial assistance programmes

11.4.1. The ECB has also been given an active role in the negotiation and monitoring of the implementation of macroeconomic adjustment programmes of euro area Member States under financial assistance. This task was first conducted outside the framework of EU law, for the loans to Greece, and thereafter introduced in the ESM Treaty.[234] Later on, it was gradually brought back within the EU framework. For the implementation of the EFSM the Council gave some role to the ECB. With the entry into force of the Two-Pack (Regulation 472/2013), this role has been fully reincorporated in the EU framework.[235]

When negotiating the Memoranda of Understanding, the ECB and Commission each focused on the design and monitoring of national policies related to the main EU competences. However, at staff level, the two institutions were de facto jointly involved, together with the IMF, in the design of each programme and the monitoring of its implementation.

11.4.2. Economists seem to consider that the involvement of the ECB in designing and monitoring financial assistance programmes is a 'dangerous liaison'.[236] The same is not true from a legal point of view. In the Pringle case the Court of Justice has considered that the tasks conferred on the ECB by the ESM Treaty are compatible with EU law: they relate to economic policy which is not an exclusive competence of the Union, they do not entail any decision-making power, and 'they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution. By virtue of its duties within the ESM Treaty, the ECB supports the general economic policies in the Union, in accordance with Article 282(2) TFEU. Moreover, it is clear from Article 6.2 of the Statute of the ESCB that the ECB is entitled to participate in international monetary institutions and Article 23 of that Statute confirms that the ECB may 'establish relations ... with organisations'.[237] Some have, nevertheless, raised some legitimacy issues arguing that the ECB was not accountable for tasks that go beyond monetary policy. For example, the ECB insists on structural reforms like labor

234. See Article 4, Article 13, paragraphs 1, 3 and 7, and Article 18 of the ESM Treaty.
235. Regulation 407/2010, Regulation 472/2013 (See also above point 4.2.2).
236. See Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013; Pisany-Ferry, Sapir and Wolff, EU-IMF assistance to euro-area countries: an early assessment, Bruegel Blueprint 2013.
237. Pringle Judgment, paragraph 165.

market flexibility which have a very loose link with monetary policy. It is, therefore, argued that the ECB is de facto engaged in fiscal policy,[238] but this view seems to ignore the fact that the ECB has no decision-making whatsoever in this area and is acting together with the Commission.

Question 12: New competences in the area of financial regulation: Prudential Supervision

12.1. Before the ESM provides direct recapitalization to financial institutions within the Eurozone, it was considered necessary to have in place a common, high quality prudential supervision of banks. Thus the ECB has been given new supervisory responsibilities over credit institutions in the framework of the SSM (Single Supervisory Mechanism).[239] Regulation No. 1024/2013 is based on Article 127(6) TFEU which allows the Council to confer specific tasks upon the ECB 'concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'. The SSM will extend to the euro area as well non-euro area Member States which entered into a close cooperation with the ECB (Article 7). The ECB will directly supervise significant credit institutions and will have exclusive competence for some crucial supervisory tasks vis-à-vis all banks (Articles 4 and 6). It will also perform some macro-prudential tasks (Article 5). Before assuming these new responsibilities, the ECB will perform 'a comprehensive assessment, including a balance-sheet assessment, of the credit institutions' (Article 33(4)). These new competences will cover a number of banks increasing over time. The ECB will not act in a vacuum, but will carry out its tasks within a Single Supervisory Mechanism composed of the ECB and national control authorities (NCAs) based on a complex system of checks and balances, under a system of differentiated supervision.[240] The SSM is not an institution, but a 'mechanism', without specific legal status.[241]

238. Beukers, The new ECB and its relationship with the Eurozone Member States: Between Central Bank independence and central bank intervention, Common Market Law Review, 2013: 1579-1620, p. 1590.
239. Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.
240. 'By differentiated supervision it is meant that the ECB would set out the required approach to supervision in a supervisory handbook and other pronouncements, apply that approach directly in the case of a small number of systemically significant banks, oversee its implementation by national supervisors in other cases, and retain the right

It is not possible within the limits of this report to provide an exhaustive analysis of all legal questions raised by this new set of rules. We will limit ourselves to highlight briefly the main institutional issues in relation with the status of the ECB. The SSM Regulation represents a major evolution since for the first time non-monetary tasks will be exercised by the ECB. The objectives to be pursued will no longer be price stability as of Article 127(1) TFEU, but those specified by the Council.[242] Moreover, for the first time the ECB will carry out these tasks outside of the general framework of the ESCB. While the ECB's competence over monetary policy is exclusive, its action in the SSM will be subject to a strict principle of conferral – only for the tasks conferred on the ECB in the SSM Regulation the ECB will be exclusively competent. Those tasks not conferred will remain within the competence of Member States.

12.2. Legal basis: Whether monetary and supervisory functions should be integrated or conferred to separate institutions is a most contentious issue amongst economists. From a legal point of view, suffice it to check whether Article 127(6) TFEU is a sufficient legal basis for entrusting the ECB with this additional task. Even if there is some insistence in the text of the Regulation that it concerns only 'specific tasks', it has to be recognized, looking at the list of Article 4, that the Council has given a broad interpretation to Article 127(6) TFEU. For significant banks in particular, most of the supervision will be directly exercised by the ECB. The ECB will also issue regulations, guidelines, and general instructions to national authorities. This quasi-legislative power partially substitutes itself to the normal system of delegated acts of Article 290 TFEU. This appears justified in view of the peculiarities of the ECB legal framework.

12.3. Relations with EU agencies: There will be a complex network of relations with the EU financial agencies, on the one hand, and with the NCAs, on

to call other banks into direct supervision where [...] they are giving rise to problems of potentially systemic proportion.' (Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/ , p. 10).

241. Lastra, Banking Union and Single Market: Conflict or Companionship?, Fordham International Law Journal, 2013, p. 1201.

242. On the legality of this setting up of new objectives see Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/ , p. 12.

the other hand. In regards to the EU agencies, particularly the European Banking Authority (EBA), 'EBA and ECB are reflections of the co-existence of the Single Market and the Banking Union'.[243] Their relations can be assessed on the basis of their respective institutional position, thus giving more weight to the ECB (an institution governed by primary law) than to EBA (an agency governed by secondary law).[244] A more convincing view would, however, be to assess their relations in terms of their respective fields of competence. This could justify that the ECB may be bound by positions taken by EBA insofar as these positions are within the latter's competences.

12.4. Institutional design: The ECB was designed for the conduct of monetary policy. For this reason it is based on a complex relationship with the NCBs of the euro area which are subordinated to the ECB, but whose governors constitute, together with the members of the Executive Board, the ECB Governing Council. This design is possibly not optimal for implementing a prudential supervision of credit institutions potentially situated in the whole EU.[245] For this reason the SSM Regulation has set up a brand-new governance and decision-making process, with a newly created Supervisory Board whose members include representatives of the supervisory authorities of all participating Member States, euro or not euro. This solution departs substantially from the Treaty based decision-making structure of the ECB. This has been criticized by some.[246] However, one can reasonably assume that the power to entrust the ECB with specific tasks related to prudential supervision entails the corresponding power to set up the adequate decision-making structure. In any event, the central role of the Governing Council has not been altered by the SSM Regulation, even if its liberty is constrained by the procedure of Article 26 of the Regulation. In conclusion the specific decision-making process set up by the SSM Regulation appears legally sound, but is not a model of clarity and simplicity. It has to be recognized though that the

243. Lastra, Banking Union and Single Market: Conflict or Companionship?, Fordham International Law Journal, 2013, p. 1212.
244. Ibidem.
245. Repasi, Limits and opportunities for the ECB in the multi-tier governance, European Parliament, 2013:1-20, p. 18.
246. Idem.

Treaty framework probably did not permit the achievement of a better result.[247]

12.5. Relation between national and EU law: The relations between these two sets of law will be complex as the two following examples demonstrate. First, the application of national law by the ECB as provided for in Article 4(3) raises interesting issues: ECB decisions will benefit from the primacy of EU law even when applying national law because their legal basis would be the SSM Regulation and they should not be considered as national implementing measures. Therefore, the European Court of Justice would be competent to revise such decisions rather than national courts. Second, the powers of the ECB will coexist with those of the national supervisors under national law. This could create overlaps and duplication of tasks.[248]

12.6. Relation with non-euro Member States participating: The system provided in order to allow the participation of non-euro Member States (Article 7) also raises complex issues. The most important question is whether Article 127(6) TFEU is a sufficient legal basis for covering non-euro Member States. Whilst this has been contested by some, one should recall that their participation is voluntary and, as a result, contains a contractual element.

12.7. Non-contractual responsibility: By conferring new competences to the ECB, the Council has also extended its non-contractual responsibility as provided by Article 340(3) TFEU. Since the conditions for such responsibility are set up at primary law level, there is no possibility for the Council to limit the supervisory liability of the ECB. However, the conditions for incurring non-contractual liability are rather strict under EU law.

12.8. Independence and accountability: The question of independence and accountability is closely related to the issue discussed just below, i.e. the relationship between monetary and supervisory competences within a single institution. The SSM Regulation does not state that Article 130 TFEU applies as such in relation to the new tasks conferred on the ECB. This makes clear

247. Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/, p. 15.

248. Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/, p. 12.

that the full ECB independence does not apply, at least to the same extent, in this area. Indeed the justification for independence as regards monetary policy does not as such apply here.[249] It is generally accepted that the Article 130 TFEU independence of the ECB is a functional one and is justified only in regards to the conduct of monetary policy since it is not an end in itself.[250] Hence, it does not automatically apply to the ECB in the exercise of its new supervisory functions.[251]

A principle of independence is nevertheless set up in Article 19 of the Regulativ in broadly similar terms. A doctrine of supervisory independence has indeed developed as best practice.[252] At the same time the Regulation provides for a whole new set of accountability rules (Articles 20 and 21), that go beyond the provisions of Article 284 TFEU and would not be acceptable in the field of monetary policy. Article 20(9) refers even to 'accountability and *oversight* over the exercise of the tasks conferred on the ECB by this Regulation'. The European Parliament, the Council, the Euro Group, the Commission and even national parliaments of the participating Member States will be kept informed at different degrees about supervisory decisions.[253] Independence and accountability are, therefore, seen as going hand in hand,[254] but with a higher standard of accountability than for monetary de-

249. See points 150 and 155 of AG Jacob's conclusions in the OLAF case where he makes a link between the independence and the achievement of the monetary policy objectives of Article 127(1) TEU. See Goebel, Court of Justice oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945, p. 933.
250. According to Advocate General Jacobs in case C-11/00, 'the independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB from short-term political pressures the principle of independence aims to enable the ECB effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community as required by Article 105(1) EC.'
251. Repasi, Limits and opportunities for the ECB in the multi-tier governance, European Parliament, 2013:1-20, p. 17; Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/, p. 14.
252. Smaghi, Central Bank independence in the EU: From theory to practice, European Law Journal, 2008: 446-460, p. 455 ; Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/, p. 16.
253. See the Interinstitutional Agreement concluded between the EP and the ECB (2013/694/EU, OJ L 320, 30.11.2013, p. 1.).
254. See the core principles for effective banking supervision, Basel Committee on banking Supervision.

cisions, because of the differences with regard to the goal, the means, the personnel, and the very nature of the supervisory work and in particular of the higher intrusiveness of supervisory decisions.[255] Independence of the unelected supervisor must be coupled with a sufficient degree of accountability.

12.9. Supervisory competences and monetary policy: There are clear links, and possibly tensions, between the monetary policy decisions and the supervision of credit institutions. Economists have divergent views on the issue: for instance, the provision of liquidity to the banking sector during the crisis has kept alive non-viable banks while prudential supervision could call for the orderly restructuring or resolution. More generally price stability and financial stability are probably not always easy to reconcile. However, combining monetary policy and prudential policies within the same institution can also prove beneficial.[256] Many national central banks have a role in supervision. The ECB itself has for a long time emphasized that close involvement of central banks in prudential supervision was to be searched.[257]

From a legal point of view, some have argued that the independence of the ECB in the conduct of its monetary policy could be structurally endangered with the granting of these additional competences. Firstly, to make the ECB liable for damages for supervisory faults would be to expose its independence to risk (financial and reputational risks). This risk of financial liability appears, however, quite remote.[258] Secondly, it is feared that control by the EP on the supervisory tasks of the ECB could be used in order to put pressure on the conduct of its monetary policy. This view seems excessive since it is the Treaty itself that allows for granting additional supervisory competences to the ECB. By definition there cannot be a contradiction between Article 127(6) and Article 130 TFEU. One should remember that most NCBs were already in charge of financial supervision while being covered by Article 130

255. Lastra, Accountability and governance banking Union proposals, DSF Policy Paper No. 30, 2012, p. 8; Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/ , p. 17; Lastra, Banking Union and Single Market: Conflict or Companionship?, Fordham International Law Journal, 2013, p. 1217.
256. Darvas and Merler, The European Central Bank in the age of banking union, Bruegel policy Contribution, 2013; Athanassiou, Financial sector supervisors' accountability – a European perspective, ECB Legal Working Paper Series, 2011: 1-53, p. 40.
257. Smaghi, Central Bank independence in the EU: From theory to practice, European Law Journal, 2008: 446-460, p. 454.
258. Athanassiou, Financial sector supervisors' accountability – a European perspective, ECB Legal Working Paper Series, 2011: 1-53.

TFEU. Moreover, the Council has built up a number of mechanisms in order to avoid cross-contamination. First, there is an obligation on the ECB to pursue only the objectives set by the Regulation and 'a clear statement of objectives is recognized to be a valuable part of a statutory mandate for a financial supervisor'.[259] Second, the SSM Regulation explicitly requires separation of financial supervision and monetary policy within the ECB. There will be a Supervisory Board consisting of five representatives from the ECB and representatives from national central banks; the staff involved will be organizationally separated; meetings of the Governing Council will be completely differentiated in regards to monetary and supervisory functions. It is true that a full separation cannot be achieved, but probably it should not: the ECB as central bank should have ultimate control over any decision that could affect its independence.[260]

What remains true is that the specific arrangements decided in the SSM Regulation do not solve the biggest issue regarding accountability, i.e. the fact that it is only accountability and not responsibility. No political institution of the EU has effective means to constrain the ECB. While the EP can force the dismissal of the Commission and the members of the Council are under the control of their respective national parliament, the same is not true for the ECB. The only control is the judicial one (see below). According to some academics the only way for a Member State to truly make ECB accountable for its actions would be threatening to leave the Monetary Union[261] or instructing its NCB not to obey any longer to the ECB. Both options run against the legal foundations of the Union and would, therefore, threaten its very existence.

12.10. This brief discussion of institutional issues linked to the SSM Regulation is in no way exhaustive. Other difficult issues will probably also require in-depth reflection (for instance macro-prudential supervision and the relation ECB/ESRB). The SSM Regulation has probably achieved the best that could be achieved on the basis of primary law as it stands today, but at the price of

259. Ferran and Babis, The European Single Supervisory Mechanism, Legal Studies Research, University of Cambridge, 2013, available at: http://www.law.cam.ac.uk/ssrn/ , p. 12.

260. Smaghi, Central Bank independence in the EU: From theory to practice, European Law Journal, 2008: 446-460, p. 455.

261. Von Hagen, quoted by 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, 2000, p. 5.

a high degree of complexity for the supervisory picture in the Union, knowing, as put by R. Lastra, that 'complexity frustrates accountability'.[262]

Question 13: Redefinition of the ECB statutory objectives

13.1. Any change in the objectives to be pursued by the ECB would entail a major shift in the EMU as designed by the Maastricht Treaty. Hence, full political consensus would be needed between the Member States. Legally it would require changes to the Treaties. The simplified revision procedure of Article 48(6) TEU could in principle be used depending on the exact nature of the changes, provided in particular that they do not increase the competences conferred on the Union.[263] By contrast the (even more) simplified revision procedure provided by Article 129 TFEU does not apply for amending the objectives and main tasks of the ECB.

13.2. The most obvious change to the statutory objectives of the ECB would be to remove the hierarchy between the current objective of price stability, on the one hand, and of support of economic policies, on the other hand. This would follow the example of the US Federal Reserve whose objectives are equally maximum employment, stable prices, and moderate long-term interest rates.[264] Some argue that this change of objectives would in itself require a higher level of accountability of the ECB vis-à-vis the political institutions of the Union.[265] As far as monetary policy is concerned, there is a low level of parliamentary control, direct or indirect. The legitimacy of the ECB is based on clear limits and control of its powers e.g. through judicial review and predetermined goals.[266] If the list of goals is expanded, more control would be needed. Others argue that the independence in the conduct of monetary policy

262. Lastra, Banking Union and Single Market: Conflict or Companionship?, Fordham International Law Journal, 2013, p. 1214.
263. Article 48(6) TEU refers explicitly to 'institutional changes in the monetary area' as requiring the consultation of the ECB.
264. Repasi, Limits and opportunities for the ECB in the multi-tier governance, European Parliament, 2013: 1-20, p. 15.
265. Repasi, Limits and opportunities for the ECB in the multi-tier governance, European Parliament, 2013: 1-20, p. 18; Gros and Thygesen, quoted by 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, 2000, p. 1.
266. 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, 2000, p. 19.

should be preserved whatever the changes that could be decided regarding the objectives to be pursued.[267] Whether this independence should stay at the constitutional level it is today and/or whether it should be complemented with a higher level of accountability are questions on which divergent views have been expressed.[268]

13.3. Alternative changes have been envisaged. *First*, deletion or softening of the prohibition of monetary financing of Article 123 TFEU would indirectly result in an enlargement of the list of monetary policy instruments at the disposal of the ECB. It could become a lender of last resort for the sovereigns.[269] *Second*, according to other scholars an alternative option would be to involve other institutions in the definitions of the monetary policy objectives.[270] *Finally*, new competences could be granted to the ECB regarding economic policy. Such a move would, however, raise additional issues. In particular a higher democratic accountability would again certainly be needed in case ECB's competences were expanded beyond the field of monetary policy. Such a democratic control would necessarily after the independence of the ECB. It is doubtful that the uneasy combination of independence and accountability that has been achieved in the SSM Regulation could be further used for other new competences. Moreover, the whole design of the decision-making process within the ESCB and ECB would need to be reshuffled.

267. Louis, Indépendance des banques centrales, séparation des pouvoirs et démocratie, Mélanges en hommage à Michel Waelbroeck – Vol. 1 / sous la direction de Dony M. – Bruxelles : Bruylant, 1999: 459-481, p. 475.

268. See Goebel, Court of Justice oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945; Smits, The European Central Bank's independence and its relations with economic policy makers, Fordham International Law Journal, 2008: 1614-136.

269. Repasi, Limits and opportunities for the ECB in the multi-tier governance, European Parliament, 2013: 1-20, p. 18.

270. Some suggest that the ECB and the Council together would determine an inflation target for a fixed period of time (Scheinin, quoted by 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, 2000, p. 24) or that the Council could overrule the ECB (idem, p. 26).

Question 14: Judicial review of the ECB's monetary policy

14.1. Basic principles

The Union is founded on the rule of law;[271] and the ECB, being bound by Union law, is formally subject to judicial control by the Court of Justice like any other institution, body or organ of the Union.[272] In accordance with Article 263 TFEU acts adopted by the ECB and intended to produce legal effects vis-à-vis third parties may be reviewed by the Court of Justice, except opinions and recommendations and the Court has exclusive competence to declare such an act illegal, be it through an action for annulment or a preliminary ruling question;[273] the ECB may also be sued for a failure to act to fulfil its duties (Article 265 TFEU); acts of the ECB may be the subject of preliminary questions by national courts regarding their interpretation or validity (Article 267 TFEU); the ECJ has jurisdiction regarding the non-contractual responsibility of the ECB (Article 340(3) TFEU), and finally the Court was given unlimited jurisdiction with regard to sanctions that the ECB may impose on undertakings.[274]

271. Article 2 TEU.
272. Article 35.1, ESCB Statute. Correspondingly, the ECB has been given an active role before the European jurisdictions (The ECB has the power to sue the Union political institutions for the purpose of protecting its prerogatives (Article 263(3) TFEU). It may start infringement procedures against national central banks for failure to fulfill their obligations (Article 271, letter (d)). It may also refer to the Court a national decision to dismiss the Governor of a NCB (Article 14.2 of the ESCB Protocol). It may apply to the Court for the compulsory retirement of a member of its Executive Board (Article 11.4 of the ESCB Statute)).
273. National courts, whether or not a judicial remedy exists against their decisions under national law, have no jurisdiction to declare that acts of Union institutions are invalid. They have to refer a preliminary question to the ECJ (Foto-Frost). This applies to constitutional courts as well (On the German Constitutional Court, see Wendel, who notes that it would have to refer a preliminary question to Luxemburg, not only under Article 367(3) TFEU, but also according to its own standards) (Wendel, Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012, German Journal, 2013: 21-52, p. 50).
274. Council Regulation No. 2532/97, Article 5 (OJ L 318, 27/11/1998, p. 4).

14.2. Judicial review and monetary policy

14.2.1. In the absence of a strong democratic control over the monetary policy of the ECB, one could expect that jurisdictional control would play an important role as counterbalance, but this has not been the case in practice. In theory there are many cases that might result in legal challenges.[275] In practice, there are very few cases where monetary policy acts of the ECB have been challenged before the Court.[276] There has, however, been a growing number since the beginning of the euro area crisis, mostly related to measures targeted at Member States in financial difficulties. Most of them have been rejected as inadmissible.[277] Some are still pending and we will abstain from commenting on them since they often involve the Commission.[278]

14.2.2. There are a number of reasons that may explain the small number of such cases. *Firstly*, there is a long-standing practice for Institutions and Member States to discuss monetary policy issues behind closed doors and to solve possible divergence of views via informal political channels rather than by going to Court. Yet the United Kingdom has recently started to challenge the validity of a number of ECB's acts, but for specific reasons related in substance to the territorial scope of application of such acts and to their interaction with the single market.[279]

275. For a tentative list of possible challenges against the ECB, see Craig, EMU, the European Central Bank and Judicial Review, in: Beaumont and Walker (eds.), Legal Framework of the Single European Currency, 1999, Hart Publishing, pp. 100-102.
276. We do not discuss staff cases, public procurement cases, access to documents cases and privileges and immunities cases which form the bulk of the cases initiated against the ECB.
277. In Case T-532/11 (confirmed on appeal case C-102/12) the application against temporary monetary policy measures and against the SMP decision was rejected because it was introduced too late. In case T-492/12 the application against the OMT announcement was also rejected as inadmissible.
278. In cases T-224/12 and T-79/13 the applicants seek compensation for the damage alleged to have been suffered as a result of measures related to the Greek debt instruments. In cases T-289/13, T-290/13, T-291/13, T-292/13, T-293/13 and T-294/13 the applicants seek compensation against the ECB and Commission for losses due to the restructuring of the Cypriot banks. In cases T-327/13, T-328/13, T-329/13, T-330/13 and T-331/13 the applicants seek annulment of an alleged 'decision' of the Eurogroup on Cyprus of 25 Mars 2013 while directing their application against the Commission and the ECB.
279. Cases T-496/11, T-45/12 and T-93/13.

14.2.3. Secondly, admissibility issues are very often a formidable obstacle for many direct actions. First, it is difficult for non-privileged applicants to have standing against monetary policy acts. Such acts are in principle not of concern for individuals. The new provision introduced by the Lisbon Treaty in Article 263 TFEU could, however, change the situation. It allows any natural or legal person to institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures. Second, many monetary policy acts are not amenable to review. Only acts that have binding force or produces legal effects are open for review. The limits of judicial review in the sphere of monetary policy are quite apparent when looking at the recent crisis. The most important measure was the announcement of the design of the OMT through a press release. It is unclear wether these is a formal decision behind this policy line.[280] Since the OMT has not been activated so far there is in principle no act to be contested.[281] By its very nature monetary policy is based on communication and such communication is rarely amenable to judicial review ...

14.2.4. Thirdly, individuals do not have full access to ECB acts and their justification. We refer in particular to the ECB's decision concerning public access to documents and archives.[282] While these restrictions appear justified in order to protect the efficiency of monetary policy decisions, it has to be recognized that they negatively affect the possibility of an effective judicial review.

14.2.5. Fourthly, even if Article 130 TFEU could probably not be formally opposed to the Court of Justice in order to reduce the level of judicial control, since that would be contrary to the right to judicial protection as protected by Article 47 of the Charter, the grounds for annulment remain hard to find. Most ECB acts are adopted on the basis of expert economic assessment and involve complex economic determinations. The standard review is less intensive in such cases. Moreover, monetary policy measures entail a large discretionary power and the necessity to balance conflicting policy considera-

280. No formal ECB Governing Board decision was published.

281. See, the action for annulment initiated by Mr Storch and others before the General Court (T-492/12, OJ C 32 from 02.02.2013, p. 18). The case was rejected as inadmissible for other reasons.

282. OJ L 110, 28.4.1999 (see 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, 2000, p. 11).

tions.[283] This discretionary power can be compared with the power of the Commission when assessing the compatibility of State aids with the internal market. According to a constant case-law, such measures will only be quashed by the Court if they are manifestly inappropriate in regard to the objective pursued.[284] This is particularly true for the ECB since its main objective of price stability is hard, if not impossible to judge on. The legality of ECB's acts could also be reviewed on grounds of lack of competence and especially, as put by P. Craig, 'the boundaries between monetary policy and economic policy'. However, as seen above, because of the complexity of the assessment it appears rather unlikely that a judicial body could qualify ECB's acts as being outside its monetary policy mandate. Fundamental rights, like e.g. the right to property, apply to the ECB but, without going as far as some who argue that price stability can be regarded as a value that stands above democracy, 'it is difficult to imagine circumstances in which an individual interest would proportionally outweigh a Community measure claimed to infringe on fundamental rights.'[285] Finally, criteria for non-contractual responsibility are also difficult to fulfil because there will hardly be a clear causal link between the damage and the monetary policy decision.[286] Only infringement of an essential procedural requirement, lack of motivation, or misuse of power could possibly be a cause for annulment. Yet, since the procedural rules regarding the decision-making process of the ECB are quite limited and do not relate in principle to the individual rights of private parties, the scope for judicial review is limited in this respect. As Petch puts it, 'Save in very clear cases, such questions [regarding the role and function of the ECB as a central bank] are not amenable to judicial determination.'[287]

283. Goebel, Court of Justice oversight over the European Central Bank: Delimiting the ECB's constitutional autonomy and independence in the OLAF judgment, Fordham International Law Journal, 2005: 901-945, p. 917.
284. Craig, EMU, the European Central Bank and Judicial Review, in: Beaumont and Walker (eds.), Legal Framework of the Single European Currency, 1999, Hart Publishing, pp. 111-112.
285. 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, 2000, p. 8.
286. Idem, p. 15.
287. Petch, The compatibility of Outright Monetary Transactions with EU law, Law and Financial Markets review, 2013: 13-21, p. 19; 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, 2000, p. 14.

14.2.6. Fifthly, the possible role for national judges is unclear: it seems difficult to frame the course of action at national level in the context of a challenge to a norm made by the ECB.[288] Moreover, the preliminary ruling procedure is probably too slow for disputes linked to monetary policy issues. In any case most provisions in the field of monetary policy probably lack direct effect; they do not confer on interested parties rights which the national courts would be bound to protect.[289]

Limited judicial review is inherent to the nature of monetary policy. The ECB does not stand isolated in this regard. In general, judicial review in relation to a central bank core activity is very unusual.[290]

PS: This report was finalised mid-January 2014. By a decision of 14 January 2014, released on 7 February 2014, the German Constitutional Court referred several questions to the EU Court of Justice for a preliminary ruling. The subject of the questions is in particular whether the 'OMT Decision' of the ECB is compatible with the primary law of the EU, i.e. the mandate of the ECB and the prohibition of monetary financing. These issues are discussed under Questions 11 and 14 of this report. The debate has now moved from academic circles to an unprecedented jurisdictional dialogue.

Brussels, 17 February 2014

288. Craig, EMU, the European Central Bank and Judicial Review, in: Beaumont and Walker (eds.), Legal Framework of the Single European Currency, 1999, Hart Publishing, pp. 109-110.
289. See Case 9-73, Schlüter v Hauptzollamt Lorrach, [1973] ECR 1135, where the Court found that Article 107 EEC concerning the exchange-rate policy of the Member States (now Article 142 TFEU) allowed Member States such freedom of decision that the obligation it contained could not confer rights on interested parties. The same is probably true today for the monetary policy decisions of the ECB concerning the euro area.
290. 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, 2000, p. 14.

National reports

AUSTRIA

Alina Lengauer[1]

Wirtschaftspolitik

EU-Rechtsordnung

Frage 1

Die vorliegende Frage, nämlich ob und in welchem Ausmaß primäres Unionsrecht die Annahme von Instrumenten erlaube, auf die man sich als Reaktion auf die Finanz- und Wirtschaftskrise geeinigt habe, kann an dieser Stelle bereits auf Grund beschränkten Platzes kaum umfassend beantwortet werden; aus diesem Grunde muss die vorliegende Stellungnahme auf jene Punkte be- und eingeschränkt werden, die als Kernpunkte allfälliger Kompetenzprobleme eingestuft werden können.

Zunächst ist an dieser Stelle der Frage nach der Definition der ausschließlichen Kompetenzmaterie »Währungspolitik für die Mitgliedstaaten, deren Währung der Euro ist« gemäß Art. 3 Abs. 1 lit. c AEUV nachzugehen. Diese Frage soll in unmittelbarem Zusammenhang mit der Rechtmäßigkeit des Beschlusses 2011/199/EU analysiert werden.

Mit dem Beschluss 2011/199/EU beschließt der Europäische Rat, Art. 136 AEUV eine zusätzliche Bestimmung über die Einrichtung eines dauernden Stabilitätsmechanismus anzufügen; der Stabilitätsmechanismus ist dann zu aktivieren, wenn dies für die Stabilität des Euro-Währungsgebiets unabdingbar ist.[2] Dieser Beschluss ergeht im vereinfachten Änderungsverfahren gemäß Art. 48 Abs. 6 EUV.

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1. Ao. Univ.-Prof. Dr. Alina-Maria Lengauer, LL.M. (Bruges), Institut für Europarecht, Internationales Recht und Rechtsvergleichung, Rechtswissenschaftliche Fakultät, Universität Wien; dieser beitrag gründet auf die Rechtslage zum 1.8.2013
2. Art. 136 Abs. 3 AEUV (neu) lautet nun wie folgt: »Die Mitgliedstaaten, deren Währung der Euro ist, können einen Stabilitätsmechanismus einrichten, der aktiviert wird, wenn dies unabdingbar ist, um die Stabilität des Euro-Währungsgebiets insgesamt zu

In der Rechtssache *Thomas Pringle*[3] wird der EuGH mit der Frage befasst, ob die Mitgliedstaaten mit dem genannten Beschluss nicht etwa in die ausschließliche Kompetenzmaterie »Währungspolitik« der Union nach Art. 3 AEUV eingreifen würden. In diesem Urteil hält der EuGH zunächst fest, dass EUV und AEUV keine Definition der Materie »Währungspolitik« enthalten, sondern bloß (allenfalls) eine Aufzählung ihrer Instrumente; dieser Befund wird in gleicher Weise in der Literatur abgebildet, da nach mancher Ansicht die in den Art. 127 ff. AEUV enthaltenen Instrumente enumerativ die Kompetenzmaterie Währungspolitik ergeben sollen,[4] nach anderer Ansicht die in Art. 127 ff. AEUV enthaltenen Instrumente wiederum bloß die grundlegenden Aufgaben der Währungspolitik erfassen würden.[5]

Offenbar vermeidet der Gerichtshof eine Definition der Materie »Währungspolitik«. Der enge Zusammenhang zwischen den Bestimmungen des AEUV über Wirtschaftspolitik und die Ziele des Beschlusses 2011/199/EU würden es nach Ansicht des Gerichtshofes jedoch rechtfertigen, dass sowohl der Beschluss 2011/199/EU als auch der ESM-Vertrag selbst der Kompetenzmaterie »Wirtschaftspolitik« zugeordnet werden. Da es sich hierbei bloß um eine koordinierende Kompetenz der Union handelt, steht den Mitgliedstaaten Abschluss und Ratifikation des ESM-Vertrages offen.

Die in der Rechtssache *Thomas Pringle* gegebene Auslegung der Kompetenzmaterie »Währungspolitik» kann, wie oben argumentiert, nicht als Definition des Kompetenztatbestandes aufgefasst werden; noch spricht der EuGH darüber ab, ob die Art. 127 ff. bloß grundlegende Aufgaben der Währungspolitik umfassen,[6] oder aber taxativ zu begreifen sind.

Mit der Zuordnung des Beschlusses 2011/199/EU und dem ESM zu der Kompetenzmaterie »Wirtschaftspolitik« wird zugleich implizit die der Union

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wahren. Die Gewährung aller erforderlichen Finanzhilfen im Rahmen des Mechanismus wird strengen Auflagen unterliegen«.

3. EuGH Rs. C-370/12 Thomas Pringle gegen Government of Ireland, Ireland und The Attorney General, Urteil des EuGH (Plenum) vom 27.11.2012, noch nicht in amtl. Slg. veröffentlicht (zitiert im Folgenden: *Thomas Pringle*).
4. *Pelka*, Kommentar zu Art. 3 AEUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.), EU-Kommentar, 3. Aufl. (2012), 406 Rz. 11.
5. *Nettesheim*, Kommentar zu Art. 3 AEUV, in *Grabitz/Hilf/Nettesheim* (Hg.), Das Recht der Europäischen Union (2012), Rz. 16.
6. Oder aber grundlegende Aufgaben des Europäischen Systems der Zentralbanken (ESZB), die nach der hier vertretenen Ansicht als der Kompetenzmaterie »Währungspolitik« deckungsgleich verstanden werden; vgl. *Nettesheim*, Kommentar zu Art. 3 AEUV, in *Grabitz/Hilf/Nettesheim* (Hg.), Das Recht der Europäischen Union (2012), Rz. 16.

nach Art. 3 AEUV zustehende ausschließliche Kompetenzmaterie »Währungspolitik« eng ausgelegt; im Gegensatz hierzu wird die Kompetenzmaterie »Wirtschaftspolitik«, welche gemäß Art. 5 Abs. 1 AEUV als koordinierende Unionszuständigkeit aufzufassen ist, weit ausgelegt. Dies mag außerrechtlichen Erwägungen geschuldet sein, doch könnten sich die Auswirkungen dieser Positionierung sowohl in Bezug auf das nachgerade Fehlen einer Definition der Kompetenzmaterie »Währungspolitik« als auch in Bezug auf deren enge Auslegung für die Zukunft der Union als überaus problematisch erweisen.

Art. 125 AEUV sieht vor, dass weder Union noch Mitgliedstaaten für die Verbindlichkeiten eines anderen Mitgliedstaates oder dessen Untergliederungen haften; Art. 122 Abs. 2 AEUV sieht vor, dass bei Heimsuchung durch Naturkatastrophen oder außergewöhnliche Ereignisse einem betroffenen Mitgliedstaat finanzieller Beistand gewährt werden kann.

Im Rahmen einer kontextuellen Analyse stellt *Calliess* nach der hier vertretenen Ansicht zutreffend fest, dass bei der Konzeption der Währungsunion mit der sog. no bail out-Klausel im Kern auf die Korrektivkraft der Märkte zur Sicherung der Haushaltsdisziplin gesetzt wurde; dass letztlich die Finanzmärkte gerade auf ein bail out von in ökonomische Schwierigkeiten geratenen Staaten gesetzt haben und diese Wette auch gewonnen haben – daher handele es sich bei Art. 125 AEUV um einen bereits ursprünglich angelegten Konstruktionsfehler der WWU.[7]

Dieser Ansicht ist zuzustimmen, da historisch bis zu dem gegenwärtigen Zeitpunkt die Korrektivkraft des Marktes jedenfalls in einer gravierenden Krise stets staatlicher oder quasi-staatlicher Intervention bedurfte, um ihre ursprüngliche Aufgabe (erneut) wahrnehmen zu können.

Dieser Konstruktionsfehler wird daher durch die strikte Auslegung des Art. 125 AEUV durch manche Autoren sogar noch verschärft.[8] Folgte man diesen Auffassungen, wäre jede Haftung und freiwillige Gewährung von Darlehen durch Union oder Mitgliedstaaten an einen anderen Mitgliedstaat unzulässig sowie rechtswidrig.

7. *Calliess*, Der ESM zwischen Luxemburg und Karlsruhe – Die Krise der Währungsunion als Bewährungsprobe der Rechtsgemeinschaft, NVwZ 2013, 97.
8. *Hattenberger*, Kommentar zu Art. 125 AEUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.), EU-Kommentar, 3. Aufl. (2012), 406 Rz. 3; nach dieser Ansicht soll sowohl die Haftung als auch ein (wie immer geartetes) Eintreten der Union oder der Mitgliedstaaten für Verbindlichkeiten eines anderen Mitgliedstaates verboten sein; vgl. auch *Obwexer*, Das ESM-Urteil des EuGH, ecolex 2013, 87.

Nach anderer Ansicht jedoch ist Beistand zwischen Mitgliedstaaten und Union, insbesondere durch die Gewährung freiwilliger Darlehen, auf Basis des Grundsatzes der Solidarität zwischen den Mitgliedstaaten und der Union, der in Art. 4 Abs. 3 EUV Verankerung findet, und Anwendung allgemeiner Auslegungsregeln als rechtlich unbedenklich einzustufen.[9]

Der Gerichtshof schließt sich in seinem Urteil in der Rechtssache *Thomas Pringle* der zuletzt angeführten Ansicht an, der an dieser Stelle beigepflichtet wird: Ziel und Zweck der Bestimmung des Art. 125 AEUV seien zwar, die Mitgliedstaaten zu solider Haushaltspolitik anzuhalten; die freiwillige Gewährung eines Darlehens oder der Ankauf von Staatsanleihen seien jedoch nicht als »Haftung für die Schuld« eines anderen Mitgliedstaates aufzufassen. Die gegenteilige Ansicht, so *Generalanwältin Kokott*, würde bedeuten, dass die Mitgliedstaaten der Union und diese selbst an Drittstaaten Darlehen gewähren könnten, nicht jedoch an Mitgliedstaaten der Union – dies nämlich auch dann nicht, wenn etwa ein drohender Staatsbankrott eine massive Gefährdung der Volkswirtschaft des potentiell gewährenden Mitgliedstaates nach sich ziehen würde.[10]

Der vom Gerichtshof niedergelegten und von *Generalanwältin Kokott* vorgeschlagenen Auslegung von Art. 125 AEUV ist nach der hier vertretenen Ansicht zuzustimmen: Bereits ein Vergleich relevanter Sprachfassungen lässt vermuten, dass mit der Wortfolge »haftet nicht« eine automatische Haftung im Sinne einer Solidarhaftung ausgeschlossen werden soll; systematische und teleologische Auslegung bekräftigen das so gewonnene Ergebnis.

Eine systematische Auslegung unter Heranziehung von Art. 122-124 AEUV sowie, weiterführend, des in Art. 4 Abs. 3 EUV verankerten Prinzips der Solidarität vermögen nicht den Ausschluss der freiwilligen Vergabe von Darlehen der Mitgliedstaaten und der Union untereinander in rechtlich tragfähiger Weise zu rechtfertigen. Ob eine solche Gewährung von Darlehen bilateral oder aber im Wege einer Internationalen Organisation wie des ESM erfolgt, ist nach der hier vertretenen Ansicht nicht von Relevanz.

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9. *Bandilla*, Kommentar zu Art. 125 AEUV, in *Grabitz/Hilf/Nettesheim* (Hg.), Das Recht der Europäischen Union (2012), Rz. 24; *Calliess*, Der ESM zwischen Luxemburg und Karlsruhe – Die Krise der Währungsunion als Bewährungsprobe der Rechtsgemeinschaft, NVwZ 2013, 97 (101); zum Meinungsstand zur Auslegung von Art. 125 AEUV vgl. *Herrmann*, Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts, EuZW 2012, 805 (807).
10. Stellungnahme von GA *Kokott* vom 26.10.2012, EuGH Rs. C-370/12 Thomas Pringle gegen Government of Ireland, Ireland und The Attorney General, noch nicht in amtl. Slg. veröffentlicht, Rz. 132 ff.

Frage 2

Die Beantwortung der vorliegenden Frage kann – jedenfalls zum Teil – den vorstehenden Ausführungen entnommen werden; auch an dieser Stelle soll die geradezu notwendige Konzentration auf jene Kernpunkte der Fragestellung betont werden, die bedeutendere konstitutionelle Auswirkungen nach sich ziehen.

In seinem Urteil in der Rechtssache *Thomas Pringle* erklärt der EuGH sowohl den Beschluss 2011/199/EU für rechtmäßig als auch die Ratifikation des ESM-Vertrages unter Bezug auf Unionsrecht für zulässig.[11] Das Urteil des EuGH in dieser Rechtssache geht jedoch über eine bloße Rechtmäßigkeitsprüfung hinaus und determiniert zusätzlich die Wirtschafts- und Währungsunion anhand bestehender und weiterentwickelter Grundsätze der Rechtsordnung der Union.[12]

Nach Ansicht des EuGH beinhaltet bereits der letzte Satz des Art. 48 Abs. 6 EUV einen Verweis auf die kompetenzrechtlichen Bestimmungen der Verträge,[13] so dass diese Bestimmung gemeinsam mit Art. 19 Abs. 1 EUV eine umfassende Prüfungsbefugnis des Gerichtshofes begründet.

Zunächst fällt an der oben skizzierten Argumentation auf, dass der Gerichtshof die Frage der Prüfungskompetenz an einem formalen Kriterium, nämlich der Erzeugung des angefochtenen Beschlusses durch den Europäischen Rat sowie dessen nach Art. 13 EUV bestehender Organeigenschaft festmacht. Erwägungen, ob denn der angefochtene Beschluss nun der Kategorie Primärrecht (für den EuGH nicht überprüfbar) oder aber der Kategorie Sekundärrecht (für den EuGH überprüfbar) zuzuordnen sei, finden sich in dem Urteil *Thomas Pringle* nicht.

Die Stellungnahme von *Generalanwältin Kokott* enthält hingegen einen Hinweis auf die dahinter verborgene Problematik: Diese erörtert die in Art. 48 Abs. 6 letzter Satz EUV vorgesehenen Grenzen des vereinfachten Änderungsverfahrens, um sodann auf diese Erfordernisse gestützt »eine gewisse

11. EuGH Rs. C-370/12 Thomas Pringle gegen Government of Ireland, Ireland und The Attorney General, Urteil des EuGH vom 27.11.2012, noch nicht in amtl. Slg. veröffentlicht.
12. *Calliess*, Der ESM zwischen Luxemburg und Karlsruhe, NVwZ 2013, 97 (103).
13. Art. 48 Abs. 6 letzter Satz EUV sieht vor: »Der Beschluss nach Unterabsatz 2 darf nicht zu einer Ausdehnung der der Union im Rahmen der Verträge übertragenen Zuständigkeiten führen.«

Hierarchisierung des Primärrechts« festzustellen,[14] die eine Erhöhung der »rechtstechnischen Komplexität des Unionsrechts« zur Folge habe. *Generalanwältin Kokott* ist gemäß hier vertretener Ansicht sowohl hinsichtlich Befund als auch hinsichtlich Wortwahl zuzustimmen.

Komplex ist auch die Frage der Zuordnung des Beschlusses 2011/199/EU jedenfalls: Bisweilen werden in der Lehre Beschlüsse des Europäischen Rates gemäß Art. 48 EUV im Gesamten dem Primärrecht der Union zugeordnet. Daher sei dem EuGH bloß eine Überprüfung der Einhaltung der vorgesehenen Verfahrensregeln zuzusprechen.[15] Konsequent gedacht hieße dies aber, dass der EuGH jedenfalls berufen sei, über das ordnungsgemäße Zustandekommen von Primärrecht zu entscheiden.

Würden die Verfahrensregeln des Art. 48 Abs. 6 EUV korrekt eingehalten, so wäre Art. 48 Abs. 6 letzter Satz gegenstandslos, da ja nach dieser Auffassung eine materielle Prüfungsbefugnis des EuGH gerade nicht zulässig sei. Dies könnte zu dem Ergebnis führen, dass bei Einhaltung der vorgesehenen Verfahrensregeln ein Beschluss nach Art. 48 Abs. 6 materiell durchaus zu einer Ausdehnung der Zuständigkeiten der Union führen könnte.

Oder aber die Bestimmung des Art. 48 Abs. 6 EUV ist für sich im Gesamten gegenstandslos, da nach dieser Ansicht auf Grundlage von Art. 48 Abs. 6 keine Rechtsakte des Sekundärrechts erlassen werden können[16] – an bloß die Kompetenzbestimmungen des EUV und des AEUV präzisierende Beschlüsse wird hier nicht gedacht.

Nach der hier vertretenen Ansicht bedarf es einer differenzierten Betrachtungsweise:

Drei Elemente sind hierbei anfangs heranzuziehen, zuerst die von *Generalanwältin Kokott* festgestellte »Hierarchisierung des Primärrechts«, eine allfällige Präzisierung der durch den Gerichtshof überprüfbaren Kategorie von Primärrecht und jener, die gerade nicht überprüfbar ist, soll angedacht werden. Weiters ist eine systematische Auslegung des Art. 48 Abs. 6 EUV vorzunehmen, die sämtlichen Bestandteilen dieser Norm einen eigenständigen Bedeutungsinhalt belässt; in der Folge soll der Auffassung des Gerichts-

14. Stellungnahme von GA *Kokott* vom 26.10.2012, EuGH Rs. C-370/12 Thomas Pringle gegen Government of Ireland, Ireland und The Attorney General, noch nicht in amtl. Slg. veröffentlicht, Rz. 60.
15. *Ohler*, Kommentar zu Art. 48 EUV, in *Grabitz/Hilf/Nettesheim* (Hg.), Das Recht der Europäischen Union (2012), Rz. 27; *Herrnfeld*, Kommentar zu Art. 48 EUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.), EU-Kommentar, 3. Aufl. (2012), Rz. 10 (374).
16. *Ohler*, Kommentar zu Art. 48 EUV, in *Grabitz/Hilf/Nettesheim* (Hg.), Das Recht der Europäischen Union (2012), Rz. 44.

hofes in Bezug auf seine inhaltlich unbeschränkte Prüfungsbefugnis zugestimmt werden, und der mögliche Anwendungsbereich von Beschlüssen nach Art. 48 Abs. 6 EUV (der Dritte Teil des AEUV über die internen Politikbereiche der Union) von der Prüfungskompetenz des EuGH getrennt gedacht werden.

Die Frage nach der *Hierarchisierung unionsrechtlichen Primärrechts* ist nicht neu[17] und kann an dieser Stelle bloß skizzenhaft erörtert werden. Bevor jedoch bereits vorhandene Rechtsprechung des EuGH und Äußerungen der Lehre erörtert werden, ist die Definition von »Primärrecht« zu präzisieren: Unter die Kategorie »Primärrecht« fällt nach überwiegender Ansicht »das unmittelbar von den Mitgliedstaaten geschaffene Recht«.[18] Folglich fallen in diese Kategorie auch Änderungen und Ergänzungen der Verträge, sowie Beitrittsverträge.[19]

Daher ordnet das Unterscheidungsmerkmal »Erzeugung durch die Mitgliedstaaten« einen Rechtsakt der Kategorie Primärrecht zu; Sekundärrecht wird wiederum durch die Organe der Union erzeugt, der Rechtserzeugungszusammenhang des Sekundärrechts unterscheidet sich von jenem des Primärrechts.

An dieser Stelle tun sich zwei denkbare Argumentationsketten auf: Die erste Argumentationskette würde entsprechend der oben referierten Ansicht den Beschluss des Rates 2011/199/EU dem Sekundärrecht zuordnen, da dieser zweifellos von dem Europäischen Rat als Organ der Union erzeugt wurde; der Inhalt dieses Beschlusses ist jedoch als Primärrecht zu qualifizieren, da zweifellos als Änderung der Verträge zu begreifen. Diese Auffassung entspricht in der Struktur der Argumentation über die Zuordnung »uneigentlicher Ratsbeschlüsse« zu Sekundärrecht.

Dieser Auffassung kann aus den ebenso oben dargelegten Gründen nicht gefolgt werden. An dieser Stelle soll eine deutliche Differenzierung zwischen Prüfungskompetenz des EuGH und der Erfassung der Kategorie »Primär-

17. In Zusammenhang mit dem Verfassungsvertrag weiterführend: *von Arnauld*, Normhierarchien innerhalb des primären Gemeinschaftsrechts – Gedanken im Prozess der Konstitutionalisierung Europas, EuR 2003, 191; *Puttler*, Sind die Mitgliedstaaten noch »Herren« der EU? – Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz, EuR 2004, 669; *Nettesheim*, Normhierarchien im EU-Recht, EuR 2006, 737.
18. Vgl. statt vieler *Borchardt*, Die rechtlichen Grundlagen der Europäischen Union, 5. Aufl. (2012), 73 Rz. 82.
19. So qualifiziert *Borchardt* ausdrücklich Änderungen der Verträge nach Art. 48 EUV als zu Primärrecht gehörend, vgl. *Borchardt*, Die rechtlichen Grundlagen der Europäischen Union, 5. Aufl. (2012), 73 Rz. 82.

recht» der nun folgenden Argumentation zugrunde gelegt werden. Es soll daher postuliert werden, dass – wie bereits bei der Kategorie der allgemeinen Rechtsgrundsätze – die Prüfungsbefugnis des EuGH bloß »die Verträge« nicht umfasst.

Zunächst ist festzuhalten, dass sich Ansätze zu einer Hierarchisierung des Primärrechts[20] bereits in der Rechtssache *Defrenne II*[21] und in dem Gutachten des EuGH 1/91 (im Folgenden: Gutachten des EuGH EWR I)[22] finden.

In der Rechtssache *Defrenne II* betont der Gerichtshof die Bedeutung des Grundsatzes des gleichen Entgelts für Männer und Frauen für die Rechtsordnung des Europarechts; die argumentative Verstärkung dieses Grundsatzes erfolgt unter Hinweis auf die tragende Bedeutung der Grundsätze des Unionsrechts als dessen grundlegende Bestimmungen.[23] Der Hinweis des Gerichtshofes auf grundlegende Bestimmungen des Unionsrechts – oder auf dessen Grundsätze – kennzeichnet nach der hier vertretenen Ansicht zwar deren besondere Bedeutung, inkludiert jedoch nicht eine Prüfungskompetenz des Gerichtshofes nach Art. 267 AEUV auf deren Gültigkeit hin.

Die Stellungnahme des EuGH in dem Gutachten EWR I fügt einen weiteren Grundsatz der Unionsrechtsordnung hinzu: In diesem Gutachten ist der EuGH aufgerufen, über die Vereinbarkeit des zu jenem Zeitpunkt geplanten EWR-Übereinkommens und dessen Rechtsschutzsystem mit dem Rechtsschutzsystem der Union abzusprechen. Das zu jenem Zeitpunkt gewählte Abschlussverfahren ist jenes des Art. 238 EGV, der den Abschluss internationaler Abkommen zwischen Gemeinschaft und Drittstaaten vorsah und ermöglichte.[24] Zwar entstammt die hier aufgeworfene Rechtsfrage einer mit der Frage nach der Gültigkeit des Beschlusses 2011/199/EU nicht vergleichbaren

20. Für die Ansatzpunkte Gutachten EWR I sowie Prinzipien des Gemeinschaftsrechts: *Heintzen*, Hierarchisierungsprozesse innerhalb des Primärrechts der Europäischen Gemeinschaft, EuR 1994, 35 (37); *Herdegen*, Vertragliche Eingriffe in das Verfassungssystem der Europäischen Union, in *Due/Lutter/Schwarze* (Hg.), Festschrift für Ulrich Everling, Band I (1995), 447 (449).
21. EuGH Rs. 43/75 Gabrielle Defrenne gegen SABENA, Slg. 1976, 455.
22. EuGH Gutachten 1/91, erstattet auf der Grundlage von Artikel 228 Abs. 1 Unterabsatz 2 EWG-Vertrag, Slg. 1991, I-6079.
23. EuGH Rs. 43/75 Gabrielle Defrenne gegen SABENA, Slg. 1976, 455, Rz. 28/29: »[...] denn dieser Ausdruck dient nach dem Sprachgebrauch des Vertrages eben gerade dazu, bestimmte Vorschriften als grundlegende Bestimmungen zu kennzeichnen [...]«.
24. Art. 238 EGV: »Die Gemeinschaft kann mit einem oder mehreren Staaten oder einer oder mehrerer internationaler Organisationen Abkommen schließen, die eine Assoziierung mit gegenseitigen Rechten und Pflichten, gemeinsamem Vorgehen und besonderen Verfahren herstellen«.

Rechtsgrundlage, die Aussage des EuGH schließt jedoch an jene an, die dieser bereits in *Defrenne II* getätigt hatte: »Artikel 238 bietet jedoch keine Grundlage für die Errichtung eines Gerichtssystems, das Artikel 164 EWG-Vertrag und allgemeiner die Grundlagen der Gemeinschaft selbst beeinträchtigt.«[25]

Aus dem Vorstehenden kann daher gefolgert werden, dass bereits das bislang in Geltung stehende System des Unionsrechts eine Hierarchisierung des Primärrechts zwischen Grundlagen der Unionsrechtsordnung und einfachem Vertragsrecht beinhaltet; durch die in dem Urteil *Thomas Pringle* getroffenen Aussagen wird das bisherige zweigliedrige Konzept durch ein dreigliedriges ersetzt: Nun kann unter einfaches Vertragsrecht – die Ansiedelung unter einfaches Vertragsrecht würde sich aus dem Rechtserzeugungszusammenhang ergeben – in vereinfachtem Änderungsverfahren nach Art. 48 Abs. 6 EUV angenommenes Vertragsrecht gedacht werden.

Über dieses materiell eingeschränkt zu erlassende Vertragsrecht, das gemäß Art. 48 Abs. 6 EUV nur mit Bezug auf den Dritten Teil des AEUV erlassen werden kann, besteht uneingeschränkte Prüfungsbefugnis des EuGH. Unterstützend kann vorgebracht werden, dass die Verträge selbst in Art. 48 Abs. 6 EUV die umfassende Prüfungskompetenz des EuGH über im vereinfachten Änderungsverfahren vorsehen: Ansonsten wäre es auch nicht möglich, eine allfällige Kompetenzüberschreitung nach Art. 48 Abs. 6 letzter Satz EUV festzustellen. Schließlich soll in diesem Zusammenhang auf die dem Gerichtshof aufgrund von Art. 19 EUV zustehende umfassende Prüfungskompetenz verwiesen werden.

Zusätzlich zu der hier angesprochenen Gemengelage im Bereich Europäisches Verfassungsrechts findet sich nach der hier vertretenen Ansicht eine freilich anders gelagerte Gemengelage zwischen dem rechtlich in Art. 4 Abs. 2 lit. a und Art. 26 Abs. 2 AEUV normierten Begriff des Binnenmarktes und dem nach der hier vertretenen Ansicht politikwissenschaftlich determinierten Begiff des »Konzepts des Binnenmarktes«. Der Begriff des Binnenmarktes in Art. 26 Abs. 2 AEUV definiert diesen als einen Raum ohne Binnengrenzen, in dem der freie Verkehr von Waren, Personen, Dienstleistungen und Kapital gemäß den Bestimmungen der Verträge gewährleistet ist; dieser Begriff schließt in rechtlicher Betrachtung gemäß systematischer Auslegung die »Währungspolitik für die Mitgliedstaaten, deren Währung der Euro ist« be-

25. EuGH Gutachten 1/91, erstattet auf der Grundlage von Artikel 228 Abs. 1 Unterabsatz 2 EWG-Vertrag, Slg. 1991, I-6079, Rz. 71; zustimmend *Herdegen*, Vertragliche Eingriffe in das Verfassungssystem der Europäischen Union, in *Due/Lutter/ Schwarze* (Hg.), Festschrift für Ulrich Everling, Band I (1995), 447 (453).

reits aus, da letztere dem Bereich der ausschließlichen Kompetenzen der Union zuzuordnen ist, der Kompetenztatbestand der Regulierung des Binnenmarktes jedoch gemäß Art. 4 AEUV dem Bereich geteilter Zuständigkeiten zuzuordnen ist.

In umfassender Betrachtung jedoch kann es sich zweifellos als problematisch erweisen, den Kompetenztatbestand der Währungspolitik – wie oben bereits dargelegt – eng auszulegen und in diesem Zusammenhang einen durchaus denkbaren Brückenschlag zwischen den Kompetenzmaterien Währungspolitik und Binnenmarkt zu dem gegenwärtigen Zeitpunkt nicht anzusprechen.

Frage 3 und Frage 4

Die in Fragen 3 und 4 aufgeworfenen Problemkreise weisen unmittelbaren thematischen Zusammenhang auf und rechtfertigen daher den Versuch, den Problemkreis der Schaffung einer »vollständigen steuerlichen, wirtschaftlichen und politischen Union« mit jenem nach demokratischer Legitimation und Rückkoppelung unionaler Entscheidungen an mitgliedstaatliche Strukturen zu verknüpfen; für eine Beantwortung sollen folgende Passagen aus der Mitteilung der Kommission »Ein Konzept für eine vertiefte und echte Wirtschafts- und Währungsunion«[26] herausgegriffen werden:

»Schließlich sollte langfristig (in mehr als fünf Jahren), durch schrittweise Zusammenführung von Hoheitsrechten und damit Verantwortung sowie Solidaritätsbefugnissen auf europäischer Ebene, die Schaffung eines autonomen Haushalts des Euro-Währungsgebiets möglich werden, der eine Fiskalkapazität für die WWU schafft, die so die Mitgliedstaaten bei der Bewältigung von Krisen unterstützen kann. Auch könnte ein stärker integrierter wirtschafts- und fiskalpolitischer Rahmen eine gemeinsame Ausgabe von Staatsanleihen ermöglichen, was die Funktion der Märkte und die Umsetzung geldpolitischer Maßnahmen verbessern würde.
[...]
Diese progressive weitere Integration des Euro-Währungsgebiets zu einer umfassenden Banken-, Fiskal- und Wirtschaftsunion wird parallele Schritte zu einer politischen Union mit verstärkter demokratischer Legitimation und Rechenschaftspflicht erfordern.«

Einleitend ist festzuhalten, dass makroökonomische Ungleichgewichte zwischen den Mitgliedstaaten strukturelle Motive aufweisen; deren Abmilderung

26. Mitteilung der Kommission, Ein Konzept für eine vertiefte und echte Wirtschafts- und Währungsunion. Auftakt für eine europäische Diskussion, KOM/2012/777 endg.

oder sogar Beseitigung erscheint als Aufgabe europäischer *governance*. Nahezu sämtliche in der Mitteilung der Kommission vorgeschlagenen Ziele erfordern eine Änderung des geltenden Primärrechts der Europäischen Union: So kann etwa nach der hier vertretenen Ansicht die zentralisierte Ausgabe von Schuldverschreibungen im Euro-Währungsgebiet als Begleiterscheinung oder aber als notwendige Konsequenz aus einer Fiskalunion verstanden werden.[27]

Während an dieser Stelle eine Parallele zur Verfassungsgenese in den Vereinigten Staaten von Amerika und der dortorts ab 1785 geführten Debatte[28] zur der verfassungsrechtlichen Entwicklung in der Europäischen Union nicht ohne Weiteres gesehen werden kann, soll an dieser Stelle betont werden, dass eine Föderalisierung bestehender oder neu aufzunehmender Staatsschulden nicht ohne eine tragfähige verfassungsrechtliche Struktur der Union denkbar erscheint.

Eine solche muss und soll *demokratische Legitimierung* aufweisen: Die Verfassungsordnung der EU ist als »Mehrebenensystem« zu betrachten, in dem die Bürger der Union auf die Entscheidungsprozesse der EU sowohl durch die jeweiligen parlamentarischen Vertretungen in den Mitgliedstaaten Einfluss nehmen können, als auch durch Instrumente direkter Demokratie, wie etwa jenem der Direktwahl des Europäischen Parlaments (EP) oder jenem der europäischen Bürgerinitiative.

Das in Art. 10 EUV gedachte Legitimationsmodell sieht zwei demokratische Legitimationsstränge vor: Während der erste und unmittelbare Legitimationsstrang Entscheidungsprozesse demokratisch verankern soll, indem die Mitglieder des EP unmittelbar von den Unionsbürgern gewählt werden,[29] knüpft der zweite und mittelbare Legitimationsstrang an die Vertretung der Mitgliedstaaten im Europäischen Rat und im Rat der Europäischen Union an. Die Mitglieder des Europäischen Rates bzw. des Rates der EU müssen wiederum ihren nationalen Parlamenten unmittelbar Rechenschaft ablegen.[30]

Das anzudenkende System demokratischer Legitimation ist entsprechend den oben angeführten Legitimationssträngen anzudenken; der Beschluss des EP zu dem Abschluss einer interinstitutionellen Vereinbarung zwischen EP

27. Vgl. hierzu *Loubert*, Sovereign Debt Threatens the Union: The Genesis of a Federation, European Constitutional Law Review 2012, 442.
28. Mit ausführlicher Darstellung *Loubert*, Sovereign Debt Threatens the Union: The Genesis of a Federation, European Constitutional Law Review 2012, 442(447 ff).
29. So lautet Art. 10 Abs. 2 EUV Satz 1: »Die Bürgerinnen und Bürger sind auf Unionsebene unmittelbar im Europäischen Parlament vertreten.«
30. Art. 10 Abs. 2 Satz 2 EUV.

und der Europäischen Zentralbank (EZB) über die praktischen Modalitäten für die Erfüllung der demokratischen Rechenschaftspflicht[31] legt den Schluss nahe, dass die Organe der Union das oben angesprochene Problem jedenfalls einer weitergehenden Behandlung zuführen möchten. Die zwischen EP und EZB abgeschlossene interinstitutionelle Vereinbarung sieht zum einen die organisatorische Trennung zwischen jenem Personal der EZB, das an der Wahrnehmung der Aufsichtsaufgaben der EZB beteiligt ist, von jenem Personal vor, das an der Wahrnehmung von geldpolitischen Aufgaben beteiligt ist, vor. Für den Bereich der Wahrnehmung von Aufsichtsaufgaben erhält das EP Mitwirkungsrechte an der Bestellung leitender Personen sowie weitgehende Informationsrechte.

Auf Grundlage der oben dargelegten und in der Systematik von EUV und AEUV angelegten doppelten demokratischen Legitimation unionsrechtlicher Entscheidungsfindung soll jedoch vorgeschlagen werden, sowohl die Wahrnehmung aufsichtsrechtlicher als auch die Wahrnehmung geldpolitischer Befugnisse durch die EZB in dieses System einzufügen.

Eine Kontrolle und, in Ausnahmefällen, eine Revision von Rechtsakten der EZB durch den Rat der Union gemeinsam mit dem EP im Rahmen des Verfahrens der Mitentscheidung soll *de lege ferenda* vom Standpunkt demokratischer Legitimation ermöglicht werden.[32] Um andererseits jedoch der (als notwendig) gedachten Unabhängigkeit der Geldpolitik der EZB und des ESZB Raum zu belassen, erscheint es sinnvoll, ein entsprechend erhöhtes Zustimmungsquorum als *lex specialis* zu normieren.

Schließlich wäre die Vorgabe von Leitlinien durch die Parlamente der Mitgliedstaaten ergänzend zu solchen des EP für die Wahrnehmung der Geldpolitik durch die EZB anzudenken.

31. Beschluss des Europäischen Parlaments vom 9.10.2013 zu dem Abschluss einer interinstitutionellen Vereinbarung zwischen dem Europäischen Parlament und der Europäischen Zentralbank über die praktischen Modalitäten für die Erfüllung der demokratischen Rechenschaftspflicht und die Aufsicht über die Wahrnehmung der der EZB im Rahmen des einheitlichen Aufsichtsmechanismus übertragenen Aufgaben, 2013/2198 (ACI).

32. In diesem Sinne bereits *Frank/Lengauer*, Notenbankunabhängigkeit auf europäischer und staatlicher Ebene im Spannungsfeld zwischen europäischem und staatlichem Verfassungsrecht, in *Demel* u.a. (Hg.), Funktionen und Kontrolle der Gewalten (2001), 247 (302).

Frage 5

Mit der Errichtung einer europäischen »Bankenunion« soll in der Union eine gemeinsame Bankenaufsichtsbehörde, ein einheitliches Bankenaufsichtsrecht, jedoch auch und zusätzlich eine einheitliche oder jedenfalls innerhalb einer Bandbreite festgelegte Einlagensicherung sowie ein einheitliches Bankenrestrukturierungsrecht normiert werden.[33]

Zwar soll eine einheitliche Bankenaufsicht mit Beginn des Jahres 2014 operationell tätig sein können, im Rahmen der hier vertretenen Ansicht bedarf es jedoch umgehend der Schaffung eines materiell einheitlichen Bankenrestrukturierungsrechts, um öffentliche Budgets von etwaigen in Zukunft anfallenden Notwendigkeiten der Rekapitalisierung von Kreditinstituten zu schützen.

Weiters erscheint es dringlich, gemeinsame Standards für eine europäische Einlagensicherung vorzusehen; in welchem Ausmaße dies jedoch praktikabel sein kann, soll an dieser Stelle nicht ausgesagt werden, da die von den Kreditinstituten der Mitgliedstaaten eingegangenen Risiken stark unterschiedlich sind und obendrein bereits die als Grundlage anzusehenden Geschäftsmodelle der einzubeziehenden Kreditinstitute divergieren.

Schließlich müssten im Rahmen einer einheitlichen Bankenaufsicht nationale Spielräume nach Tunlichkeit reduziert werden; dies könnte und sollte materiell durch die Anwendung eines »Single Rulebook« vorgenommen werden. Da dies jedoch (noch) nicht der Fall ist, steht die nunmehrige Aufsichtsbehörde (EZB) vor der Herausforderung, mit Unterstützung nationaler Behörden möglicherweise divergierendes nationales Recht der Mitgliedstaaten anzuwenden,[34] so dass komplexe rechtliche Fragen der Kompetenzabgrenzung und des anwendbaren Rechts zum Tragen kommen.

33. *Gstädtner*, Ein europäisches Bankenrestrukturierungsrecht als Grundbestandteil der europäischen Bankenunion, ifo-Schnelldienst 7/2013, 22.
34. Vgl. etwa Art. 8 Abs. 10 und Art. 26 Vorschlag einer Verordnung des Europäischen Parlaments und des Rates zur Festlegung einheitlicher Vorschriften und eines einheitlichen Verfahrens für die Abwicklung von Kreditinstituten und bestimmten Wertpapierfirmen im Rahmen eines einheitlichen Abwicklungsmechanismus und eines einheitlichen Bankenabwicklungsfonds, COM/2013/0520 final.

Rechtsordnungen der Mitgliedstaaten

Frage 6 und Frage 7

Aufgrund des unmittelbaren sachlichen Zusammenhanges sollen die in den Fragen 6 und 7 aufgeworfenen Problemkreise zusammenfassend beantwortet werden; zunächst soll in der gebotenen Kürze die Mitwirkung der regionalen Regierungen und des österreichischen Parlaments im europäischen Entscheidungsprozess dargelegt werden; anschließend und darauf aufbauend sollen spezifische Regelungen in Bezug auf solche Entscheidungsprozesse dargelegt und analysiert werden, die in den Bereichen der Währungs- und Wirtschaftspolitik angesiedelt sind. Schließlich soll der Frage nach möglichen Änderungen zur Gewährleistung der demokratischen Legitimitäts- und Rechenschaftspflicht nachgegangen werden.

Aufgrund von Art. 23d Abs. 1 B-VG hat der Bund die Länder unverzüglich über sämtliche Vorhaben im Rahmen der Europäischen Union zu unterrichten, die den selbständigen Wirkungsbereich der Länder berühren oder sonst für sie von Interesse sein könnten. Art. 23d Abs. 2 B-VG sieht vor, dass der Bund bei Vorliegen einer einheitlichen Stellungnahme der Länder im Rahmen der Europäischen Union – sofern die betroffene Angelegenheit in der Gesetzgebung Landessache ist – an diese Stellungnahme gebunden ist. Jedoch kann der Bund bzw. dessen Vertreter von einer solchen einheitlichen Stellungnahme der Länder dann abweichen, wenn dies aus »zwingenden außen- und integrationspolitischen Gründen« erforderlich ist.[35]

Art. 23e B-VG regelt in strukturell gleicher Weise die Mitwirkung des Nationalrates und des Bundesrates an Entscheidungsprozessen innerhalb der Europäischen Union; wiederum hat gemäß Art. 23e Abs. 1 B-VG das sachlich zuständige Mitglied der Bundesregierung Nationalrat und Bundesrat unverzüglich über sämtliche Vorhaben im Rahmen der Europäischen Union zu unterrichten und den Vertretungskörpern Gelegenheit zur Stellungnahme zu geben. Falls dem zuständigen Mitglied der Bundesregierung nun eine Stellungnahme des Bundesrates oder des Nationalrates zu einem Vorhaben im Rahmen der Europäischen Union vorliegt – die Angelegenheit muss diesfalls durch Bundesgesetz zu regeln sein bzw. auf die Erlassung eines unmittelbar anwendbaren Rechtsaktes gerichtet sein – so ist das zuständige Regierungsmitglied an diese Stellungnahme gebunden. In strukturell gleicher Weise

35. Vgl. dazu im Überblick *Mayer*, B-VG Kurzkommentar, 4. Aufl. (2007), 185.

kann jedoch von einer solchen Stellungnahme aus zwingenden außen- und integrationspolitischen Gründen abgegangen werden.[36]

Für den Bereich der Währungs- und Wirtschaftspolitik kann eingangs festgehalten werden, dass die Budgethoheit im Grundsatz bei den nationalen bzw. (soweit anwendbar) regionalen Parlamenten verbleibt. Die nun folgenden Ausführungen beziehen sich aus Gründen der Relevanz im Wesentlichen auf mögliche durch Fiskalpakt und ESM aufgeworfene Fragen. Der Vertrag über Stabilität, Koordinierung und Steuerung in der WWU (VSKS; Fiskalpakt) soll die Einhaltung der Haushaltsdisziplin in den Euro-Mitgliedstaaten sicherstellen; Art. 3 lit. b des Fiskalpaktes sieht ein länderspezifisch mittelfristig zu erreichendes Ziel unter Verweis auf den Stabilitäts- und Wachstumspakt mit einer Untergrenze von 0,5 % des BIP vor.

Fiskalpakt und ESM wurden von der Republik Österreich durch den Nationalrat aufgrund von Art. 50 Abs. 1 B-VG als gesetzesändernde bzw. gesetzesergänzende Staatsverträge mit einfacher Mehrheit genehmigt und durch den Bundespräsidenten der Republik Österreich ratifiziert.[37]

Nach hier vertretener Ansicht ist die Verpflichtung zu der Einhaltung eines Limits bei Neuverschuldung durch den Vertrag von Maastricht eingeführt worden; die in Art. 3 Abs. 2 Fiskalpakt enthaltene Verpflichtung, im einzelstaatlichen Recht der Vertragsparteien eine Regelung vorzusehen, die Neuverschuldung limitiert, ist daher als Wiederholung und Präzisierung einer grundsätzlichen Bestimmung unionaler Wirtschaftspolitik anzusehen.[38]

Für den Bereich des österreichischen Verfassungsrechts sieht Art. 13 Abs. 2 B-VG vor, dass Bund, Länder und Gemeinden bei ihrer Haushaltsführung die Sicherstellung des gesamtwirtschaftlichen Gleichgewichtes anstreben sollen. Nach Ansicht der Lehre wird Art. 13 Abs. 2 B-VG jedoch durch unionsrechtliche Haushaltsvorschriften überlagert.[39]

Mit Genehmigung des Fiskalpaktes und des ESM wurden Art. 50a-50d B-VG eingefügt, die eine Mitwirkung des Nationalrates in Angelegenheiten des

36. *Mayer*, B-VG Kurzkommentar, 4. Aufl. (2007), 189.
37. Vgl. zu der verfassungsrechtlichen Problematik unten Frage 9 sowie *Potács/Mayer*, Fiskalpakt verfassungswidrig?, JRP 2013, 140; kritisch hingegen *Griller*, zur verfassungsrechtlichen Beurteilung des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, JRP 2012, 177.
38. Zutreffend daher *Potács/Mayer*, Fiskalpakt verfassungswidrig?, JRP 2013, 140 (142).
39. Vgl. dazu im Überblick *Mayer*, B-VG Kurzkommentar, 4. Aufl. (2007), 83.

ESM vorsehen;[40] diese Änderung der österreichischen Bundesverfassung wird als »ESM-Begleitnovelle« bezeichnet.

Aufgrund dieser Bestimmungen wurde jedoch eine Adaptierung geltender Bestimmungen der Geschäftsordnung des Nationalrates erforderlich. Diese erfolgte mit Bezug auf die Mitwirkung des Nationalrates in Sachen ESM mit Bundesgesetz; dieses sieht vor, dass die Mitwirkungsrechte des Nationalrates einem nun einzurichtenden Unterausschuss des Budgetausschusses zu übertragen sind.[41] Die in diesem Bundesgesetz genannten Mitwirkungsrechte umfassen das Recht auf vollständige und zeitgerechte Information sowie das Recht, zur Stellungnahme bzw. Beschlussempfehlung an den Nationalrat.[42]

In Schlussfolgerung kann daher festgehalten werden, dass mit der ESM-Begleitnovelle und deren Einbettung in bereits geltende Rechtsvorschriften eine umfassende Einbindung des Nationalrates und damit demokratische Legitimität und Rechenschaftspflichten ausreichend sichergestellt werden.

Frage 8

Der VSKS bzw. Fiskalpakt soll die Einhaltung der Haushaltsdisziplin in den Euro-Mitgliedstaaten sicherstellen. Dessen Kernstück stellt Art. 3 VSKS dar. Daher soll in Beantwortung dieser Frage der Umsetzung der Verpflichtungen aus Art. 3 VSKS auf österreichisch-nationaler Ebene nachgegangen werden.

Einleitend ist festzuhalten, dass Fiskalpakt und ESM seitens der Republik Österreich durch den Nationalrat aufgrund von Art. 50 Abs. 1 B-VG als gesetzesändernde bzw. gesetzesergänzende Staatsverträge mit einfacher Mehrheit genehmigt und durch den Bundespräsidenten der Republik Österreich ratifiziert wurden.[43]

Da Art. 50 Abs. 2 B-VG vorsieht, dass anlässlich der Genehmigung eines unter Art. 50 Abs. 1 B-VG fallenden Staatsvertrages der Nationalrat be-

40. Bundesgesetz, mit dem das Bundes-Verfassungsgesetz und das Zahlungsbilanzstabilisierungsgesetz geändert werden (»ESM-Begleitnovelle«), BGBl I Nr. 65/2012.
41. Bundesgesetz, mit dem die Geschäftsordnung des Nationalrates (Geschäftsordnungsgesetz 1975) geändert wird, BGBl I Nr. 66/2012.
42. § 32 e des Bundesgesetz, mit dem die Geschäftsordnung des Nationalrates (Geschäftsordnungsgesetz 1975) geändert wird, BGBl I Nr. 66/2012.
43. Vgl. zu der verfassungsrechtlichen Problematik unten Frage 9 sowie *Potács/Mayer*, Fiskalpakt verfassungswidrig?, JRP 2013, 140; kritisch hingegen *Griller*, zur verfassungsrechtlichen Beurteilung des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion, JRP 2012, 177.

schließen kann, dass dieser durch Erlassung von Gesetzen zu erfüllen ist,[44] wurden die aus Art. 3 VSKS erfließenden Verpflichtungen im Bundeshaushaltsgesetz (BHG) verankert.[45]

Schließlich ist anzumerken, dass Art. 3 VSKS sich in zu jenem Zeitpunkt in Geltung stehendes Verfassungsrecht einfügt, da bereits Art. 13 Abs. 2 B-VG vorsieht, dass Bund, Länder und Gemeinden bei ihrer Haushaltsführung die Sicherstellung des gesamtwirtschaftlichen Gleichgewichtes anstreben sollen.

Frage 9

Mit Erkenntnis vom 16. März 2013[46] weist der Verfassungsgerichtshof die Anträge der Landesregierung Kärntens gegen den ESM-Vertrag und gegen die von den Vertragsparteien vereinbarte Auslegungserklärung ab. Aus der umfangreichen Argumentation des Gerichtshofes sollen zwei wesentliche Argumentationsmuster herausgegriffen werden:

Zum einen würden nach Ansicht des Verfassungsgerichtshofes die Bedenken der Landesregierung Kärntens die Vornahme einer anders gearteten rechtspolitischen Abwägung im Rahmen der geregelten Materie – nämlich des ESM-Vertrages – erfordern, eine solche Abwägung stehe jedoch der Exekutive bzw. der Legislative zu, nicht jedoch dem Verfassungsgerichtshof.

Zum anderen sei es möglich und zulässig, den ESM-Vertrag auf Grundlage von Art. 92 Abs. 2 B-VG abzuschließen und daher die in diesem Vertrag vorgesehene Übertragung von Hoheitsrechten auf eine zwischenstaatliche Einrichtung vorzunehmen.[47]

44. Vgl. dazu im Überblick *Mayer*, B-VG Kurzkommentar, 4. Aufl. (2007), 83; weiterführend hierzu *Öhlinger*, Kommentar zu Art. 50 B-VG in *Holoubek/Korinek* (Hg.), Österreichisches Bundesverfassungsrecht – Textsammlung und Kommentar, Band II (2009).
45. Vgl. insbesondere § 2 »Ziele und Grundsätze der Haushaltsführung«, Bundesgesetz über die Führung des Bundeshaushaltes – BHG 2013, in jeweils aktueller Fassung abrufbar unter www.ris.bka.gv.at.
46. VfGH, SV 2/12-18; abrufbar unter www.Vfgh.gv.at bzw. unter www.ris.bka.gv.at; für eine Urteilsbesprechung vgl. etwa *Claudia Mayer*, Europäischer Stabilitätsmechanismus nicht verfassungswidrig, ÖZW 2013, 53.
47. *Claudia Mayer*, Europäischer Stabilitätsmechanismus nicht verfassungswidrig, ÖZW 2013, 53 (70); kritisch dazu *Hauer*, der ESM-Vertrag auf dem Prüfstand, in *Ennöckl/Raschauer/Schulev-Steindl/Wessely*, Festschrift für Bernhard Raschauer zum 65. Geburtstag (2013), 48.

Frage 10

Die vorliegende Fragestellung kann im Rahmen eines österreichischen Länderberichts und daher unter Rückgriff auf (vornehmlich) österreichische Literatur und Judikatur kaum beantwortet werden; aus diesem Grunde sowie im Bestreben, den vorgesehenen Umfang nicht über Gebühr zu strapazieren, soll an dieser Stelle »bloß« eine strukturelle Frage angesprochen werden:

Art. 119 Abs. 1 AEUV sieht vor, dass die Tätigkeit der Mitgliedstaaten und der Union »nach Maßgabe der Verträge die Einführung einer Wirtschaftspolitik [umfasst], die auf einer engen Koordinierung der Wirtschaftspolitik der Mitgliedstaaten, dem Binnenmarkt und der Festlegung gemeinsamer Ziele beruht [...]«.

Während in der systematischen Anlage der WWU daher Währungspolitik zu den ausschließlichen Kompetenzen der Union zu zählen ist (Art. 3 AEUV), fällt der Bereich der Wirtschaftspolitik unter die koordinierenden Kompetenzen der Union (Art. 5 AEUV); für jene Mitgliedstaaten, deren Währung der Euro ist, gelten hinsichtlich der Koordinierung der Wirtschaftspolitik jedoch besondere Regeln (Art. 5 Abs. 1 Satz 2 AEUV). Wesentlich erscheint, dass zwar für die an der Währungsunion teilnehmenden Mitgliedstaaten besondere Regeln hinsichtlich des Prozedere anzuwenden sind – diese finden sich nunmehr in den neu geschaffenen Art. 136-138 AEUV – *materiell* jedoch diese Regeln keine Ausnahmen von den in Art. 119-121 AEUV an *sämtliche Mitgliedstaaten* gerichteten Pflichten darstellen.[48]

In rechtspolitischer Betrachtung jedoch vermag es einzuleuchten, dass aufgrund Abstimmungsmodalitäten im Rahmen der Gesetzgebung in der Union ein gewisser Druck zur Anpassung im Allgemeinen entstehen mag, der auf jenen Mitgliedstaaten lastet, die nicht bzw. noch nicht an der Währungsunion teilnehmen.

48. *Hatje*, Kommentar zu Artikel 119 AEUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.) EU-Kommentar, 3. Aufl. (2012), 1488.

Währungspolitik

Frage 11

Art. 127 AEUV sieht vor, dass es vorrangiges Ziel des ESZB und der EZB sei, die *Preisstabilität* zu gewährleisten. Soweit dies ohne Beeinträchtigung des Ziels der Preisstabilität möglich ist, sind EZB und ESZB verpflichtet, die *allgemeine Wirtschaftspolitik der Union zu unterstützen* und zu der *Verwirklichung der Ziele der Union* beizutragen. Die Ziele der Union finden Normierung in Art. 3 EUV, dessen Abs. 4 die Errichtung einer Wirtschafts- und Währungsunion vorsieht, deren Währung der Euro ist.

Der Rat der EZB sieht mit Beschluss von 1998 »Preisstabilität« dann als erfüllt an, wenn der Anstieg des Preisniveaus nicht mehr als 2 % beträgt; hinzu kommt, dass nach überzeugender Argumentation davon ausgegangen werden kann, dass der Begriff der »Preisstabilität« einen gewissen Beurteilungsspielraum offen lässt.[49]

Art. 123 Abs. 1 AEUV verbietet den »*unmittelbaren Erwerb*« von Schuldtiteln des öffentlichen Sektors der Mitgliedstaaten durch EZB und nationale Zentralbanken; mit dem Begriff »unmittelbarer Erwerb« wird der Erwerb staatlicher Wertpapiere am Primärmarkt, d.h. unmittelbar vom Emittenten, nämlich dem jeweiligen Mitgliedstaat, untersagt. *E contrario* ist daher der mittelbare Erwerb am Sekundärmarkt im Rahmen der sog. »Offenmarktpolitik« möglich und zulässig;[50] Art. 18 Satzung ESZB und EZB präzisiert jene Regeln und Bedingungen, unter denen EZB und ESZB zur Erreichung ihrer Ziele an den Finanzmärkten tätig werden können.

Erwägungsgrund Nr. 7 der Verordnung 3603/93[51] wiederum wendet sich an den Normadressaten »Zentralbank eines Mitgliedstaates« und untersagt den Erwerb von handelbaren Schuldtiteln des öffentlichen Sektors eines Mitgliedstaates, sofern der öffentliche Sektor den Regeln der Marktmechanismen

49. *Potács,* Kommentar zu Artikel 127 AEUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.) EU-Kommentar, 3. Aufl. (2012), 1571.
50. *Hattenberger*, Kommentar zu Artikel 123 AEUV, in *Schwarze/Becker/Hatje/Schoo* (Hg.) EU-Kommentar, 3. Aufl. (2012), 1533; so auch *Sester*, Plädoyer für die Rechtmäßigkeit der EZB-Rettungspolitik, RIW 2013, 451 (454).
51. Verordnung 3603/93 zur Festlegung der Begriffsbestimmungen für die Anwendung der in Artikel 104 und Artikel 104 b des Vertrages vorgesehenen Verbote, ABl L 332/1993, 1.

entzogen werden soll, und sofern ein derartiger Erwerb nur zum Zwecke der Währungsreservenverwaltung vorgenommen wird.

Bereits die Fassung des genannten Erwägungsgrundes wendet sich an die »Zentralbank eines Mitgliedstaates«. Bei Auslegung in Konkordanz sowohl mit geltendem Primär- als auch Sekundärrecht und bei teleologischer Auslegung des Erwägungsgrundes anhand Art. 3 EUV und Art. 127 AEUV kann eine Verletzung des gesetzlichen Auftrages von ESZB und EZB durch ihre Handlungen als Reaktion auf die Schuldenkrise im Euro-Währungsgebiet nicht ausgemacht werden.

Auch in Betrachtung der Faktenlage – nämlich der gegenwärtigen Inflationsrate – kann nach der hier vertretenen Ansicht gefolgert werden, dass die EZB mit ihrer Reaktion auf die Schuldenkrise im Euro-Währungsgebiet in Übereinstimmung mit ihrem primärrechtlich erteilten Auftrag gehandelt hat.

Frage 12

Die in der vorliegenden Fragestellung aufgeworfene Problematik stellt aufgrund der oben vertretenen Ansicht – dass nämlich die EZB bei der Definition des gesetzmäßig vorgegebenen Ziels »Preisstabilität« über beträchtlichen Ermessensspielraum verfügt – weniger ein rechtliches Problem, als vielmehr eine Frage der Abwägung von Zielen gegen- und zueinander. Dies scheint umso mehr der Fall zu sein, als eine personelle Trennung im Bereich des EZB-Rates zwischen jenen Mitgliedern, die Aufsichtsfunktionen wahrnehmen, und solchen, die den Bereich Währungspolitik betreuen, nicht vorgesehen ist.

Die Übertragung der Bankenaufsicht auf EZB und ESZB in Zusammenarbeit mit nationalen Behörden wirft jedoch sowohl in Hinblick auf die Gemengelage des anwendbaren Rechts als auch in Bezug auf den zu gewährenden Rechtsschutz beträchtliche Probleme auf.[52]

Frage 13 und Frage 14

In der Beantwortung der Frage nach der möglichen Umdefinierung der gesetzlich verankerten Ziele der EZB soll abschließend der Problemkreis Rechtsschutz vor dem EuGH thematisiert werden; nach der hier vertretenen

52. *Schneider*, Europäische Bankenunion ohne effektiven Rechtsschutz?, abrufbar unter www.börsenzeitung.de; ausführlich zu dem Problemkreis *Schneider*, Inconsistencies and unsolved problems in the European Banking Union, euZW 2013, 452.

Ansicht hängen diese zwei Fragestellungen nämlich unmittelbar zusammen und sollen daher gemeinsam einer Analyse zugeführt werden:

Eingangs soll festgehalten werden, dass eine Umdefinierung des in Art. 127 AEUV enthaltenen vorrangigen Ziels der »Preisstabilität« rechtlich durch die Streichung des Halbsatzes »soweit dies ohne Beeinträchtigung des Ziels der Preisstabilität möglich ist« und dessen Ersetzen durch das Wort »und« systematisch sinnvoll und machbar erschiene.

Eine solche Änderung der Bestimmung des Art. 127 AEUV würde jedoch geradezu notwendigerweise eine Änderung der Aufsicht über ESZB und EZB nach sich ziehen: Nach der hier vertretenen Ansicht erscheint aufgrund des der EZB zugesprochenen weiten Beurteilungsspielraums eine Kontrolle durch den EuGH ins Leere zu laufen. Art. 263 AEUV beschränkt nämlich Kontrolle durch den EuGH auf Rechtmäßigkeit eines erlassenen Aktes,[53] der in Frage kommende Klägerkreis ist obendrein einigermaßen eingeschränkt. Daraus folgt, dass selbst bei offensichtlicher und erheblicher Verkennung des vorrangigen Ziels der Preisstabilität ein justiziabler Verstoß kaum denkbar ist. In der Praxis werden wohl formale Fehler sowie Fragen der Zuständigkeit aufgeworfen werden.

Eine Umdefinierung der Ziele des Art. 127 AEUV wiederum würde die geringe Tragweite der Rechtskontrolle durch den EuGH nicht bloß vollends zu Tage treten lassen, sondern – und dies verstärkt – die eingangs in diesem Bericht thematisierte Frage nach demokratischer Legitimierung und Rechenschaftspflicht aufwerfen.

53. Vgl. hierzu im Überblick *Borchardt*, Kommentar zu Art. 263 AEUV, in *Lenz/Borchardt* (Hg.), EU-Verträge – Kommentar, 6. Aufl. (2012).

CROATIA

Iris Goldner Lang and Maroje Lang[1]

Economic policy

EU legal order

Question 1

The constitutional limits of the EU primary law for the adoption of EU financial assistance instruments are most evident in Art. 122(2) and 125 TFEU. The wording of Art. 122(2) TFEU provides that the Council, on a proposal from the Commission, may grant financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties 'caused by natural disasters of exceptional occurrences beyond its control'. One wonders whether the events that have taken place in certain EU Member States were entirely beyond their control or whether their governments have partly contributed to the emergence of the sovereign debt crisis. Similarly, Art. 125 TFEU excludes the Union's and Member States' liability for debts of other Member States and prohibits them from giving financial assistance to each other. One could argue that such a prohibition prevents moral hazard as it provides an incentive to Member States to pursue a sound fiscal policy. On the other hand, it is questionable whether a mechanism of lending money subject to strict conditionality is encompassed by Art. 125 TFEU as it provides for financial support only under severe terms and conditions.

In any case, the creation of the European Financial Stabilisation Mechanism (EFSM), established in 2010 within the EU law framework via Regulation 407/2010[2] based on Art. 122(2) TFEU, questions the appropriateness of

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2. Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118/1, 12 May 2010.

its legal base. Furthermore, both the EFSM and the European Financial Stability Facility (EFSF) – which was created outside the EU law framework as a limited liability company under Luxembourg law following an intergovernmental decision of euro area ministers – were intended as temporary financial assistance mechanisms that would exist until their last obligations have been fully repaid. For this reason a permanent mechanism was to be created – the European Stability Mechanism (ESM).

Furthermore, on the 28-29 October 2010 European Council meeting, a general agreement was reached 'on the need for Member States to establish a permanent crisis, mechanism to safeguard the financial stability of the euro area as a whole and invite the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect, not modifying Art. 125 TFEU ('no bail-out' clause)'.[3] Consequently, a new paragraph 6 was added to Art. 136 TFEU via a European Council Decision 2011/199 amending Art. 136 TFEU.[4] Due to the fact that Art. 125 TFEU has not been changed, one can view this provision as *lex specialis*, enabling euro area states to establish a permanent stability mechanism 'to safeguard the stability of the euro area as a whole', while 'the granting of any required financial assistance under this mechanism would be subject to 'strict conditionality'.' Reference to 'Member States whose currency is the euro', and not to EU institutions, accords intergovernmental character to this provision. Consequently, it enables the application of the simplified revision procedure based on Art. 48(6) TEU, which provides for Treaty revision without convening a European Convention. However, the amendment entered into force only on 1 May 2013 upon the Czech notification of its ratification on 23 April 2013, as the procedure required a unanimous decision of all EU Member States and their ratification under their constitutional requirements.

Due to the urgency of the matter, one could not wait that long to establish a permanent stability mechanism. Consequently, the ESM was established outside the EU law framework as an intergovernmental organisation under public international law, to be located in Luxembourg. The Treaty establishing the European Stability Mechanism was signed by 17 euro area Member States on 2 February 2010 and it entered into force upon German ratification.

3. European Council 28-29 October 2010 Conclusions, EUCO 25/1/10, 30 November 2010, para. 2.
4. European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

The issue of the constitutionality of the ESM Treaty, the Treaty on Stability, Coordination and Governance and the amendment of Art. 136 TFEU was raised in the judgment of the *Bundesverfassungsgerich* of 11 September 2012.[5] Having given the green light for ratification (under two conditions), the German Constitutional Court enabled German ratification of the Treaty and only then could it come into force. On the other hand, the questionable compatibility of the ESM Treaty with EU law is best illustrated in *Pringle*.[6] Here, the Court of Justice gave a highly pragmatic judgment, turning a blind eye to the fact that the Treaty amendment was done for the very reason to provide an incontestable legal base for the ESM Treaty, by stating that the Treaty amendment adds nothing new to the existing Union competences and could have been done via a simplified revision procedure.

Question 2

The Treaty on Stability, Coordination and Governance, was initially intended as a treaty within the EU law framework. However, the UK refusal to support the Treaty (later on joined by the Czechs) and German insistence to have it as primary law, led to its establishment as an intergovernmental treaty outside the EU law framework, but with a certain level of EU institutional involvement. The Treaty on Stability, Coordination and Governance was signed on 2 March 2012 by 25 Member States and entered into force on 1 January 2013, as it had to be ratified by at least 12 euro area Member States.

Art. 9 of the Treaty provides that at most within five years of the date of its entry into force, 'on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken ... with the aim of incorporating the substance of this Treaty in the legal framework of the EU.' This provision, therefore, indirectly states that the Treaty is currently outside the EU law framework and provides a route, but no definite obligation to incorporate it within EU law.

It is questionable whether, and to which extent, certain parts of the Treaty on Stability, Coordination and Governance could have been realised within the EU law framework without a Treaty revision. It seems that some issues probably could have been covered via enhanced cooperation (such as Title V on the governance of the euro area), while others would have required Treaty

5. 1 BVR987/10, 7 September 2011, 129 BVERFGE 124 (Ger.)
6. Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, [2012].

revision. For example, Art. 8 of the Treaty on the role of the Court of Justice would have probably required a Treaty revision. It is questionable whether the balanced-budget rule, contained in Art. 3 of the Treaty, could have been realised via enhanced cooperation or a revision of Protocol No. 12 on the Excessive Deficit Procedure.

On the other hand, the Six-Pack[7] and the Two-Pack[8] have been adopted as two sets of EU legal acts. Both Packs provide for balanced-budget rules and are legally binding (regulations and a directive). The Euro Plus Pact, on the other hand, is a non-legally binding instrument. This is due to the fact that it goes beyond the EU competence, as it commits its signatories to stronger economic coordination and convergence in areas of national competence.

Finally, the European Financial Stability Facility (EFSF) has been incorporated in Luxembourg under Luxembourgish law, following a decision of the euro area states in 2010. It is incorporated as a limited liability company and is intended to be a temporary financial assistance mechanism. The issue of the constitutionality of the German contribution to the EFSF was raised in the 'Greek bailout' judgment of the German Constitutional Court. The BVerfG ruled that the EFSF was not unconstitutional, but that the aid package needs to be approved by the parliamentary budget committee.

Question 3

Currently, the EU can only coordinate Member States' economic policies. Therefore, it seems that further economic integration would require a Treaty revision. Any other action might be contrary to the principle of conferral (Art.

7. The Six-Pack consists of five regulations and a directive: Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area – sanctions regulation; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation 1175/2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances; Regulation 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure; and Directive 2011/85 on requirements for budgetary frameworks of the Member States.
8. The Two-Pack consists of two regulations: Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; and Regulation 473/2013 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.

5(2) TEU stating that 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties' and that 'competences not conferred upon the Union in the Treaties remain within the Member States.'

Question 4

Further economic integration might disrupt the principle of institutional balance (Art. 13(2) TEU) providing that 'each institution shall act within the limits of the powers conferred on it in the Treaties and in conformity with the procedures, conditions and objectives set out in them.'

As regards the role of the Court of Justice of the European Union, it is questionable whether the jurisdiction given to the Court, based on Art. 8 of the Treaty on Stability, Coordination and Governance, is contrary to Art. 126(10) TFEU, stating that the rights to bring infringement actions may not be exercised within the framework of paragraphs 1-9 of Art. 126 TFEU, meaning that a Treaty revision would be needed in case of incorporating the Treaty on Stability, Coordination and Governance within the EU law framework. On the other hand, it has been noticed that Art. 8 of the Treaty provides only for the possibility to bring an action before the Court of Justice in case a state signatory has failed to implement the balanced budget rule into its national system, not in case of a breach of the balanced-budget rule. Furthermore, Art. 8 of the Treaty enables only the state signatories of the Treaty and not the Commission to start the infringement proceedings.

Question 5

Further challenges with regard to financial market regulation and supervision are exemplified by the banking union. A banking union refers to a threefold structure whereas its members have a Single Supervisory Mechanism of the banking system, a Single Resolution Mechanism for failing banks, and a deposit guarantee fund. Concerning the Single Supervisory Mechanism, on 15 October 2013 the Council adopted two regulations creating the Mechanism.[9]

9. Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 9044/13; Regulation of the European Parliament and of the Council amending Regulation 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards conferral of specific tasks on the European Central Bank, PE-CO_S 22/13.

It should become operational in late 2014. The ECB Governing Council will have a challenging task of reconciling two ECB's conflicting tasks: to maintain price stability and act as a supervisor at the same time. Furthermore, some critics are questioning the appropriateness of Art. 127(6) TFEU as its legal basis, as it enables the Council to 'confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions ...'. While Art. 127(6) TFEU refers to 'specific tasks', one could claim that the general supervisory role remains with the national authorities, based on Art. 127(5) TFEU.

On the other hand, the proposal of the Single Resolution Mechanism raises even more concerns in terms of the use of Art. 114 TFEU as its legal basis. Art. 114 TFEU calls for the adoption of 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'. It is questionable whether the functioning of the internal market, particularly free movement of capital, necessitates the establishment of a Single Resolution Mechanism. Furthermore, this mechanism would apply only to euro area states and other EU Member States that have chosen to join the banking union. It would, therefore, apply only to the banks within the participating states and not the whole EU. For this reason, it is questionable whether it contributes to the functioning of the EU internal market as a whole.

Finally, there are concerns that the establishment of the Single Resolution Mechanism goes beyond the internal market competence, as its function is not pure harmonisation. This concern is in line with the recent (12 September 2013) Opinion of Advocate General Jääskinen in Case C-270/12, *UK v Council and Parliament*, who recommended to the Court of Justice to annul Art. 28 of Regulation 236/2012 on short selling, and certain aspects of credit default swaps, because Art. 114 TFEU is not the appropriate legal basis.[10] The case is now before the Grand Chamber and its decision might shed further light on the use of Art. 114 TFEU for the Single Resolution Mechanism. In this case, the Advocate General suggested the use of Art. 352 TFEU (flexibility clause) as a more appropriate legal basis. The same could apply to its use as the legal basis for the Single Resolution Mechanism. However, this Treaty provision requires unanimity of all EU Member States which would not be politically feasible in case of the Single Resolution Mechanism.

10. AG Jääskinen's Opinion in Case C-270/12, *UK v Council and Parliament*, pending.

Legal orders of the Member States

Question 6

Croatia is a new EU Member State that joined the Union on 1 July 2013. It aspires to become a euro area member, but under the current procedures it will take many years before it joins the single currency. In the meanwhile, it is only bound by the rules of the Stability and Growth Pact and the Six-Pack. The Two-Pack does not apply to Croatia as it is applicable only to euro area members. Croatia could unilaterally decide to adopt more stringent national rules as well as sign and ratify the TFCG in its full scope. However, such decision would mean undergoing an even more ambitious adjustment than that required by the Stability and Growth Pact, i.e. the Excessive Deficit Procedure that Croatia will have to observe as the new member with formidable fiscal imbalance. Since Croatia had previously not been bound by such strict rules[11] and since the procedures built into the Stability and Growth Pact will be binding and very challenging to achieve under the weak economic situation Croatia is experiencing, any additional and more strict rules would hardly be justifiable in the short term. Based on the Six-Pack, most particularly its Directive 2011/85 on requirements for budgetary frameworks of the Member States, Croatia needs to implement it into its legal system by 31 December 2013. This implementation will set much stricter requirements on the Croatian budgetary framework than the current ones and impose new and more demanding rules for Croatian fiscal policy.

Question 7

The balanced-budget rule has to be implemented into Member States' national legal systems, either based on the EU law requirements (Stability and Growth Pact and Six-Pack), or the requirements stemming from the intergovernmental instrument (Treaty on Stability, Coordination and Governance).

11. The Fiscal Responsibility Law, with a rule for achieving sustainable budget deficit, has been active since 2012. During the first year Croatia managed to observe the rule requiring steep fiscal consolidation towards balanced budget despite a deep recession. Since the adjustment path as designed by the national fiscal rule is very ambitious and was created on the assumption of strong economic growth, such a rule is too strict under the prolonged recession Croatia is enduring. For that reason, the existing fiscal rule is being amended to make it more cyclically balanced and make it fully compatible with the *acquis*.

Therefore, even though the balanced-budget rule is being superimposed, the implementation requirement might give the impression that it is nationally self-imposed. Potentially, this gives it more credibility and legitimacy at the national level, but also raises the chances of its enforcement and respect, especially in case of a national measure of a constitutional character, but also if adopted as a national law, like in the Croatian case.

The existing timeline extends beyond the time euro Member States have to report their draft budgets to the European Commission for the comments before their formal adoption.

Question 8

Croatia is in a specific situation as it joined the European Union in July 2013, after the Treaty on Stability, Coordination and Governance was originally signed. It is not (yet) a signatory to the Treaty on Stability, Coordination and Governance and, as a non-member of the euro area, it is not obliged to sign the Treaty. Currently, it is still open whether Croatia will join the Treaty and, if so, which title(s). On the one hand, the Treaty provides for an even stricter balanced-budget rule requirement than the Six-Pack, as well as the requirement of additional economic coordination – that could be interpreted as giving away some of the national competencies – which should be taken into consideration when contemplating on the possibility of joining. On the other hand, the Treaty preamble conditions, as of 1 March 2013, the granting of financial assistance within the framework of the European Stability Mechanism, on the ratification of the Treaty by the state concerned and on the implementation of the balanced-budget rule within the set transposition period.

Question 9

As stated previously, Croatia is a new Member State which joined the EU on 1 July 2013. At least partly for this reason, there has not yet been any challenge of the instruments addressing the EU debt crisis before the Croatian Constitutional Court.

Question 10

Since the introduction of the Economic and Monetary Union, most changes of the EU legislative framework in the area of economic governance and to some extent of the financial system have been to assure smooth functioning of the single currency. It accelerated with the Great Recession and during the

last 5 years the Stability and Growth Pact has been amended with numerous regulations and directives in the framework of the Two-Pack and the Six-Pack, the framework of the European Semester, as well as other extra-EU instruments such as the TSCG. It further continues with the initiative for the Deep and Genuine EMU which further extends the idea of the banking, fiscal, economic, and demographic union needed for the smooth functioning of the EMU.

Member States with the derogation face a difficult choice. They can decide to undergo a lengthy and sometimes difficult process of nominal and real adjustment in order to meet the criteria for joining the single currency and become fully-fledged members of the euro area with all rights and responsibilities, including the transfer of sovereignty in many areas of economic and financial policy. Alternatively, they can decide to wait for the right circumstances for joining and accept their position as outsiders from more involved processes in the euro area.

Taking into consideration all that has been stated above, certain, particularly smaller Member States have a limited possibility to influence the development of EU rules applicable to the euro area states. However, they can better define the rules governing the 'antechamber' to the single currency. Unfortunately, some initiatives are often discussed and possibly decided among the euro area Member States, with outs being invited to join only after decisions have, to a large degree been formed. In such circumstances, extending the Union competencies in the areas previously within national competence can be difficult to accept, although it could be arguably defended as a step towards further European integration. However, the possibility of sanctions for the outs that are not observing the rules designed in particular for the smooth functioning of the single currency can be difficult to defend from the economic, if not from the legal perspective.

A special challenge arises for the position of the single market (for financial services) and the single currency. The development of the banking union has in particular been envisaged to encompass only the euro area Member States with other Member States being allowed to join. It can be argued that banks and financial institutions from the euro area could have a competitive advantage *vis-à-vis* institutions from non-euro Member States which do not have a strong EU system behind them. However, this problem can be ameliorated by an open invitation to the non-euro Member States to join the Single Supervision Mechanism. The fact that they are not represented in the Governing Council of the ECB means that they could have lesser position in the Single Supervisory Mechanism, despite the built-in safeguards to prevent it from happening.

Furthermore, within the framework of the European Semester – a yearly cycle of economic policy coordination set by the European Commission, the Commission performs a detailed analysis of Member States' economic and structural reforms and provides country-specific recommendations. Therefore, even though these recommendations are soft law, they have a major impact on EU Member States, including Croatia (which is taking part in the European Semester) and not just on euro area members. Furthermore, they not only coordinate, but also influence and put pressure on national economic policies and the enforcement of economic and structural reforms.

Monetary policy

Question 11

There are concerns that the European Central Bank has been acting beyond its legal mandate, specified by Art. 123 TFEU, which prohibits monetary financing. It is true that the ECB has been buying bonds from the troubled Member States, which has had the same effect as printing money. However, pragmatically speaking it seems that such actions have been necessary, taking into consideration the fact that in the monetary union its member states are not able to use the tools of monetary policy, such as producing money, in order to address their fiscal problems. The financial crisis has shown that the euro area is not yet an optimum currency area – with full labour mobility and large fiscal transfers among different regions enduring asymmetric shocks. Even though the European Union is addressing those weaknesses by encouraging further development of labour mobility and further fiscal transfers, there was an acute situation and a need for fast actions of the ECB for the purpose of safeguarding the existence of the single currency.

Question 12

Article 127(6) provides the legal basis for conferring bank supervision to the ECB as many Member States have the system where the central bank is also the bank supervisor.

There is always a conflict between different objectives of an entity. The potential outcome should encompass a degree of fulfilment of all stated objectives. Focus on price stability alone has its limits, especially in situations such as the present when it is not endangered in the short time. In such cir-

cumstances, other objectives become vital for the functioning of the economies of the euro area. Yet, banking supervision is different from monetary policy objectives of the central bank; whereas price stability and support for the general economic policies of the Union, as stated in Art. 127(1) TFEU, are of relatively abstract nature, the responsibility of the bank supervisor is much more concrete. Although the present system does not allow for a clear-cut accountability of the official charged with the bank supervision, it can be expected that strong pressure would be put on the ECB management in a case of a significant bank failure. The experience of other countries is that central bankers do not get fired in case they do not meet the inflation target – they get fired in case of a bank failure. It is to be expected that similar pressure would work for the single European supervisor. In such circumstances there could be a situation of a conflict of interest on behalf of some members of the ECB. However, collective decision-making should alleviate most of those concerns.

Another problem could arise in a situation when a non-euro Member State decides to join the Single Supervisory Mechanism. In such a case, the respected country would not be represented in the ECB Governing Council, which is charged for making the ultimate decision regarding all actions, including those of the Single Supervisory Mechanism. This means that the participating non-euro Member State will have a weaker position in the Single Supervisory Mechanism. Built-in safeguards to protect the position of the participating non-euro Member State, which allows it to leave the Single Supervisory Mechanism in case it disagrees with the decision of the Governing Council, might not be enough to enable full protection of such a Member State. This constitutes a serious problem in the design of the system.

Question 13

There are different views as to whether the ECB should have a single objective (price stability) or multiple objectives (e.g. unemployment, apart from price stability). Such different views depend on the problems a particular state is facing at a particular time. Therefore, it is logical that a country enduring a strong economic growth and with a historical anti-inflationary bias sees the ECB's objective as single, while countries enduring strong recession might see its objectives as multiple.

Question 14

Throughout the EU's history, the Court of Justice of the European Union has shown a tendency to promote European integration and has often acted as an 'activist' Court not only interpreting, but also influencing the development and further creation of EU law. Its approach has always been teleological, concentrating on the nature and purpose of a legal norm. The Court has never ruled in vacuum, but has always been conscious of the political, economic and social reality. For this reason, its judgments have sometimes been pragmatic and occasionally problematic in terms of logical legal reasoning. A good example of such a pragmatic judgment is the Court's ruling in *Pringle*, which has been necessary, as it has enabled the continuation of a single currency, even though it is legally problematic. It might have been fairer and more credible had the Court been more honest in its legal deliberation in *Pringle*.

DENMARK

Nina Dietz Legind, Camilla Hørby Jensen and Mette Winther Løfquist[1]

Connection to FIDE 2014

The choice of topic for our contribution to FIDE 2014 is based on the following condition and consideration: the authors' areas of research are financial regulation and financial activity, and by exploring the legal challenges and consequences of the governance system for the Single Supervisory Mechanism (SSM) both from the perspective of the EU and non-Euro member states we aim to target questions 5 and 10[2] in the questionnaire general topic 1.[3]

Non-Euro member states and the Single Supervisory Mechanism

Abstract

The Single Supervisory Mechanism (SSM) is a vital part of the European Banking Union, but since the task of carrying out supervision has been entrusted to the European Central Bank (ECB), it is highly relevant to distinguish between Euro member states and non-Euro member states. The Euro member states are born participants in the SSM, whereas the non-Euro mem-

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2. Question 5: What legal challenges (if any) does the EU face with regard to financial market regulation and supervision? Question 10: What are the specific legal challenges for Member States outside the euro area, that is Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency, of the emergence (mainly subject to Articles 121(6), 126(14), 136 TFEU and intergovernmental treaties) of an ever more detailed economic governance regime for euro area Member States?
3. The economic and monetary union: constitutional and institutional aspects of the economic governance within the EU.

ber states can choose to participate. This opt-in option is given to non-Euro member states because the SSM is closely connected to ECB, whereas non-Euro member states have no voting rights in the Governing Council. Furthermore, as a safeguard to participating non-Euro member states, the SSM Regulation now includes additional rules for participating non-Euro member states.

The focus of this short article is the SSM and non-Euro member states. The article explains co-operation within the SSM and in particular addresses the components of the governance structure from the perspective of participating non-Euro member states.

Background

The Single Supervisory Mechanism is a vital part of creating a European Banking Union. The idea of a European Banking Union was fostered in the aftermath of the financial and debt crisis' (2008-2011) as a safeguard against future negative consequences for member state public finances caused by crises in the banking sector.[4] Compared to the internal market for banking, The Banking Union goes a step further since it adds new components such as single supervision and single resolution mechanisms to the European legislation.

The four components of the Banking Union are:

1) A Single Supervisory Mechanism,[5]
2) A Single Resolution Mechanism and a Single Bank Resolution Fund,[6]

4. Com(2012)510: Communication from the Commission to the European Parliament and the Council: A Roadmap towards a Banking Union.
   Com(2012)777: Communication from the Commission: A blueprint for a deep and genuine economic and monetary union.
5. Council Regulation (EU) no. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.
6. Com(2013)520 Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

3) A revision of the Capital Requirement Directive[7] and
4) A Single Deposit Guarantee Scheme.[8]

As of January 2014 no. 1 and 3 are in place and political agreements for no. 2 and 4 have been reached. In the following sections we will concentrate on the SSM.[9]

The opt-in choice for non-Euro member states

The Euro member states are born members of the SSM, whereas EU member states that are not members of the Euro are invited to join the SSM on the basis of an agreement of close cooperation. The conditions and procedure for entering into the SSM are regulated by art. 7 of the SSM Regulation.

When a non-Euro member state wishes to join, it must announce a request of participation to the other member states, the Commission, ECB, and the European Banking Authority (EBA). In the request it must state that the conditions of participation have been met. The conditions for achieving participant status are 1) to adopt the necessary legal framework[10] and 2) to co-operate with the ECB along the lines codified in the SSM Regulation. This means that the national authorities will be forced to abide by guidelines and requests issued by the ECB, and be responsible for providing adequate information.[11]

The co-operation is established when the ECB issues a decision stating that the non-Euro member state meets the conditions outlined in the SSM Regulation. The agreement will come into effect 14 days after the decision is published in the Official Journal of the European Union.

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7. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

   Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.
8. Com(2010)368 Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes [recast].
9. SSM Regulation entered into force on November 3, 2013. Art. 34
10. Regulation no 1024/2013 art. 7(2)c.
11. Regulation no 1024/2013 art. 7(2)b.

The SSM Regulation lists three ways in which the exit of non-Euro members states may occur: 1) after three years without qualification[12]; 2) exclusion by the ECB in the event of major non-compliance on the part of the national authorities,[13] and 3) expedited exit as requested by the non-Euro member state due to a major disagreement with a supervisory decision impacting that member state.[14] If a non-Euro member state has exited, re-entering is not possible until three years have passed.[15]

Co-operation within SSM and tasks conferred on the ECB

The SSM consists of a co-operation between the national supervisory authorities and the ECB.[16] It is the overall duty of ECB to conduct the prudential supervision of all credit institutions within the participating member states. However, in practice ECB is only supervising the significant credit institutions within the participating member states, while the supervision of credit institutions that are not significant is carried out by the national competent authorities in accordance with instructions from ECB. A credit institution is defined as significant when at least one of the following criteria is present:[17]

- the total value of its assets exceeds EUR 30 billion;
- the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 billion;
- following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution.

12. Regulation no 1024/2013 art. 7(6). The participating member state is free to resign from the co-operation after three years. The member state is not obliged to state any reason.
13. Regulation no 1024/2013 art. 7(5).
14. Regulation no 1024/2013 art. 7(8).
15. Regulation no 1024/2013 art. 7(9).
16. Regulation no 1024/2013 art. 6.
17. Regulation no 1024/2013 art. 6(4).

The ECB may also consider a credit institution significant if it has established banking subsidiaries in more than one participating member state and its cross-border assets or liabilities represent a significant part of its total assets or liabilities.[18] Institutions which have requested or received public financial assistance directly shall also be considered significant.[19] In all circumstances, ECB will carry out the prudential supervision of the three most significant credit institutions in each of the participating member states.[20]

When it comes to the supervision task carried out by the national competent authorities, ECB shall issue regulations, guidelines or general instructions to national competent authorities.[21] For member states whose currency is not the Euro but who have chosen to participate in the SSM, ECB may address instructions to the national competent authority or the national designated authority.[22]

The SSM Regulation confers a number of specific tasks to ECB where it is exclusively authorized for prudential purposes in relation to all credit institutions established in the participating member states.[23]

a) to authorize credit institutions and to withdraw authorizations of credit institutions;
b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross- border services in a non-participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law;
c) to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution;
d) to ensure compliance with the EU legal framework, which impose prudential requirements on credit institutions in the areas of own funds requirements, securitization, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;
e) to ensure compliance with the EU legal framework, which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management pro-

18. Regulation no. 1024/2013, art. 6(4)2.
19. Regulation no. 1024/2013, art. 6(4)3.
20. Regulation no. 1024/2013, art. 6(4)4.
21. Regulation no 1024/2013 art. 6(5).
22. Regulation no 1024/2013 art. 7(1).
23. Regulation no 1024/2013 art. 4 referring to art. 6 and art. 3.

cesses, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound management and coverage of their risks, and on the basis of that supervisory review EBA should impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;
g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member States;
h) to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law;
i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers.

ECB is entitled to request information, carry out specific examinations and conduct onsite inspections.[24] When it is deemed appropriate or necessary ECB shall carry out a macro prudential task e.g. specific requirement of capital buffers with the aim of addressing systemic risk. Supervision tasks which are not specifically assigned to ECB stay at the national level. The national

24. Regulation no 1024/2013 chapter III.

authorities remain responsible for ensuring a high level of consumer protection and maintaining the fight against money laundering.

Governance System

The legal basis for the SSM initiatives is the TEUF art. 127(6).[25] This Treaty article does not only deliver the basis for harmonization, but its precise wording also puts the ECB in the front seat as far as carrying out the single supervision mechanism is concerned. Cited in part the wording is*: '... confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.'*

Since a non-Euro member state has no vote in the Governing Council of ECB, the immediate allocation of the supervision task to ECB gives rise to challenges relating to their participation in the SSM. Put simply, the problem is that non-Euro member states would be cut off from influencing the final supervision decisions if no alternative government structure was added.

So in order to stop the Treaty basis being a deal breaker for non-Euro member states joining the Banking Union/the SSM, a compromise solution was reached. Thus, the SSM regulation outlines an additional governance structure within the ECB. A Supervisory Board is put in place to prepare the draft decisions.[26] These draft decisions will be sent to the Governing Council of the ECB and adopted unless the Governing Council objects within 10 days.[27] The Supervisory Board consists of the Chair, the Vice Chair, who is an ECB executive Board member, four representatives from the ECB, and one representative from the supervisory authority of each member state participating in the SSM, including the non-Euro member states. Decisions of the Supervisory Board are taken by simple majority of its members with every member having one vote.[28]

Furthermore, a safeguard for non-Euro member states has been added to the governance structure. The safeguard is two-fold. Art. 7(8) deals with disagreements relating to drafts decisions from the Supervisory Board and art. 7(7) deals with disagreements relating to objections from the Governing Council.

25. The legal bases for the other initiatives of the Banking Union are the commonly used provisions for harmonization of banking law TEUF art. 53(1) and art. 114.
26. Regulation no 1024/2013 art. 26.
27. Regulation no 1024/2013 art. 26(8).
28. Regulation no 1024/2013 art. 26(6).

If a participating non-Euro member state disagrees with a draft decision prepared by the Supervisory Board, it shall inform the Governing Council of its reasoned disagreement within five working days of receiving the draft decision. The Governing Council shall then make a decision on the matter within five working days, taking fully into account these reasons, and explain its decision in writing to the member state concerned. The member state concerned may request that the ECB terminates the close cooperation with immediate effect and will not be bound by the ensuing decision.[29]

If a participating non-Euro member state disagrees with an objection of the Governing Council relating to a draft decision prepared by the Supervisory Board, it can notify the ECB about this. The Governing Council shall then, within a period of 30 days, give its opinion on the reasoned disagreement expressed by the member state and, stating its reasons for doing so confirm or withdraw its objection. If the Governing Council confirms its objection, the participating non-Euro member state may notify the ECB that it will not be bound by the potential decision related to a possible amended draft decision by the Supervisory Board. The ECB shall then consider the possible suspension or termination of the close cooperation with that member state, paying due consideration to supervisory effectiveness, and make a decision in that respect.[30]

With the view to ensuring that differences of views are resolved in a balanced manner, the ECB will issue a regulation setting up a mediation panel and its rule of procedure. The mediation panel will step in and resolve differences between competent authorities in participating member states regarding an objection of the Governing Council towards a draft decision from the Supervisory Board. The mediation panel comprises one member from each participating member state, chosen by each member state among the members of the Governing Council and the Supervisory Board. Every member has one vote and the mediation panel makes its decision by simple majority.[31]

The assignment of supervisory tasks to the ECB will not influence the role of the European Banking Agency (EBA).[32] EBA will maintain its current role in the legislative process and its task of developing and contributing to a consistent application of single market legislation. Yet, as a safeguard to member states that do not choose to participate in the SSM, a significant change to the procedure of decision-making in EBA has been made. The general rule is still

29. Regulation no 1024/2013 art. 7(8).
30. Regulation no 1024/2013 art. 7(7).
31. Regulation no 1024/2013 art. 25(5).
32. Established by Regulation no. 1093/2010.

simple majority in EBA's Board of Supervisors, but with regard to decisions on issuing regulatory technical standards, guidelines, recommendations,[33] and on temporary restricting certain financial activities,[34] a qualified majority is now needed.[35] Such a qualified majority shall include at least a simple majority of its members from member states participating in the SSM and a simple majority of its members from member states that are not participating in the SSM.

Final remarks

The ECB will start operating its conferred task on November 4, 2014.[36]

By designing the governance system as described above and making changes to the decision making procedure of EBA, it is the authors' opinion that the non-Euro member states have gained as much influence in the SSM as possible under the adopted legal framework.

Besides the governance system and the exit possibilities, other aspects of course also have to be included in non-Euro member states' decisions whether to participate in the SSM or not, e.g. the range and coverage of ECB's supervisory task, and the accountability of the ECB in the exercise of supervisory tasks.[37]

When writing this article, the UK and Sweden have already announced that they do not wish to join the SSM, while Denmark's answer still waits until the last detail of the Single Resolution Mechanism (SRM) is put in place.

In these years, there is an extensive and unprecedented harmonization of the financial regulation at EU level. Bearing that in mind, it can be assumed that the EU wishes as many non-Euro member states as possible to join the SSM. Otherwise, they will not be subject to the prudential guidelines from ECB. However, **all** member states – both Euro and non-Euro member states – have to comply with the rules and frameworks issued by EBA. These rules are so comprehensive and detailed that the consequences of some member states choosing not to join the SSM are perhaps limited.

33. Regulation no. 1093/2010, art 10-16.
34. Regulation no. 1093/2010, art. 9(5).
35. Regulation no. 1022/2013 no. 24) changing Regulation 1093/2010 art. 44(1).
36. Regulation no. 1024/2013 art. 33(2).
37. *Bruegel: Zsolt Darvas and Guntram B. Wolff*: Should non-euro area countries join the SSM, 18 February 2013.

APPENDIX TO THE DANISH REPORT

Niels C. Andersen[38]

Question 8

Denmark (as a non-euro area Member State) signed the Treaty on Stability, Co-ordination and Governance in the European Union (the Stability Treaty), and the Danish Parliament passed a resolution for ratification of the Treaty in May 2012. The process of ratification was concluded in July 2012. In connection with the deposit of the instrument of ratification, the Government declared Denmark's intention to be bound by all the provisions in Titles III and IV of the Stability Treaty. (At the same time, the Government declared that Denmark will not, pursuant to the Stability Treaty, be bound by any acts of Union law which only apply to euro area Member States.) In June 2012 the Parliament adopted the Budget Act which implements Article 3 of the Stability Treaty. The Budget Act is based on an agreement between the political parties which currently form the government as well as two political parties in opposition, and that agreement provides that the Budget Act can only be amended with the consent of all the political parties that are parties to the agreement. This arrangement is intended to enhance the binding effect of the Budget Act in order to guarantee that the fiscal balance rules are fully respected and adhered to throughout the national budgetary processes, cf. article 3(2) of the Stability Treaty. It should be noted that the Danish legal system does not provide for specific constitutional laws or specific legislative procedures. The Budget Act stipulates that the overall budgetary position of the general government must be balanced or in surplus (i.e. following Article 3 of the Stability Treaty). The Budget Act also includes provisions on expenditure ceilings for the State, the regions and the municipalities. Together with the Budget Act, the Parliament passed an act under which the Economic Council (an independent economic advisory body established by law) can assess the financial policy pursued. The Economic Council will also assess whether the expenditure ceilings decided by Parliament are in accordance

38. Niels Andersen is General Counsel at the National Bank of Denmark. It has regarding the replies from Denmark been necessary to divide the questions among different experts.

with the financial policy objectives and whether the expenditure ceilings are complied with.

Question 9

No.

ESTONIA

Andres Tupits[1]

Economic policy

EU legal order

Question 1

As far as Articles 121(6), 122(2), 126(14) and 136 TFEU are concerned, the primary Union law allows to adopt measures as far as the euro area economic governance is concerned. In so doing, prohibition of monetary financing by central banks (Article 123(1) TFEU), prohibition of privileged access regarding the funds of commercial banks (Article 124 TFEU) as well as the no-bail-out principle of a Member State in financial difficulties (Article 125 TFEU) should limit the possible measures available, however, one may have different impression if assessing the measures taken during the euro area debt crisis. In this regard, Article 127(6) TFEU as the legal basis for the Banking Union is relevant, since that particular provision was agreed upon already at the Treaty of Maastricht.

From the legal point of view it is questionable whether a matter that is subject to rather extensive regulation in TFEU should be complemented by non-EU instruments as well as decision-making mechanisms that are different from those of the EU. The effect of the Treaty on Stability, Co-ordination, and Governance is that a parallel procedure will be created vis-à-vis Articles 121 and 126 TFEU, and that Article 126(13) TFEU will lose its original meaning due to the fact that reversed qualified majority voting will be used. Furthermore, contrary to Article 126(10) TFEU, there will be a possibility to bring a Member State to the Court of Justice of the European Union (ECJ) under Article 8 of the Treaty on Stability, Co-ordination, and Governance. Therefore, the problem with this Treaty is that its legal certainty is questiona-

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ble as its provisions co-exist with the provisions of TFEU, while provisions of the latter will prevail in case of conflicts.[2] The reason for a conclusion of the Treaty establishing the European Stability Mechanism is hidden in the need of avoiding formal conflict with the text of Article 125 TFEU. If either of the Treaties were to be incorporated into TFEU, such amendment can only be made through an ordinary revision procedure, as the competences that have already been conferred to the Union institutions (or the future Union institutions like the ESM) would necessitate this. The fact that the conferral of additional powers and the emergence of additional institutions and bodies for the euro area governance have been silently recognized by all Member States should not serve as a reason for a simplified revision procedure.

Question 2

The main constitutional and institutional implication at the European level by the use of supranational, intergovernmental, private law, and soft law instruments in reforming the euro area economic governance is the growing consolidation of power to the Council (acting either as Council, ESM Board of Directors, or representatives of Member States/shareholders, depending on the legal basis), the interests of which the Commission has to bear in mind while executing its tasks under the TFEU as well as the non-EU Treaties. The ECJ has found that allocation of various tasks to the EU institutions by the ESM Treaty is compliant with the TFEU.[3] A possible implication may arise from the fact that the Union budget, which caters among others for the Commission's administrative costs, applies to the euro area and non-euro area Member States alike, which means that the measures for the euro area governance are also paid for by Member States outside the euro area.

Question 3

TFEU specifies that the primary objective of a single monetary policy and exchange rate policy is to maintain price stability and to support the general economic policies in the Union.[4] The authority for the single monetary policy lies at the ECB.[5] The authority of the euro exchange rate lies at the Council.[6]

2. Article 2 of the Treaty on Stability, Co-ordination, and Governance.
3. Case C-370/12, Pringle, paragraphs 155-165.
4. Article 119(2) TFEU.
5. Article 283(1) TFEU.
6. Article 219 TFEU.

The current legal framework does not foresee direct taxation, Union debt instruments or (apart from Article 122(2) TFEU) autonomous budgetary means at the Union level to stabilize economies at the national level. Any of such measures would call for a revision of the Treaties (TEU and TFEU) with regard to the competences of the Union and its Member States.

Question 4

In order to ensure democratic legitimacy and accountability at the EU level, no further measure is necessary. Instead, for as long as economic policy remains a national affair, the role of national parliaments over the Council (the latter acting either as Council, ESM Board of Directors, or representatives of Member States/shareholders, depending on the applicable legal basis) should be increased.

Question 5

The main legal challenge is the body of EU law that already governs the financial market regulation and supervision. For example, the CRD IV/CRR[7] alone is more than 400 pages long, to which both the European Banking Authority (EBA) as well as competent national authorities will add their respective rules. The complexity is extended due to the fact that both the Single Supervisory Mechanism as well as national competent authorities would need to co-exist and work within the framework of the EBA. Against this background, one should note that the Single Resolution Mechanism is still underway and that the deposit guarantee schemes continue, for the time being, to be national.

7. Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.06.2013, p. 1; and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.06.2013, p. 338.

Legal orders of the Member States

Question 6

Under the EU Treaties, economic and budgetary matters remain within the competence of the Member States,[8] and the latter 'shall regard their economic policies as a matter of common concern and coordinate them within the Council'.[9] The Member States committed themselves for the Stability and Growth Pact.[10] All Member States, except the UK,[11] are required to avoid having excessive government deficits.[12] For the Member States of the euro area, special rules apply.[13] It is noteworthy that while the Commission was assigned, a duty to monitor the development of the budgetary situation and of the stock of government debt in the Member States,[14] the legal mechanism was there only for the assessment of budgetary situations and not for the government debt.[15] In this regard the so-called 'Euro Plus Pact',[16] 'six-pack'[17] or the 'two-pack'[18] are certainly a step ahead.

8. Article 120 TFEU provides that the 'Member States shall conduct *their economic policies*', which is further confirmed by Article 127(1) TFEU referring to the task of the ESCB to 'support the *general economic policies in the Union*' indicating that it is possible to have a number of economic policies in the EU.
9. Article 121(1) TFEU.
10. Resolution of the European Council on the Stability and Growth Pact Amsterdam, 17 June 1997, OJ C 236, 2.8.1997, p. 1.
11. See Article 4 of the Protocol No 15 (The UK Protocol).
12. Article 126(1) TFEU.
13. Articles 136-138 TFEU.
14. Article 126(2) TFEU.
15. See Protocol (No 12) on the Excessive Deficit Procedure; Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 209, 2.8.1997, p. 1; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 209, 2.8.1997, p. 6.
16. Available at. http://www.consilium.europa.eu./uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.
17. Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure; OJ L 306, 23.11.2011, p. 33; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306, 23.11.2011, p. 25; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic

Furthermore, there was never an effective mechanism to discipline the Member States[19] or sanction those euro area Member States that fail to comply with their Treaty obligations.[20]

For the national parliaments, the legal challenges are derived from the fact that relations with the Commission and the decision-making in the Council or in the ECB are trusted with the executive part of the government, while the legislator is left with 'pre-agreed' option or options by the time the matter is presented to the national parliament. Further issues arise from the fact that since ESM is not part of the EU framework, national parliaments may be restricted to exercise their control over the executive branch of the government, as the latter may benefit from the professional secrecy rules of the ESM.

For smaller Member States, which under Article 4(4) of the Treaty establishing the ESM are not treated equally in the decision-making process, there is

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policies, OJ L 306, 23.11.2011, p. 12; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, 23.11.2011, p. 8; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, 23.11.2011, p. 1; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ L 306, 23.11.2011, p. 41.

18. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, 27.5.2013, p. 11; Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140, 27.5.2013, p. 1.
19. Article 4 of the Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund (OJ L 210, 31.07.2006, p. 79) has been applied only once with regard to Hungary, see the Council Implementing Decision 2012/156/EU of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013 (OJ L 78, 17.03.2012, p. 19), but was soon repealed, see the Council Implementing Decision 2012/323/EU of 22 June 2012 lifting the suspension of commitments from the Cohesion Fund for Hungary (OJ L 165, 26.06.2012, p. 46).
20. Article 126(11) TFEU has never been applied against the euro area Member States; furthermore, coercive means of remedying excessive deficits are not applicable to the Member States with a derogation, as well as to the UK under Article 139(2)(b) TFEU and Article 4 of the UK Protocol. However, sanctioning appears to be possible under the Treaty on Stability, Co-ordination, and Governance where a Contracting Party whose currency is the euro should pay to the European Stability Mechanism and in other cases payments will be made to the general budget of the European Union.

a risk that their views will not be taken into account at all, which in turn undermines the parliament's controlling power. In budgetary terms, smaller Member States without any veto powers in the ESM cannot effectively control their national budgets, as ESM-related costs beyond their control have to be honored.

Question 7

N/A

Question 8

The duties arising from the Treaty on Stability, Co-ordination, and Governance in the European Union, including Articles 3(1), 4, 5, and 6, of it as well as the Council Directive 2011/85/EU have been taken into account for the drafting of the new State Budget Act ('Riigieelarve seadus' in Estonian). The draft new State Budget Act was submitted to concerned parties on 28 June 2013 and it is envisaged that it will be adopted by the parliament by end-2013. As the balanced budget rule was also applied in practice before, the draft new State Budget Act amends the preparatory process of annual budgets and specifies the roles and responsibilities of different institutions in this regard.

Question 9

The Chancellor of Justice referred to the Estonian Supreme Court ('Riigikohus' in Estonian) to declare Article 4 (4) of the Treaty Establishing the European Stability Mechanism, the emergency voting procedure, to be in conflict with the Constitution. The Chancellor of Justice focused on the issue that substantial budgetary decisions could be made in the future under the emergency voting procedure without the involvement of the Estonian parliament. The Estonian Supreme Court dismissed the application in its decision 3-4-1-6-12 on 12 July 2012 with 10 judges out of 19 (full court) in favor and a number of judges submitting dissenting opinions.[21]

In the same decision, the Estonian Supreme Court also held that if the European Union Treaties were to be amended; or a new founding treaty is entered into, and if it brings about more extensive delegation of Estonia's competences to the European Union, and more extensive interference of the Constitu-

21. An English translation of the judgment can be accessed at http://www.riigikohus.ee/?id=1347.

tion, the consent of the people of Estonia must be requested. Legal scholars in Estonia have pointed out that the Estonian Government, and the Supreme Court to a certain extent, assimilated the integration of Estonia into the ESM to the EU integration, although the ESM's framework lays outside the framework of EU law.[22]

Question 10

N/A

Monetary policy

Question 11

In order to safeguard the independence[23] of the ECB in the conduct of its monetary policy, with the primary objective to maintain price stability,[24] Articles 123(1) and 124 TFEU rule out 'monetary financing'[25] of the public sector[26] as well as 'privileged access',[27] while Article 125 TFEU establishes the no-bail-out principle.

22. See Ginter, C. Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty. European Constitutional Law Review, 9, pp. 335-354.
23. Article 130 TFEU, Article 7 of the Statute of the ESCB and the ECB.
24. Articles 127(1) and 282(2)TFEU, Article 2 of the Statute of the ESCB and the ECB.
25. The monetary financing prohibition is laid down in Article 123(1) TFEU, replicated in Article 21.1 of the Statute, which prohibits overdraft facilities or any other type of credit facility with the ECB or the NCBs in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States, and the purchase of debt instruments directly from these public sector entities by the ECB or NCBs. The precise scope of application of the monetary financing prohibition is further clarified by the Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty, OJ L 332, 31.12.1993, p. 1. Articles 104 and 104b(1) of the Treaty establishing the European Community are now Articles 123 and 125(1) of the Treaty on the Functioning of the European Union.
26. For example, Union institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law or public undertakings of Member States.

The ratio legis for the above prohibitions is the following: Article 125 TFEU in conjunction with the current Article 123 and 124 TFEU was designed to counteract excessive budget deficits and debts on the part of the Member States. Those were – inter alia because of the fear of instability on the financial markets – regarded as endangering monetary stability and the survival of the economic and monetary union. In order that the debts of Member States should not be excessive, the Member States were, inter alia, required to practise budgetary discipline, and the incurring of debt was thereby to become more difficult. Article 123 TFEU prohibits the Member States from being funded by the central banks. Article 124 TFEU further prohibits the Member States from having privileged access to financial institutions.[28] Eligible government bonds are used as collateral by commercial banks for the Eurosystem monetary policy operations, and there are consequences for the commercial banks if the value of the collateral decreases.

Against this background, the policy measures adopted by the European Central Bank during the euro area debt crisis aim to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism.[29] In this regard the European Central Bank has acted in accordance with its legal mandate in responding to the euro area debt crisis.

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27. The prohibition of privileged access laid down in Article 124 TFEU refers to financial institutions only (see Case T-116/94 Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori Legali v Council of the European Union, paragraph 28). Article 124 TFEU provides that any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited. The definitions for the application of privileged access have been further specified in the Council Regulation (EC) No 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty, OJ L 332, 31.12.1993, p. 4. The prohibition addresses Member States, but it also concerns central banks since they are also bound by EU law and cannot take measures granting privileged access by the public sector to financial institutions if such measures are not based on prudential considerations.
28. Case C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General, view of Advocate General Kokott delivered on 26 October 2012, paragraphs 128-129.
29. For example, Regulation (EC) No 1053/2008 of the European Central Bank of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/11), OJ L 282, 25.10.2008, p. 17; Decision ECB/2010/5 of 14 May 2010 establishing a securities markets programme, OJ L 124, 20.5.2010, p. 8; Decision of

Question 12

Article 127(6) TFEU and Article 25.2 of the Statute set forth that the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the ECB, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings. Furthermore, this is also confirmed by Article 25.2 of the Statute,[30] which provides that in accordance with any regulation of the Council under Article 127(6) TFEU and Article 25.2 of the Statute, the ECB may perform specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings. It is noteworthy that Article 127(6) TFEU is meant to apply to all members of the ESCB,[31] not just the Eurosystem. In addition, Article 42 of the Statute, which specifies the provisions that are not applicable to the Member States with a derogation, does not list Article 25.2 of the Statute. Even Articles 4 and 7 of Protocol No 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland do not exclude the applicability of Article 127(6) TFEU or of Article 25.2 of the Statute to the United Kingdom.

However, this EU-wide supervisory competence has no EU-wide regulatory backing from the Statute. While the first indent of Article 132(1) TFEU and Article 34.1 of the Statute authorize the ECB to make regulations to the extent necessary to implement the tasks defined in, inter alia, Article 25.2 of the Statute, those regulations would only be applicable to the Member States that have adopted the euro. In particular, Article 139(1)(e) TFEU provides that acts of the European Central Bank issued under Article 132 TFEU

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the European Central Bank of 21 March 2012 amending Decision ECB/2011/25 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral (ECB/2012/4), OJ L 91, 29.03.2012, p. 27.

30. Remarkably, the task of prudential supervision has not been placed in Article 3 of the Statute together with other tasks of the ESCB. The rationale may be that this was a task foreseen for the ECB alone and not for the entire ESCB. However, Smits points out that Article 127(6) TFEU is not a separate article but a paragraph in an article describing the tasks of the ESCB (Smits, European Central Bank Institutional Aspects, 1997, reprinted with corrections 2000, p. 355). Smits' observation is supported by the language of Article 132(1) TFEU, which stipulates, among others that *'[I]n order to carry out the tasks entrusted to the ESCB, [...]'*, while one of the legal bases for the ECB Regulations is also Article 25.2 of the Statute.
31. See Article 139(2)(c) TFEU.

should not apply to Member States with a derogation.[32] The same is also true for the United Kingdom.[33] Therefore, while being lawfully competent to carry out prudential supervisory tasks throughout the EU, once the Council has issued its regulation, the ECB's power to issue legal acts in this field would unfortunately be limited to the euro area Member States, unless a mechanism is created that would extend the legal instruments of the ECB also to the Member States with a derogation.

The Committee of Governors foresaw the supervision of not '*all*' credit and financial institutions by the ECB, but only those '*for which it is designated as competent supervisory authority*'.[34] Article 127(6) TFEU and Article 25.2 of the Statute make no distinction between micro- and macro-prudential supervision. It is therefore possible for the ECB to carry out either of them or even both. However, the exact scope of prudential supervision needs to be determined by the Council's regulation referred to in Article 127(6) TFEU and Article 25.2 of the Statute.

One would assume that under its supervisory role, the ECB will have rulemaking powers under Article 132 TFEU, although the SSM Regulation[35] is not very clear on this.[36] The basis for the assumption is that the legal instruments listed in the SSM Regulation are the same that the ECB adopts already in its traditional role.[37] The ECB is in charge of applying all relevant Union law, which under the SSM Regulation also includes national legislation transposing EU Directives, and in this context has the right to adopt guidelines and recommendations, take decisions subject to, and in compli-

32. Respectively, Article 42.1 of the Statute and Article 34 of the Statute.
33. See Articles 4 and 7 of Protocol No 15.
34. See Committee of Governors of the Central Banks of the Member States of the European Economic Community, 1990, p. 9.
35. See Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, 2012. See also ECB Opinion CON/2012/96 of 27 November 2012 on a proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, as well as a proposal for a regulation of the European Parliament and of the Council amending regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), OJ C 30, 1.2.2013, p. 6.
36. Article 4(3) of the SSM Regulation does refer to neither Article 132(1) TFEU or Article 34.1 of the Statute, while recital 32 of the SSM Regulation refers to Article 132 only in the context of adopting regulations.
37. For dissenting views, see Wymeersch, 2012, p. 23.

ance with Union law, as well as adopting regulations necessary to organise and specify the modalities for carrying out its tasks.[38]

Constitutional concerns under Articles 129(1) and 283(1) TFEU and Articles 9(3) and 10(1) of the Statute have secured the ECB Governing Council involvement in the adoption of the ECB legal instruments under the SSM Regulation. For example, while it is the Supervisory Board that is supposed to carry out preparatory works regarding the ECB's supervisory tasks, including the preparation of draft decisions, it is the ECB Governing Council that formally adopts these decisions.[39] Unlike traditional ECB legal instruments, supervisory legal instruments are adopted when the Governing Council remains passive.[40]

Pursuant to Article 6(5) of the SSM Regulation, the ECB may issue regulations, guidelines or instructions[41] to national supervisory authorities, and instructions to the national supervisory authorities of non-euro area Member States of close cooperation.[42] The close cooperation appears to be a measure to bypass Article 139(1)(e) TFEU, and without any amendment to the Treaties, extend the jurisdiction of the ECB legal instruments, while giving the Member State concerned an option not to be bound with the Governing Council's objection to a draft Supervisory Board decision.[43] However, it is unclear whether only instructions will apply to national supervisory authorities or would it also be possible to apply regulations, decisions, and guidelines of the ECB to the non-Eurosystem national supervisory authorities.[44] Decisions appear to be addressed towards credit institutions,[45] opinions are used in the context of addressing the close cooperation by non-Eurosystem Member States, while the addressee of recommendations[46] is not clear in the SSM Regulation. The text of the SSM Regulation also refers to instruments

38. Amtenbrink, 2012; Article 4(3) of the SSM Regulation.
39. Article 19(3) of the SSM Regulation.
40. See Article 26(8) of the SSM Regulation.
41. Article 6(5) of the SSM Regulation actually refers to 'general instructions' which is not repeated anywhere in the SSM Regulation.
42. Article 7(1) of the SSM Regulation.
43. Article 7(7) of the SSM Regulation.
44. The text of Article 26(8) of the SSM Regulation refers to draft decisions, but it is not clear whether this means already draft ECB decisions subject to the ECB Rules of Procedure or Supervisory Board decisions on the adoption of regulations, guidelines or instructions. In this sense, Articles 7(1) and 26(8) of the SSM Regulation are contradictory.
45. Article 22 of the SSM Regulation.
46. Recommendations issued by the ECB are mentioned only in Recitals 34 and 60 and in Article 4(3) of the SSM Regulation, without revealing any instances where recommendations could be used.

like 'warning',[47] and 'prior notification',[48] and it is not clear whether warnings and prior notifications constitute separate legal instruments or should be issued in the form of a decision. There are also other occasions where the form of legal instrument to be used is unclear.[49]

Since Article 130 TFEU and Article 7 of the Statute, which establish the principle of central bank independence, provide that '*when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute*' [My emphasis, AT.], and taking account of the fact that the supervisory task of the ECB originates from Article 127(6) TFEU and Article 25.2 of the Statute, one can conclude that the concept of central bank independence would also spill over to the supervisory task under these circumstances.

Question 13

The re-division of the ECB statutory objectives requires a Treaty change under Article 48 TEU. The exact content of the change is dependent on the objectives that are envisaged for the ECB.

Question 14

The first paragraph of Article 263 TFEU provides that the Court shall review, among others, the legality of acts of the European Central Bank, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties.[50]

47. Article 7(5) of the SSM Regulation.
48. Article 12(1) of the SSM Regulation.
49. See, for example, Articles 5(4) and 30 of the SSM Regulation.
50. The Court of Justice has noted that action against an act of an institution intended to have legal effects is admissible, irrespective of whether the act was adopted by the institution pursuant to Treaty provisions, see Case C-316/91 European Parliament v Council of the European Union [1994] ECR I-625, paragraph 9. An action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects, see Case 22/70 Commission v Council [1971] ECR 263, paragraph 42; joined cases C-181/91 and C-248/91 European Parliament v Council of the European Communities and Commission of the European Communities [1993] Page I-3685, paragraph 13; Case C-57/95 French Republic v Commission of the European Communities [1997] ECR I-1627, paragraphs 7 and 23. At the same time, acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member

In the past, the ECB's actions have been subjected to judicial review for example regarding the decisions made in staff matters,[51] in the procurement procedure,[52] in the assessment of public access requests,[53] or in at least one occasion regarding the validity of a legal act adopted by the ECB.[54]

Monetary policy decisions are made by the ECB Governing Council under Article 12.1 of the Statute. These decisions are not adopted as formal legal acts, despite being published in the Official Journal.[55] Monetary policy decisions do not produce any legal effects vis-à-vis third parties, but are addressed to the Eurosystem central banks.

Similarly, open market operations are conducted as a result of the Governing Council decision and do not produce any legal effects vis-à-vis third parties.

Open question

Question 15

N/A

States, are not subject to judicial review by the Court, see joined cases C-181/91 and C-248/91 European Parliament v Council of the European Communities and Commission of the European Communities [1993] Page I-3685, paragraph 12.

51. For example, Case F-15/05 Carlos Andres and Others v European Central Bank (ECB) [2008] ECR not yet reported; Case T-320/02 Monika Esch-Leonhardt, Tillmann Frommhold and Emmanuel Larue v European Central Bank [2004] ECR II-79; Case T-63/02 Maria Concandta Cerafogli and Paolo Poloni v European Central Bank [2003] ECR II-1405, II-4929.
52. For example, Case T-468/09: Action brought on 24 November 2009 — JSK International Architekten und Ingenieure v ECB OJ C 24, 30.1.2010, p. 61; Case T-279/06: Order of the Court of First Instance of 2 July 2009 — Evropaïki Dynamiki v European Central Bank (ECB) OJ C 233, 26.9.2009, p. 15.
53. For example, joined cases T-3/00 and T-337/04 Athanasios Pitsiorlas v Council of the European Union and European Central Bank [2007] ECR II-4779.
54. For example, Case C-11/00 Commission of the European Communities v European Central Bank [2003] ECR I-7147.
55. The ECB publishes them on its website. However, the interest rate applied by the European Central Bank to its main refinancing operations is then published in the OJ section C (Notices) by the Commission. Section C is different than section L of the Official Journal which addresses legislation. These notices do not refer to any legal basis in the Treaties or the Statute, see for example 'Interest rate applied by the European Central Bank to its main refinancing operations: 0.50 % on 1 September 2013, OJ C 254, 4.9.2013, p. 2.

FINLAND

Klaus Tuori and Juha Raitio[1]

Economic policy

EU legal order

Question 1

This is a very broad and also important question. It is thoroughly discussed in the book by *Kaarlo and Klaus Tuori: The Eurozone Crisis – A Constitutional Analysis* that is to be published by Cambridge University Press later in January 2014. However, it is somewhat difficult to summarise the main outcomes without losing important elements.

In the book, the issues are divided into two parts, namely constitutional analysis of individual Treaty Articles in the light of the measures on one hand, and analysis of the whole economic constitution and its principles against the measures and events that have taken place on the other hand. Starting with the individual articles that are also listed in the question as Articles 121(6), 122(2), 126(14), and 136 TFEU, the preliminary conclusion would be that the measures taken by the EU and its Member States could mostly be defended although with substantial stretching of the interpretational limits. In addition, that stretching would seem to require an implicit objective for the EU in the area of stability.

Another requirement is that we take the legal practice of the ECJ at face value also with regard to the Pringle-case,[2] and do not make much out of the inconsistencies and violations of economic rationalities that make the Pringle-

1. Klaus Tuori, Researcher, Centre of Excellence in Foundations of European Law and Polity – University of Helsinki, Juha Raitio, Professor of European Law, University of Helsinki (Questions 6-10 and partly 2, 15). Additionally, researchers Tomi Tuominen, University of Lapland and Janne Salminen, University of Turku, have been consulted by Juha Raitio.
2. See C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General, Judgment of 27 November 2012, not yet reported.

case somewhat confusing reading. In Pringle, the Court did not find anything capable of affecting the validity of European Council Decision 2011/199/EU[3] amending Article 136 TFEU with regard to the European Stability Mechanism ESM. So following the line of argumentation of the ECJ and assuming that stability is one of the key objectives of the Union, it is possible to find interpretation that would make the measures compatible with individual Treaty Articles.

However, there is one caveat, namely that a separate discussion is required on the measures taken by the ECB in the light of Articles 123-125 as well as Article 127(6) TFEU as far as the proposed Banking Union goes. For that part, it is difficult to avoid the conclusion that the interpretational limits most likely have been exceeded with regard to the TFEU Articles and the ECB Statute. This concerns a number of measures during the crisis, such as the SMP and OMT programmes, excessive relaxation of the collateral list, and even some of the liquidity creating measures to the extent that they could not be defended on the basis of quite narrow monetary policy considerations. The strict view with regard to the ECB is based on its special role as an independent expert that allows limited discretion in expanding actions from the narrowly defined monetary policy sphere. In this regard, it should be analysed differently from for example EU Council whose legitimacy is still based on continuous democratic inputs. This will be further elaborated in the questions concerning monetary policy. A special element seems to be Article 127(6) TFEU in the context of the proposed Banking Union, but it is obviously slightly early to conclude on basis of various proposals. However, it could be pointed out that the role of the ECB with regard to the banking sector and financial markets more generally was explicitly narrowed down in the drafting of the Maastricht Treaty. The Committee of Governors had proposed a more extensive role that was perceived incompatible with the independent position and extensive powers of the ECB, and hence only a contributory role was seen appropriate. To use Art 127(6) TFEU to grant general and quite open powers in the area of banking supervision to the ECB is quite problematic from the EU legal order point of view.

Yet, looking solely at the individual articles leaves aside the perspective of the constitutional legal order, the European economic constitution and its key constitutional principles. Indeed, this second level constitutional discussion on the EU economic policy in the light of European economic constitution is arguably more important, particularly when discussing recent events and

3. OJ, N:o L 91, 6.4.2011, p. 1.

changes that were not foreseen at the time the Treaty Articles got their written form. The European economic constitution as a coherent whole gives more tools to analyse new types of situations. However, the book claims that the principles of the European economic constitution have been pushed to the limits with the measures taken, which actually questions the existence of a coherent constitutional legal order at the EU level at least in the form that it was perceived before the crisis. Hence, it could be seen that the individual measures or individual Treaty articles are not the main legal concern with the economic crisis. It is rather the combination of actions and their relation with the principles of the European economic constitution that raises the main worries.

Question 2

Question 2 is discussed quite thoroughly in the book[4] and it is very difficult to summarize the main message in the reply form. Naturally, the constitutional and institutional implications at the European level of the use of supranational, intergovernmental, private law, and 'soft-law' instruments in reforming economic governance have been manifold. Particularly, the intergovernmental issue is discussed at length. In addition, further focus should probably be on the reasons why the various forms have been chosen rather than only their implications.

Following Question 1, the main implication seems to be that the whole economic constitutional model that has developed step-by-step from the Treaty of Rome and onwards is changing. The constitutional implications are quite extensive, but also quite different with the various instruments mentioned in the question. Indeed, the broadest and most important question relates to the changes in the principles of European economic constitution that will have implications far beyond the actual issues at hand.

If we approach this question from a wider perspective, one may refer to the Finnish and even Nordic discussion concerning the on-going fragmentation of EU law. This issue can be linked to the variable geometry and integrity of the internal market regime and even to the question of enhanced cooperation authorized by Articles 20 TEU and 326-327 TFEU. Surely many of the measures adopted to maintain stability in the Euro zone may have increased fragmentation. One may even pose the question, whether the enhanced coop-

4. See Tuori, Kaarlo – Tuori Klaus*: The Eurozone Crisis – A Constitutional Analysis* Cambridge University Press, 2013.

eration mechanism can be abused, if it is used to circumvent certain unanimity requirements based on the Treaties and thus political deadlocks.[5]

Perhaps a concrete example of fragmentation more or less caused by the euro crisis is the enhanced cooperation in the area of financial transaction tax (FTT), which is also called Tobin tax. The Council has recently authorized enhanced cooperation in the area of financial transaction tax,[6] and the FTT is based on the Proposal for a Council Directive on the matter.[7] Financial transactions are more thoroughly defined in the Proposal, so it suffices to state that broadly speaking they can be related to purchase, sale or exchange of financial instruments. Only eleven Member States (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia, and Slovakia) are willing to proceed by using the enhanced cooperation, and all the other Member States may opt in later. The financial sector has played a major role in causing the economic crisis whilst Member States at large have borne the costs, which is one of the political background reasons of the new Proposal.

It is to be noted that the aim of the FTT is actually to avoid fragmentation in the internal market for financial services, since there is an increasing number of uncoordinated national tax measures being put in place. To put it more precisely, enhanced cooperation in the area of FTT should provide the necessary legal framework for the establishment of a common system of FTT in the participating Member States and ensure that the basic features of the tax are harmonized. Thus, to the extend possible, incentives for tax arbitrage and allocation distortions between financial markets should be avoided by adopting enhanced cooperation in this area.

It is important to note that enhanced cooperation in the area of FTT should respect the competencies, rights and obligations of non-participating Member States to keep or introduce FTT on the basis of non-harmonised national rules. However, one may plausibly argue that the FTT might turn out to be an

5. See e.g. Lamping, Matthias: Enhanced Cooperation – A Proper Approach to Market Integration in the Field of Unitary Patent Protection, International Review of Intellectual Property and Competition Law, N:o 8, 2011, pp. 879-925 and Raitio, Juha: 'Fragmentation in the European Union and the Enhanced Cooperation Mechanism – Can it be Abused?', Europarättsligt Tidskrift 3/2013, pp. 475-484.
6. See Council Decision 2013/52/EU of 22 January 2013 authorizing enhanced cooperation in the area of financial transaction tax, OJ, N:o L 22, 25.1.2013, p. 11.
7. See Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM (2011) 594 final and Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM (2013) 71 final of 14 February 2013.

interesting idea that cannot work in practise, since it needs to be adopted universally, if it is not to be undermined by tax arbitrage.

Question 3

The reports mentioned are naturally only few of the many proposals for the future course of the EMU. The underlying questions are hardly legal, but rather economic and to some extent political.

The models presented in these quite neo-functional documents would seem to advocate extensive constitutional changes that would go well beyond the already quite extensive changes that have occurred with the somewhat chaotic ad hoc measures. From the economic side, they seem to provide measures to correct for the current deficiencies of the Optimal Currency Area (OCA). However, the proposals seem to fail in addressing the main problems of the OCA comprehensively and honestly. Without acknowledging the most important (economic) problems of the EMU and particularly the lack of any consistent path towards OCA, it is difficult to see that they would get to the root cause of the crisis. One potential reason for this could be that for some countries furthest from OCA due to economic and institutional structures, the economic, political, and social cost of the EMU continues to be very high.

Furthermore, as the measures are more administrative and fiscal policy related than market economy based, they also constitute a further deviation from the constitutional principles of the European economic constitution. Naturally, it is another question whether the measures would be helpful in supporting the EMU area in the global economic context or the opposite. The closed economy mind-set behind the proposals makes them quite inward-looking.

Most crucially, the inroad to national budgetary discretion, particularly in the case of extended mutual responsibility, would be such that it could face major constitutional hurdles in some countries. It is very difficult to see that these hurdles could be overcome without Treaty changes as even the current measures form so large deviation from the economic constitutional principles that a Treaty change, democratically speaking, could be advisable. At the same time, it unfortunately seems very unlikely that Treaty changes and a possibility for democratic input will be considered.

Question 4

As discussed earlier and again particularly in the book, issues related to democratic legitimacy and accountability have become quite pressing as the situa-

tion has deteriorated during the crisis. The balance between executive and parliamentary powers has moved towards the former, both nationally and at EU level. A specific issue is the increased role of the independent expert bodies such as the ECB that, in balance, has reduced the roles of both parliaments as well as democratically directly responsible executive organs.

Simple answers are not available. The role of the European Parliament has naturally decreased as it has been sidelined in most of the measures and proposals. However, it does not seem to be particularly well equipped to take more responsibility of the legitimacy and accountability either. Firstly, it represents EU rather than the euro area, which in many cases is a dividing line between opposite parties. Many measures with direct or indirect recourse to (euro area) taxpayers' money are such that non-euro area countries are more than happy to let euro area countries pay for the benefit of the whole union. Secondly, EP has not been able to gain legitimacy vis-à-vis European people even with the increased powers that it has been given over the years.

On a somewhat more positive note, it seems that national parliaments in some countries have become more active on the EU issues during the crisis. While this is not necessarily unproblematic for the coherence and representativeness' point of view, it shows some renewed concern for democracy at the national level.

A specific area of democratic legitimacy and accountability would seem to relate to the ECB. Should the banking union actually lead to real supervisory powers, it would need to be accompanied with a proper democratic accountability. The independent expert role based on economic theory (and practice) hardly extends to a supervisory role although some very weak economic theory explanations have been extended to supervisory area as well. How the personal and institutional accountability should be organized is far from a simple issue. Yet, if a major failure in the supervisory task does not lead to even involuntary dismissal of the ECB governor in the proposed set-up, other accountability measures would easily turn into window-dressing with adverse consequences for the democratic accountability. Also more generally, the details of the actual operationalization of the proposed framework will determine its impact on the accountability and ultimately democratic legitimacy of the framework. Unfortunately, the importance assigned to these issues so far leaves a quite limited room for optimism.

Question 5

EU financial market regulation and supervision faces the main difficulty of being between the broad market area that has a number of strong institutional

players such as the Basle Committee, the IMF, industry bodies (IOSCO etc), and the ultimate responsible party, namely national tax payers. Hence, it is less than clear that the EU level is the most relevant to discuss financial market regulation issues. Naturally, the common market for financial services argues for EU level action, but at the same time EU is not a particularly relevant level for the market. Here again, we find a dichotomy with large global players that organize themselves globally, and the national level where most of the domestic retail financial services are provided by domestic institutions regardless of their ownership.

The EU financial system has remained the most bank-centered major financial system with potential major regulatory defiance that can lead to costs for taxpayers. The first major question is whether the excessively large role of banks is a result of regulatory or market failures as efficiency considerations hardly explain the current role of banks in a number of fields. A related issue is to analyse the main reasons for European banks being major investors in government bonds that is quite counter-intuitive and economically absurd. Potentially too extensive deposit insurance or implicit government guarantee could explain some part of the bank-centered system and also banks investments in government bonds.

The need for a more centralised supervisory system (i.e. Single Supervisory Mechanism) is offered as a partial solution to supervisory failures and the risk that national supervisors are captured by the local banking systems. This is potentially accurate, but would require a similar shift in the responsibility for the banks that is hard to see in the current situation. Badly executed centralised systems can naturally make things substantially worse than is the case currently. Actually, looking at the EU one finds both banking sectors that have fared poorly even in the global perspective, as well as banking sectors that have remained fundamentally very stable. One would need to be a major optimist to assume that centralised systems would be particularly close to the better fared systems. A regression toward the mean is a more likely outcome.

An issue that is less considered for some reason is to find means to reduce the dependence of the banking sector and the underlying riskiness of the banking sector with some substantive measures. Many independent and highly regarded observers have pointed to the obvious measure of a substantial increase in own capital requirements of banks to reflect the true underlying risk of the sector. Obviously, that would reduce the competitive position of the banks, but only from the advantageous position that they now have, and actually yield a less bank-dependent economy.

Similarly, it could be possible, also at the EU level, to consider separating banking functions to basic banking and other forms, where only the former

could benefit from the deposit insurance for example. Current deposit insurance and even more so implicit government guarantee would seem to give bank prop desk enormous competitive advantage to other trading based hedge funds. Fundamentally, there is no practical difference between many of the investment banking functions of the large universal banks and the actions of the trading-based hedge funds, with the exception that the latter could actually face more scrutiny, because they need to convince their creditors and counterparties that they have sound risk management.

Legal orders of the Member States

Question 6

Since the questions concerning legal orders of the Member States are somewhat overlapping, some relevant issues are brought up already at this stage.

Firstly, one may point out that according to the Finnish Constitution, paragraph 82, the incurrence of State debt shall be based on the consent of the Parliament, which indicates the maximum level of new debt or total level of State debt. By analogy, this refers to the State securities and State guarantees as well, because in practice they may increase the financial burden of the State budget. Since one cannot exactly define the limits of the financial burden and risks of the State in the framework of neither ESM nor EFSF, the Parliament had to stretch the limits of its interpretation of the national budgetary discipline. It had to accept the very practical conclusion that it should suffice that a probable amount of financial burden must be known.[8]

The most important point in this context, however, is the role of the Finnish Parliament and its budgetary autonomy. The Constitutional Law Committee did not find the draft Treaty of the ESM to be such that it could be enacted in a normal simple majority procedure in the plenary session,[9] which in practice would have meant serious political deadlock due to the qualified majority voting (2/3 of the votes cast). One of the reasons was that it was not clear, when exactly the emergency voting procedure in Article 4(4) was to be applied. The Finnish Constitutional Law Committee argued that the draft Treaty must be written so that the circumstances when the emergency procedure ap-

8. See e.g the Opinion of the Constitutional Law Committee, PeVL 14/2011 vp. (11.11.2011)
9. See the Opinion of the Constitutional Law Committee, PeVL 22/2011 vp. (8.12.2011).

plies are clearly defined in the ESM Treaty. The Committee feared that the financial burden of the Finnish State may grow by the majority decision of the ESM Board of Governors, if the emergency procedure will not be altered. This was indeed done in the final version of the Article 4(4) ESM Treaty, since Article 4(4) now refers to Article 5(6), points f) and g) in this context. This final version as regards emergency procedure was then relatively easy to accept in the Finnish Parliament.[10]

Question 7

As it comes to democratic legitimacy and accountability of EU economic governance, one may point out that the relevant paragraphs are 94-97 of the Finnish Constitution. The Finnish parliamentary system has proven relatively efficient taking into consideration the national concerns. For example, such concerns can be connected to the budgetary powers of the Parliament as a means to safeguard democracy.

Based on paragraph 96 of the Constitution, the Constitutional and Human rights dimensions of proposals for acts, agreements, or other measures, which are to be decided in the EU, are to be pre-examined before they are handed down to the plenary session of the Parliament. The proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee. This refers especially to the task of the Constitutional Law Committee. However, one should nevertheless emphasize that in practice the Grand Committee has a significant position to streamline the Finnish EU policy. For example, based on paragraph 97 of the Constitution, the Grand Committee will receive reports on the preparation of the EU matters. The Prime Minister will provide the Parliament or a Committee (normally the Grand Committee) with information on matters to be dealt with in a European Council beforehand and also, without delay, after the meeting in the Council.

For the sake of national interests it is sometimes better to react to the novel EU-based legislative proposals or Treaty obligations in advance and in due course. Thus, the democratic deficit typical for the economic governance of the current euro zone may turn out to be more problematic for the Member States in which there is no pre-examination of the legitimacy of Government's legislative proposals.

10. See the Opinion of the Constitutional Law Committee, PeVL 25/2011 vp. (27.1.2012).

On grounds of paragraph 94 a decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. If the proposal concerns the Constitution or transfer of powers to the EU, which is of significance with regard to Finland's sovereignty, a qualified majority of 2/3 of the votes cast applies (e.g. see question 6 and the situation in the draft treaty of ESM). When the proposal in question may somehow affect the national sovereignty, the media tend to be very active in such circumstances and provide accurate information to the citizens.

According to paragraph 95, the provisions of treaties and other international obligations of a legislative nature are brought into force by a Degree. A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal somehow transfers authority to the EU and thus affects Finland's sovereignty, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least 2/3 of the votes cast.

Having considered the pros and cons of the current system based on paragraphs 94-97, there is no political will to alter the system. Maybe the only practical point to improve the current mechanism relates to the question how the Prime Minister can be more efficiently in contact with the Grand Committee during the negotiations in the European Council, if such contact is needed. As regards the substance of economic governance, one may point out that the connection between the Fiscal Compact and ESM has not been problematic from the Finnish perspective.

Question 8

A short answer to the question concerning the national legal instruments applied to implement the Fiscal Compact Treaty (Treaty on Stability, Coordination and Governance in the European Union) is that the implementation was possible at the level of statutory Acts.[11] The 'Balanced Budget Rule' described in Article 3 of the Fiscal Compact Treaty was to be transposed into national legal systems 'through binding and permanent provisions, preferably constitutional'. There was a considerable consensus among the politicians and experts that in the context of the Finnish constitutional system there is no need to adopt constitutional provisions. The fact that Fiscal Compact Treaty may affect the budgetary powers of the Parliament did not lead to a different

11. See Governmental Bill 155/2012 vp. and the national Act 869/2012 (21.12.2012).

conclusion, since compared to the already binding Stability and Growth pact the alterations and modifications were not that significant.[12]

Concerning the substance matters in Articles 3(1), 4,5, and 6 of the Fiscal Compact Treaty there were no significant political or economical obstacles to adopt them. However, when regarding Article 3(1c), certain concerns were announced due to the economic pressures, which are caused by the growth in the amount of the elderly among the population in the medium term.

Question 9

So far the EU- or non-EU instruments employed in addressing the sovereign debt crises have not been challenged before national courts. The situation in Finland is thus different from the Irish (Pringle-case) or the German situation (Rulings of the Bundesverfassungsgericht) mostly because of the institutional structures of the State.

The Finnish Parliament has 15 permanent special committees and the Grand Committee which deals with the formulation of the national policy associated with EU membership. The Constitutional Law Committee in turn decides whether a certain legislative proposal requires a qualified majority voting procedure in the plenary session or not. If the proposal somehow infringes the rights or interests protected by the Finnish Constitution, it is probable that the qualified majority is needed. In the context of ESM or EFSF such challenges have been brought up by the experts, members of the Parliament and the media. Quite often it has been the budgetary autonomy of the Finnish Parliament that has been under scrutiny in the Constitutional Law Committee. As explained above in the context of Question 6, the draft Treaty of the ESM caused a relatively intense debate in the Finnish Parliament's Constitutional Committee and the Grand Committee.

Question 10

This question is not relevant from the Finnish point of view since Finland belongs to the euro zone.

12. See the Opinion of the Constitutional Law Committee 37/2012 vp.

Monetary policy

Question 11

The role and actions of the ECB during the crisis can hardly be discussed properly in the current space. The rapporteur is referred, for example, to article Enlarged Scope and Competences of the ECB Economic Constitutional Analysis[13] and the aforementioned book also on this issue. However, some excessively simplistic comments could be made to give an idea on the legal position of the ECB during the crisis.

The EU monetary policy framework could be defined as a set of coherent constitutional principles that were by and large stipulated in the Maastricht Treaty. These principles also need to be seen in the light of the broader European economic constitution, but also vis-à-vis other policy fields that were also given EU guidelines as well as EU-based constraints. Focusing purely on some, although important, Treaty articles risk missing the broader context as well as the dynamic elements of the monetary policy framework.

The main idea of the EU monetary policy framework is that monetary policy objectives and tasks can be assigned to an independent expert body. The primary objective is defined in such a way that it does not allow any discretion, i.e. price stability cannot be jeopardized in any situation. In the same vain, the common central bank was distanced from all concerns related to public finances of the member states.

Against the background of the constitutional principles covering the ECB, the actions and roles taken by the ECB during the crisis raise some major constitutional worries. It could well be claimed that both the focus on its primary objective and its institutional independence have been compromised both with regard to its actions vis-à-vis banking sector, and also public finances, particularly in the case of Greece. Firstly, the expansion of the collateral list together with the increase in short, and particularly medium term financing, has most likely involved the ECB to the financial position of the banking sector more than would be suitable for its independence as well as the principle of the open market economy. Yet, by and large the actions could be justified with the help of a very positive interpretation purely on the basis of maintaining some form of monetary transmission mechanism and also

13. Tuori, Klaus. Enlarged Scope and Competences of the ECB Economic Constitutional Analysis. Helsinki Legal Studies Research Paper No. 25.

functioning of the payment systems. Secondly, the actions with regard to Greek and some other public finances are more difficult to justify. The heavy involvement in the rescue packages (Troika) and also relaxation of the collateral requirements risk questioning the institutional independence and also requirement of sufficient collateral. Furthermore, both SMP and announced OMT programmes would seem to be in direct contradiction of prohibition of public finances, independence and even potentially price stability. They would also be very difficult to justify on the grounds of monetary policy, although some attempts have been made on the basis of renationalization of money markets that could be tackled with targeted bond-buying in the countries that have faced financial market concerns. However, by and large these explanations seem to rather raise more worries than alleviate the previous ones.

Emergency liquidity assistance (ELA) is a very complicated issue, because the actions have not been open and transparent, which could also be said about the procedures giving ELA. There is varying information on the extent of ELA given by the national central banks of the Eurosystem (NCBs) and also on the type of actions that could have taken place. It is a major risk that some of the actions taken by the NCBs have not been ex ante approved by the ECB and more interventions to varying areas of the markets have taken place than is generally admitted. Annual accounts of the NCBs have been notoriously secretive on this issue.

Against this background, it seems that there is at minimum a major need for proper transparency. Yet, it is quite possible that the increasing demands for more flexibility of the ECB's mandate would need to be addressed with a direct impact on its independence. If it is claimed that initial mandate does not suffice to conduct monetary policy or more broadly central banking functions, the gap between the mandate and reality cannot constitutionally be closed by the independent expert itself. It would seem as if some form of democratic input is needed. The adjustment to mandate would seem to dictate whether the democratic input needs to be frequent in form of political oversight or even approval of the ECB strategy, or whether the Treaty change with regard to the mandate suffices. Here, a possible or even advisable conclusion could that the ECB would continue with its current mandate and independence, and the flexibility demands would be tackled with other procedures or institutional arrangements.

Question 12

Considering the legislative history of Art 127(6) it would seem clear that it cannot be the basis for broad supervisory functions, be it micro- or macro-supervision. The task in the field of supervision was explicitly excluded in the Maastricht Treaty although it was proposed by the Committee of Governors. The reason for the exclusions are also more convincing than reasons suggesting that the 127(6) could be used as a legal basis for a proper responsibility in the field of banking supervision.

There are two main reasons for the question combining banking supervision and monetary policy in the EU context. First, the ECB is given a level of independence that is just barely compatible for the conduct of monetary policy with some strong assumption, concerning the underlying role prices in the economy, and the straight-forward nature of monetary policy actions that do not contain value-judgments. The economic theories, and to a lesser extent the empirical economics, would hardly give the same result for the conduct of supervision, where there is a frequent need for democratic input, particularly in the cases of crisis. Secondly, the special focus on the objective of price stability in the case of the ECB goes well beyond the situations for other central banks and it serves as a basis of transnationalising monetary policy. Introducing other elements at the transnational level would be very difficult.

However, Art 127(6) does not exclude specific, well-defined and narrow tasks to be assigned to the ECB as long as it is assessed by all, including the ECB itself, that these tasks do not in any way hamper the achieving of the primary objective and also take care of the other tasks. As of now, the actual content of the supervisory tasks is unclear. And it is difficult to see how any of the proposals for the banking union would meet these requirements. Indeed, while there could be good reasons from economic or political point of views to advocate a banking union, the fact that it proposed to be built around the ECB is constitutionally very suspect and could end up resulting in an unstable framework that is prone to fail, either economically, politically, or constitutionally.

Question 13

Most of the issues have been tackled in the previous questions. Assuming a Treaty change it could be possible to reconsider the statutory objectives of the ECB. Considering the objectives of common monetary policy, it is less clear that any change in the objectives would make a difference as long as it is assumed that there is no trade-off between inflation and growth in the medium

term and at best (worst) limited short-term trade-off. In that situation, a change in the objectives would not be needed.

The underlying question as to whether a change in the ECB statutory objectives is deemed necessary, is simply whether the economic assumptions concerning monetary policy have changed in such a way that new objectives would help to make the EMU more successful than has been the case. Unfortunately, a more realistic possibility is that indeed the economic assumptions have changed, but in a way that would question the optimality of the currency area rather than the objectives for the common central bank. Should the lack of optimality of the current country composition be such that the economic and social costs of the membership are becoming intolerable, there is very little that can be done with statutory objectives, particularly concerning the common central bank. In the same vain it is very difficult to see how differently objectivized monetary policy could have resulted in a better outcome than the current disaster. The issue is discussed somewhat more on the article *From expert to politician and stakeholder? – Constitutional drift in the role of the ECB*[14] by Klaus Tuori.

Another issue is whether some changes would be needed in the institutional set-up if the tasks of the ECB are changed. As discussed in the previous questions, particularly new types of tasks that do not fulfil the criteria of tasks to be assigned to independent expert bodies would require change in the institutional status and could easily be incompatible with the tasks of conducting monetary policy. Hence, the incompatibility could result either from the fact that tasks themselves could result in conflicting measures, but also because the task would require different types of institutional set-up. With regard to banking supervision, both of these could play a role.

With regard to differentiating macro- and microprudential supervision, it is unclear whether one should make a very clear distinction between the two. Currently, any proper banking supervisors are conducting both, and might not make substantial difference between the two. From the sector failures' point of view, they always happen at least at the institutional level (micro), and the risks causing failures more often than not have some macro-economic or market based drivers. Actually, making a clear and institutionally derived distinction between the supervisory approaches could increase the level of complication in the supervisory framework and result in a declining sense of responsibility and accountability among the supervisory agencies.

14. Klaus Tuori. *From expert to politician and stakeholder? – Constitutional drift in the role of the ECB*. Presented in Arena 'Europe in crises, Europe as the crisis?' conference in Oslo 14-15 March 2013 and forthcoming in a publication.

The redefinition of ECB statute demanded for the inclusion of supervisory role (micro or macro prudential) would require both enhanced political accountability, for example, in the form of approval of the ECB strategy and also procedure for dismissal of the ECB Executive Board Members (particularly) governor in the case of failures in the supervisory field. How these changes would fit the monetary policy tasks of the ECB depends on the underlying economic and social theory. However, it is clear that the original thought behind the Maastricht Treaty would not comply with the new institutional setup.

The Lender of last resort (LOLR) function seems to be a quite unclear concept to most commentators and it was not defined in the question. It could be argued that the most classic LOLR function with regard to the banking sector has been fulfilled by the ECB (Eurosystem) from the start of the crisis. It has lent money in enormous quantities and with a quite relaxed collateral policy by illiquid banks. It could actually have been the case that it exceeded the traditional LOLR function in the sense that many of the banks could actually have been insolvent despite the specific collateral that the ECB was accepting. The insolvency could have been the case had the respective government bonds and other sub-par material in the banking books been valued at market prices. Yet, the principle is quite clear: it is compatible with the ECB objectives and tasks to maintain the liquidity situation in the banking sector as it has done to the extent that the collateral has been sufficient and bank solvent.

Another LOLR issue seems to relate to NCB funding under ELA. There it seems as if the provision of liquidity has exceeded the boundaries of traditional ELA (or LOLR) and part of the ELA has been actual solvency support. The transparency of the ELA operations is very low, which makes it very suspicious from the accountability point of view. Looking at the statutory position of the ECB, it should be highlighted that the independent expert position requires transparency and thorough accountability when there is no direct democratic control.

During the sovereign debt crisis, a new form of LOLR concept has emerged, namely with regard to Member State financing. It has been claimed that in the euro area, there is a need for an ultimate financier of the Member States in the case failure of market financing. To follow the thinking of the LOLR, the Member State in question should be solvent (i.e. credit worthy) in order to receive LOLR money. Fundamentally, any Member State LOLR function would literally be directly against prohibition of public sector financing. It is pure public sector financing. In that regard, the OTM programme is LOLR type programme and naturally against the prohibition of

public sector financing. As described in the book, it could be explained at the broader level by the second order telos of the no-bail out clause, i.e. fundamentally supporting the stability of the euro area. However, that extension would require abolition of the prohibition clause for the ECB and hopefully an addition to its tasks (objectives). Naturally, this would turn the underlying economic thinking behind the Maastricht Treaty up-side down, but in an explicit way rather than the implicit way that is the case with the SMP and OTM programmes. While that outcome might not be something to wish for, probably an objective and interest free discussion on the underlying economic paradigm of the EMU would deserve a proper chance, because from the list of actions taken that is not discernible.

Question 14

In the aforementioned book, the role of the Court of Justice of the European Union in the interpretation and application of the primary and secondary EU law pertaining to monetary policy and more generally macro-economic policy is discussed quite thoroughly. Indeed, it seems that the macro-economic part of the economic constitution is far more difficult for the ECJ than the micro-economic part of the economic constitution. This is also demonstrated by two major rulings. Firstly, the ruling on Stability and Growth Pact (the case against France and Germany) led to a factual invalidation of the disciplinary effect of the SGP. Secondly, the more recent Pringle-case makes the inability (for the ECJ) to use judicial control mechanisms on macroeconomic issues quite visible. The main focus is on the ESM Treaty, but the ruling touches upon a number of macroeconomic concepts that were a crucial part of the macro-economic part of the European economic constitution including monetary policy. For a trained economist the ruling makes a relatively violent reading.

Rather than engaging in criticising the ECJ and claiming that it has failed its duty as the ultimate guarantor of the European economic constitution, it is perhaps more fruitful to take the rulings as important parts of the EU legal practice. Accordingly, there is quite limited enforceability on the Treaty stipulation concerning the macroeconomic part of the TFEU. Actual developments and actions, to the extent that they have been agreed in the EU Council or are direct actions by the EU officials (ECB, Commission etc.) are not found to be in contradiction with the Treaty.

As far as this soft law type of application of TFEU economic policy articles continue to be verified by the legal practice of the ECJ, it will become more likely that national constitutional courts regain their position as inter-

preters of economic constitutional law. In particular, legal orders that had also considered economic constitutional law as binding hard law, will find this new strand of legal practice quite uncomfortable. Naturally, the Karlsruhe ruling on the Maastricht Treaty[15] will need to be revisited, but how far the conclusions reached could be attained at the national level is an open question.[16] If history looked for guidance, it is more likely that national ruling aims at constraining national policy-makers, also in their role in the EU Council. Yet, with well-grounded rulings they could see a possibility to regain their position at the expense of the ECJ.

Another issue related to the newly found soft law nature of the macroeconomic stipulations of the Treaty is potentially more forward-looking and has already taken place. Issues demanding enforceability and legal certainty are tackled outside the Treaty framework and even outside the scope of the ECJ. This will limit the role of EU institutions and increase, for example, the role of private sector type arrangements that have a demonstrated procedure for providing legal certainty.

Open question

Question 15

We find that the questions have been excellent and they have provided a sound basis for a profound study on topic 1. The issues concerning European constitutionalism of euro-federalism contra national constitution have given rise to various debates in Finland. For example, one may pose a question, whether we should also have a Constitutional Court like in Germany or Italy. For the reasons described more thoroughly in the context of question 7, it does not seem plausible to predict that there would be a considerable demand for a Constitutional Court in Finland irrespective of the turmoil in the euro zone as regards concerns of the democratic accountability.

15. See Brunner v Vertrag über die Europäische Union, 2 BvR 2134/92 and 2 BvR 2159/92, BVerfGE 89, p. 155.
16. See e.g. Faβbender, Kurt: Der Europäische »Stabilisierungsmechanismus« im Lichte von Unionsrecht und deutschem Verfassungsrecht, NVwZ 13/2010, s. 803, in which it has been stated: »Schlieβlich zeigt auch das Maastricht-Urteil des BVerfG einen letzten denkbaren Weg aus der Krise auf: ein Ausscheiden Deutschlands aus der Währungsunion«.

From a political and more international point of view, one may point out that during the euro crisis, the former French president *Nicholas Sarkozy* openly spoke in favour of creating a two speed European Union, composed of an '*avant garde*', represented by those countries participating in the euro zone, and then all other Member States would be drawn into a lose confederation attached to the core.[17] This idea reflects the hidden question of this report. Now that the euro zone has in fact become the economic and political core of the EU, it has enhanced a more clear-cut fragmentation in the European Union. The actual implications of the fragmentation arising from the EMU measures are likely to feed into other areas of the EU, which could further question the unity of the Union.

Another major question is that if the euro zone will not be able to cope with the current economic problems in the current form, what will happen? The euro membership could turn out to pose social costs to some members that far exceed the assumed benefits also in the medium to long term. In that situation, excluding a democratic choice of exiting the Union could fundamentally undermine the whole democracy with very serious consequences. Against that background, it should be discussed how an orderly exit of the euro area could be institutionalised, which could take place as part of the structural modifications to the current institutional framework that are necessary in the future.

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GERMANY

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Vorbemerkung

Deutschland hat als größter EU-Mitgliedstaat und größter Anteilseigner der EZB in der Wirtschafts- und Finanzkrise große finanzielle Lasten und Risiken übernommen. Sowohl die EU-rechtliche und IWF-rechtliche als auch die national-verfassungsrechtliche Zulässigkeit nahezu sämtlicher, von der EU, der Eurozone, den Mitgliedstaaten sowie dem IWF ergriffenen »Rettungsmaßnahmen« (Bilaterale Kredite, EFSF, EFSM, ESM) als auch Reformen (»Six-Pack«, »Two-Pack«, Vertrag über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion (SKSV)) ist im deutschen rechtswissenschaftlichen Schrifttum intensiv und äußerst kontrovers diskutiert worden. Mehrfach wurde das Bundesverfassungsgericht angerufen und hat in seinen Entscheidungen der Jahre 2010-2014 die diesbezüglichen verfassungsrechtlichen Maßstäbe entwickelt bzw. konkretisiert. Diese Diskussionen können im vorgegebenen Rahmen naturgemäß nur unvollkommen und unvollständig wiedergegeben und bewertet werden. Exemplarisch sei lediglich auf einige der jüngsten Beiträge (samt den dortigen weiterführenden Literaturangaben) verwiesen.[2]

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2. *Herrmann*, EuZW 2012, S. 805 ff.; *Selmayr*, ZÖR (2013) 68, S. 259 ff.

Wirtschaftspolitik

EU-Rechtsordnung

Frage 1

Die zur Bewältigung der europäischen Staatsschuldenkrise von der EU, dem Euro-Währungsgebiet, den Mitgliedstaaten der EU/des Währungsgebiets sowie dem IWF getroffenen Maßnahmen werden von zahlreichen Stimmen in der deutschen Rechtswissenschaft als »klarer Rechtsbruch« gebrandmarkt.[3] Dass auch die den öffentlichen Diskurs zu WWU-Themen in Deutschland maßgeblich prägenden Ökonomen – bar jeder rechtswissenschaftlichen oder auch nur schlicht rechtlichen Kenntnisse – in das gleiche Horn stoßen,[4] hat in der deutschen Öffentlichkeit die weitreichende Überzeugung geschaffen, die Beachtung des Rechts spiele für die Bewältigung der Staatsschuldenkrise praktisch überhaupt keine Rolle. Im Mittelpunkt der Kritik stehen dabei die angebliche Verletzung der sog. »No-Bailout-Klausel« des Art. 125 Abs. 1 AEUV durch bilaterale Kredithilfen an Griechenland, durch EFSF und ESM, sowie des Verbots der sog. monetären Staatsfinanzierung (Art. 123 Abs. 1 AEUV) durch die Maßnahmen der Europäischen Zentralbank (insbesondere SMP bzw. OMT; s. dazu unten Frage 11). Beschränkt auf rechtswissenschaftliche Kreise werden darüber hinaus auch Fragen der Kompetenzreichweite der Union, namentlich des Art. 122 Abs. 2 AEUV (als Grundlage für die im Rahmen des EFSM stattfindendende Kreditaufnahme durch die EU) sowie des Art. 136 Abs. 1 lit. a) AEUV (als Grundlage für Teile des Six-Packs bzw. Two-Packs) diskutiert.

Der Berichterstatter hat seit Beginn der Staatsschuldenkrise im Jahr 2010 in mehreren Veröffentlichungen zu einer Reihe dieser Fragen Stellung bezogen und dabei die Auffassung vertreten, dass Art. 125 Abs. 1 AEUV ebenso-

3. S. zuletzt beispielhaft *Kirchhof*, NJW 2013, S. 1 ff.
4. Zuletzt erfolgte ein Aufruf von 136 deutschen Ökonomen gegen das OMT-Programm, das als ökonomisch unsinnig und als rechtswidrig bezeichnet wird (in Reaktion auf einen vorherigen Aufruf von ca. 220 deutschen und ausländischen Ökonomen, die die OMT-Ankündigung ausdrücklich gelobt hatten). Überdies hat die Staatsschuldenkrise zur Gründung einer neuen Partei, der »Alternative für Deutschland – AfD« geführt, die offen für eine Verkleinerung des Euro-Währungsgebiets, ein Ende der Rettungsmaßnahmen und notfalls auch einen Austritt Deutschlands aus der WWU eintritt. Bei der Bundestagswahl erreichte die Partei 4,7 Prozent der Wählerstimmen, zog damit allerdings nicht in den Deutschen Bundestag ein.

wenig verletzt worden ist wie Art. 123 AEUV.[5] Im Hinblick auf die zentrale Vorschrift des Art. 125 Abs. 1 AEUV ist diese Auffassung vom Gerichtshof in der Rs. C-370/12 (*Thomas Pringle*) zwischenzeitlich bestätigt worden. Danach ist die Gewährung von Hilfskrediten nur unter der Voraussetzung verboten, dass sie »zu einer Beeinträchtigung des Anreizes für den Empfängermitgliedstaat führen würde, eine solide Haushaltspolitik zu betreiben«.[6] Da alle Hilfsmaßnahmen stets nach dem Prinzip der strikten Konditionalität gewährt worden sind, sind sie mit Art. 125 Abs. 1 AEUV auch vereinbar. Der neue Art. 136 Abs. 3 AEUV stellt dies für den ESM lediglich klar, statuiert aber zugleich das Prinzip der strikten Konditionalität. Eine solche Klarstellung hätte im Übrigen auch auf Grundlage des Art. 125 Abs. 2 AEUV stattfinden können.

Da Art. 125 Abs. 1 AEUV bereits für sich genommen eine konditionierte Leistung finanzieller Hilfen nicht verbietet, kommt es für die europarechtliche Beurteilung der bilateralen Kredite, der EFSF sowie des ESM nicht darauf an, ob die Voraussetzungen des Art. 122 Abs. 2 AEUV im Falle der Mitgliedstaaten, die Hilfe erhalten, tatsächlich vorliegen.[7] Lediglich für die Errichtung des EFSM sowie dessen jeweilige Kreditgewährung im Einzelfall stellt dies eine Voraussetzung dar. Insoweit ist die Beurteilung, dass es sich bei der weltweiten Finanz- und Schuldenkrise um ein Ereignis handelt, was sich der Kontrolle eines Mitgliedstaates entzieht,[8] rechtlich nicht zu beanstanden. Die Frage, ob ein Mitgliedstaat durch sein Haushaltsgebaren seine Schwierigkeiten mitverschuldet hat, ist hierfür unbeachtlich. Letztlich erlaubt Art. 122 Abs. 2 AEUV auch eine auf die Festlegung bloßer Verfahrensregelungen beschränkte allgemeine Regelung über die Gewährung von Finanzhilfen der EU nach Maßgabe des Art. 122 Abs. 2 AEUV, sofern die in Art. 122 Abs. 2 AEUV festgelegten tatbestandlichen Voraussetzungen einer solchen Hilfe jeweils gegeben sind.[9] Dass durch die EFSM-Verordnung[10] die EU-Kommission auch zur Begebung von Unionsanleihen ermächtigt wird,[11] obwohl in der Vergangenheit davon ausgegangen wurde, dass eine solche Er-

5. *Herrmann*, EuZW 2010, S. 413 ff.; *ders*., EuZW 2010, S. 645 f.; *ders*., EuZW 2012, S. 805 ff.
6. EuGH, Urt. v. 27.11.2012 zur Rs. C-370/12, *Thomas Pringle/Irische Regierung*, EuZW 2013, S. 100 ff., Rn. 136.
7. S. schon *Herrmann*, EuZW 2010, S. 413 (415 f.).
8. S. Erwggr. (2) ff. der VO (EU) Nr. 407/2010, ABl. Nr. L 118/1, ber. ABl. 2012 Nr. L 188/19.
9. *Obwexer*, ZÖR 2012, S. 209 (233).
10. VO (EU) Nr. 407/2010, ABl. Nr. L 118/1, ber. ABl. 2012 Nr. L 188/19.
11. Art. 2 Abs. 1 UAbs. 2 VO Nr. 407/2010.

mächtigung nur auf die Vertragsabrundungsklausel (jetzt Art. 352 AEUV) gestützt werden könne,[12] führt ebenfalls nicht zur Rechtswidrigkeit der Verordnung, da die frühere Rechtsauffassung der Organe jedenfalls keine Bindungswirkung erzeugt.[13] Die Begebung von Gemeinschaftsanleihen (jetzt Unionsanleihen) ist hingegen langjährige Praxis der Gemeinschaften bzw. Union.[14]

Im Hinblick auf die Nutzung des Art. 136 Abs. 1 AEUV wird in Deutschland vor allem kritisiert, dass die auf dieser Grundlage geschaffenen Abweichungen von den Verfahrensmodalitäten (umgekehrte Mehrheitsabstimmungen) und Sanktionsmodalitäten eine Änderung der in den Art. 121 und Art. 126 AEUV niedergelegten Verfahren darstellten. Dieses Argument bezieht sich vor allem auf die Sanktionsbewehrung des (intensivierten) Verfahrens nach Art. 121 AEUV und auf die Umkehrung der Mehrheitserfordernisse für die Sanktionsverhängung nach Art. 126 AEUV.[15] Im Hinblick auf Art. 121 AEUV ist das Argument allerdings schwächer, weil das Verfahren nach Art. 121 AEUV eher als unvollständig (und damit ergänzungsbedürftig) angesehen werden kann als das Verfahren nach Art. 126 AEUV, das überdies in einem Protokoll näher ausgestaltet ist, für dessen Ablösung eine besondere – durch Art. 136 Abs. 1 AEUV aber ausgeschlossene – Rechtsgrundlage existiert (Art. 126 Abs. 14 AEUV). Ganz generell wird die Effektivität der Vorschrift des Art. 136 Abs. 1 AEUV mit der vorgeschlagenen engen Lesart erheblich beeinträchtigt. Der Wortlaut des Art. 136 Abs. 1 AEUV (»Maßnahmen nach den einschlägigen Bestimmungen der Verträge«) kann durchaus auch so verstanden werden, dass er lediglich auf den sachlichen Anwendungsbereich (d.h. auf die Tatbestandsseite) der beiden Normen verweist, aber nicht auf diese in Gänze (d.h. Tatbestand, mögliche Rechtsfolgen und anwendbare Entscheidungsmechanismen).

Auch die Rechtmäßigkeit der Übertragung von Aufgaben der Bankenaufsicht im Rahmen des einheitlichen Aufsichtsmechanismus (SSM) auf Grundlage des Art. 127 Abs. 6 AEUV wird in Deutschland kritisch diskutiert (s. dazu Frage 12).

12. So insbesondere *Häde*, Finanzausgleich, 1996, S. 466 ff.; *ders*., in: Calliess/Ruffert (Hrsg.), Komm. z. EUV/AEUV, 4. Aufl. (2011), Art. 143 AEUV Rdnr. 11.
13. *Obwexer*, ZÖR 2012, S. 209 (232 f.).
14. S. dazu *Piecha*, EuZW 2012, S. 532 ff.
15. S. *Antpöhler*, ZaöRV 2012, S. 353 ff.; *Bast/Rödl*, EuGRZ 2012, S. 269 ff.; *Calliess/Schönfleisch*, JZ 2012, S. 477 ff.; *Gröpl*, Der Staat 2013, S. 1 ff.; *Häde*, EuZW 2010, S. 921; *ders*., JZ 2011, S. 333 ff.; *Obwexer*, ZÖR 2012, S. 209 ff.; *Ohler*, ZG 2010, S. 330 ff.; *Weber*, DVBl. 2012, S. 801 ff.

Im Hinblick auf die Nutzung extra-unionaler Instrumente ist die Diskussion weniger intensiv. Nur vereinzelt wurde die Behauptung aufgestellt, die Rettungsmaßnahmen, insbesondere der ESM, verstießen gegen das in Art. 2 Abs. 1 S. 1 AEUV niedergelegte Handlungsverbot für die Mitgliedstaaten im Bereich der ausschließlichen Zuständigkeit der Union für die Währungspolitik. Mit der Entscheidung des Gerichtshofs in der Rechtssache *Pringle* sollte diese Diskussion endgültig beendet werden, da die »Rettungsmaßnahmen« (abgesehen natürlich von SMP und OMT) offenkundig nicht in das Vertragskapitel »Währungspolitik« (Art. 127-133 AEUV) fallen.[16]

Was das Verhältnis zwischen den neuen völkervertraglichen Instrumenten (ESMV und SKSV) und dem Unionsrecht angeht, so ergeben sich keine unmittelbaren Konflikte. Kompetenziell haben die Mitgliedstaaten auf einem Gebiet gehandelt, auf dem der Union lediglich die besondere, ohne Präemptionswirkung ausgestattete Kompetenzform der »Koordinierung« zukommt.[17] Materiell inhaltlich verletzen die völkervertraglich begründeten Pflichten das Unionsrecht nicht, sondern bestärken vielmehr die Ziele des Unionsrechts. Der SKSV ist sogar ausdrücklich mit einer Unterordnungsklausel versehen (Art. 2 SKSV), die aber auch unnötig wäre, da das Unionsrecht kraft seines Vorrangs auch den völkervertraglichen Verpflichtungen der Mitgliedstaaten untereinander vorginge. Über die Zulässigkeit der Einbindung der Organe der EU in die neuen Vertragsregime hat der Gerichtshof ebenfalls in *Pringle* entschieden und den Mitgliedstaaten dabei einen weiten Spielraum gewährt.[18] Insbesondere scheint der Gerichtshof eine »Organleihe« nicht davon abhängig machen zu wollen, dass alle Mitgliedstaaten dieser zugestimmt haben.[19]

Frage 2

Die bisherige Eingrenzung bzw. Bewältigung der Euro-Staatsschuldenkrise hat ein Bündel von Maßnahmen hervorgebracht, die nur teilweise dem Unionsrecht im engeren Sinne zuzurechnen sind. Diese Flexibilität und Formen-

16. Lediglich am Rande sei erwähnt, dass der Gerichtshof unzutreffender Weise Art. 136 Abs. 3 AEUV neu bzw. den ESM-Vertrag auch an Art. 3 Abs. 2 AEUV misst, der ersichtlich nicht internationale Verträge zwischen den Mitgliedstaaten erfasst (vgl. Art. 216 Abs. 2 AEUV); dazu *Herrmann*, AJIL, Vol. 107, No. 2 (April 2013), S. 410 (416). Überdies griffe dann zumindest parallel auch Art. 219 Abs. 4 AEUV ein.
17. S. Art. 2 Abs. 3, Art. 5 Abs. 1 AEUV.
18. EuGH, Urt. v. 27.11.2012 zur Rs. C-370/12, *Thomas Pringle/Irische Regierung*, EuZW 2013, S. 100 ff., Rn. 155 ff.
19. *Herrmann*, AJIL, Vol. 107, No. 2 (April 2013), S. 410 (415).

vielfalt wurde vorrangig vom Unionsrecht selbst erzwungen, weil es mit einer – nationales Verfassungsrecht bei weitem übersteigenden – erschwerten Änderbarkeit ausgestattet ist (Art. 48 EUV), inhaltliche tiefgehende Festlegungen samt detailreicher Einzelregelungen trifft (z.B. Art. 121, 126 AEUV) und auf der Grundlage des Grundsatzes der begrenzten Einzelermächtigung nur über unzureichende bzw. unvollkommene Rechtsgrundlagen für den Erlass von Sekundärrecht verfügt bzw. auch bei diesen keine praktikablen Verfahren bereitstellt und zudem nur Rechtssetzung in den engen Grenzen des (detailreichen) Primärrechts erlaubt (Art. 121 Abs. 6, Art. 122 Abs. 2, Art. 126 Abs. 14, Art. 127 Abs. 6, Art. 136, Art. 326 ff. AEUV). Trotz dieses an sich negativen Befundes haben es die Union bzw. das Euro-Währungsgebiet vermocht, ein Auseinanderbrechen des Währungsgebiets zu vermeiden, indem fortbestehende Zuständigkeiten der Mitgliedstaaten genutzt wurden und bestehende Kompetenzgrundlagen extensiv ausgelegt wurden (Art. 122 Abs. 2, Art. 136 Abs. 1 AEUV). Die Kohärenz mit dem unionsrechtlichen Rahmen wurde durch Unterwerfungsklauseln und Verdoppelungen sowie durch die enge Einbindung der Organe auch außerhalb des eigentlichen unionsrechtlichen Rahmens gesichert, was der EuGH in *Pringle* ausdrücklich konsentiert hat.

Gleichwohl weist diese Methode der Schaffung extra- oder para-unionaler Strukturen und Verfahren auch Defizite auf, da die so geschaffenen Mechanismen nicht die gleiche Effektivität und Normstrenge erreichen und erzeugen können, wie es das supranationale Unionsrecht vermag (wenngleich im Bereich der WWU bislang auch mit mäßigem Erfolg). Der generelle Mangel an strikter Regelbindung – insbesondere für den Bereich der Koordinierung der Wirtschaftspolitik und der Haushaltsdisziplin – kann auf diese Weise auch nur unvollkommen geheilt werden. Zudem hat die Krisenbewältigung weitere, nicht auf alle EU-Mitgliedstaaten anwendbare Sonderregime erzeugt (SKSV, Euro-Plus-Pakt), die jedoch auch nicht nur auf die Mitglieder des Euro-Währungsgebiets beschränkt sind. Der Integrationsabstand zwischen Mitgliedern des Euro-Währungsgebiets und dem Rest der EU hat sich – gerade im Bereich der Wirtschaftspolitik – deutlich ausgeweitet. Der zutreffend erkannte Zusammenhang von Staatsschuldenkrise und Bankenkrise führt überdies zu dem Problem, dass eine aus Regulierungsnotwendigkeiten des Euro-Währungsgebiets resultierende Bankenregulierung (SSM, SRM) kaum friktionsfrei auf die weiteren EU-Mitgliedstaaten erstreckt werden kann (insbesondere im Hinblick auf die Rolle der EZB); gleichzeitig darf die Nichterstreckung jedoch auch nicht die Einheitlichkeit des Binnenmarktes für Finanzdienstleistungen beeinträchtigen. Generell droht eine Vertiefung der Spaltung

zwischen Euro-Währungsgebiet und Rest-EU, die den Integrationsprozess generell auf eine harte Probe stellen wird.

In institutioneller Sicht sind insbesondere die Rolle des Europäischen Parlaments, der EZB sowie der Euro-Gruppe bzw. des ECOFIN problembehaftet. Auch wenn die EU-Parlamentarier seit dem Vertrag von Lissabon »Vertreter der Unionsbürgerinnen und Unionsbürger« sind (Art. 14 Abs. 2 EUV) und nicht mehr Vertreter ihrer jeweiligen Völker, so ist es doch problematisch, wenn EU-Abgeordnete aus Mitgliedstaaten, die dem Euro-Währungsgebiet (noch) nicht angehören, über Rechtssetzung für die Mitgliedstaaten des Währungsgebiets abstimmen, da bei gewählten Vertretern – anders als bei den Kommissionsmitgliedern – gerade nicht unterstellt werden kann und darf, dass diese sich nicht an den Interessen gerade ihrer Stimmkreise orientieren. Unter Praktikabilitätsgesichtspunkten erscheint hingegen wiederum die Einrichtung eines »Euro-Parlaments« (ohnehin nur durch Vertragsänderung möglich) bedenklich. Sollte eine solche in Betracht gezogen werden, so wäre zu erwägen, dieses Euro-Parlament nach dem Prinzip der proportionalen Repräsentation zu errichten. Andernfalls bestünden aus Sicht des deutschen Verfassungsrechts bzw. – gerichts die Vorbehalte gegenüber der Übertragung von Hoheitsrechten auf die EU aus Gründen des Demokratiedefizits fort (dazu auch Fragen 4 und 7).[20] Gerade in Fragen des Euro-Währungsgebiets könnten sich diese jedoch als besonders problematisch erweisen.[21]

Frage 3

Die umfangreichen Vorschläge der beiden angesprochenen Papiere können im vorgegebenen Rahmen nicht umfassend diskutiert werden. Teile von ihnen sind bereits realisiert worden. Aus den noch abzuarbeitenden Vorschlägen stechen unter rechtlichen Gesichtspunkten insbesondere die Vorschläge für die Einführung eines »Schuldentilgungsfonds«[22] sowie der Ausgabe gemeinsamer Schuldtitel der Mitgliedstaaten des Euro-Währungsgebiets heraus.

20. S. BVerfGE 123, 267 (368 f., 373 ff.).
21. Nur am Rande sei hier erwähnt, dass in der deutschen Öffentlichkeit die fehlende Stimmgewichtung der Mitglieder des EZB-Rats wegen der potentiellen finanziellen Implikationen der EZB-Maßnahmen in jüngerer Zeit äußerst kritisch diskutiert wird.
22. Der Vorschlag für einen Schuldentilgungsfonds geht auf den deutschen »Sachverständigenrat« zurück, s. Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Verantwortung für Europa wahrnehmen, Jahresgutachten 2011/12, Drittes Kapitel, VI. Ein Schuldentilgungspakt für Europa, S. 109-118.

Beide Vorschläge sind unter rechtlichen Gesichtspunkten komplex und problematisch, aber nicht generell unzulässig.

Nach derzeitigem Integrationsstand ist davon auszugehen, dass sowohl ein Schuldentilgungsfonds als auch die Begebung gemeinsamer Schuldtitel nicht durch sekundärrechtliche Instrumente (allein) bewerkstelligt werden kann, sondern dass hierfür – wie bei ESM und SKSV – auf völkerrechtliche Konstruktionen zurückgegriffen werden müsste. Insbesondere bedürfte es – so nicht der ESM diese Funktion übernehmen sollte – der Errichtung eines neuen SPVs zur Bündelung und Abwicklung der jeweiligen Schuldbeziehungen. Auf der Grundlage der Rechtsprechung des Gerichtshofs in Pringle müsste die Konstruktion – um Art. 125 Abs. 1 AEUV genüge zu tun – jedoch so ausgestaltet sein, dass sie einen Anreiz zu solider Haushaltspolitik bildet und das diesbezügliche Unionsrecht (insb. Art. 126 AEUV) stärkt. Eine derartige Konstruktion erscheint durchaus möglich.

Aus nationaler verfassungsrechtlicher Sicht wäre die Haushaltsverantwortung des Deutschen Bundestages zu achten (s. dazu Frage 7 und 9). Danach müsste der Bundestag (z.B. jährlich) der Übernahme von Garantien für gemeinsame Anleihen bzw. Anleihen des Schuldentilgungsfonds zustimmen. Nicht ausgeschlossen werden kann allerdings, dass das Bundesverfassungsgericht bei einem solchen Schritt wegen der insgesamt dann im Raum stehenden Haftungssummen die »Überschreitung äußerster Grenzen« der Einschätzungsprärogative des Bundestages im Hinblick auf die Bewertung der Risiken für zukünftige Haushalte feststellen würde. Mit auf eine solche Feststellung abzielenden Klagen wäre mit Sicherheit zu rechnen.

Frage 4

Das Europäische Parlament verfügt in den Angelegenheiten des Euro-Währungsgebiets über beschränkte Mitspracherechte. Das ist bislang insoweit unproblematisch, als die zu koordinierende Wirtschafts- und Haushaltspolitik auf nationaler Ebene von den Mitgliedstaaten gestaltet und verantwortet wird. Je enger die europarechtlichen Vorgaben allerdings werden, umso dringlicher stellt sich auch auf europäischer Ebene die Frage nach der demokratischen Legitimation dieser Einflussnahme. Im interinstitutionellen Verhältnis ist das Europäische Parlament durch seine Fähigkeit zum *packaging* bzw. zur Blockade z.B. des Unionshaushalts durchaus in der Lage, seine Einflussmöglichkeiten auch über den eigentlichen Bereich des ordentlichen Gesetzgebungsverfahrens hinaus auszudehnen. Diese Form der parlamentarischen Einflussnahme ist nicht neu, sondern entspricht der Entwicklung parlamentarischer Mitbestimmung in vielen westlichen Demokratien. Problema-

tisch ist insoweit allerdings, dass das Parlament aus Abgeordneten aus der gesamten EU zusammengesetzt ist, und damit Parlamentarier aus Nicht-Euro-Teilnehmerstaaten über Angelegenheiten mitentscheiden, die allein das Euro-Währungsgebiet und seine Mitglieder betreffen.[23] Dadurch wird das Problem der disproportionalen Repräsentation der Mitgliedstaaten und ihrer Bevölkerungen, das nach der Rechtsprechung des Bundesverfassungsgerichts der Übertragung von Befugnissen auf die Europäische Union Grenzen setzt,[24] noch zusätzlich verschärft.

Frage 5

Nach dem bisherigen Stand der Integration des Finanzdienstleistungsbinnenmarkts besteht eine »Schicksalsgemeinschaft« zwischen nationalen Finanzinstitutionen und Mitgliedstaaten, die im Falle einer Finanz- oder Schuldenkrise zu einem negativen *feedback loop* zwischen den beiden Systemen führt, der in der ultimativen Konsequenz zu einer panikartigen Kapitalflucht, einem Zusammenbruch des jeweiligen nationalen Finanzsystems und einer Staatsinsolvenz führen kann. Zwar zeigt das Beispiel Zyperns, dass ein solcher Prozess in begrenztem Umfang durch Kapitalverkehrskontrollen verlangsamt oder verhindert werden kann; der Preis dafür ist allerdings die Aufgabe der Kapitalverkehrsfreiheit. Hinzu kommt, dass die beschriebene Situation zu unterschiedlichen systemischen Risiken mit einer entsprechenden Zinsfolge auf den renationalisierten und fragmentierten Finanzmärkten führt, wodurch die einheitliche Geldpolitik des Eurosystems gefährdet wird. Für eine dauerhafte Stärkung der Finanzsystemstabilität in der WWU sind daher alle Maßnahmen in Betracht zu ziehen, die dazu führen, dass die beschriebenen »Sollbruchstellen« der WWU beseitigt werden. Dazu gehören insbesondere ein SRM und eine gemeinsame Einlagensicherung für Kreditinstitute, die aber aus politischen Gründen kaum für bestehende Verbindlichkeiten greifen könnte. Die hierfür notwendigen Maßnahmen sollten auf Art. 114 und ggfs. Art. 352 AEUV gestützt werden können.

Zudem ist mittelfristig zu überlegen, die Risikogewichtgung »Null« für Staatsanleihen der Mitgliedstaaten des Euro-Währungsgebiets im Bereich der Eigenkapital- und Liquiditätsanforderungen abzuschaffen, da die Mitgliedstaaten wegen des Verbots der monetären Finanzierung und der fehlenden

23. Von den derzeit 766 Abgeordneten (s. Art. 19 Abs. 1 des Beitrittsvertrags Kroatiens, ABl. 2012 Nr. L 112/26) kommen 481 aus den 17 Mitgliedstaaten des Euro-Währungsgebiets (2014 bei dann 18 Mitgliedstaaten: 484 von 751).
24. BVerfGE 123, 267 (368 f., 373 ff.).

souveränen Möglichkeit zur Beseitigung dieser Regel hinsichtlich ihrer Bonität stets wie Fremdwährungsschuldner behandelt werden müssen. Ein solcher Schritt ist allerdings erst denkbar, wenn die Staatsschuldenkrise überwunden ist, da er vorher krisenverschärfende Wirkung hätte. Sobald eine echte Bankenunion einschließlich der notwendigen Mechanismen zur Rekapitalisierung und Abwicklung von Kreditinstituten geschaffen ist, sollten zudem die Bedingungen für *Emergency Liquidity Assistance (ELA)* durch die nationalen Zentralbanken des Eurosystems entweder deutlich verschärft oder diese sogar gänzlich abgeschafft werden[25] (zu ELA s. auch Frage 11).

Rechtsordnungen der Mitgliedstaaten

Frage 6

Die Bundesrepublik Deutschland verfügte bereits vor Einführung neuer haushaltspolitischer Regelungen auf europäischer Ebene über einen umfassenden rechtlichen Rahmen für die Haushalts- und Finanzplanung einschließlich einer Schuldenbremse. Die Anpassung an den SKSV hat geringfügige Änderungen hieran erforderlich gemacht, die im Sommer 2013 erfolgt sind (s. Frage 8). Die notwendigen Maßnahmen zur Anpassung des statistischen Regelwerks an die Anforderungen der Richtlinie 2011/85/EU hat der Bundesgesetzgeber durch eine Änderung des Finanz- und Personalstatistikgesetzes im Mai 2013 vorgenommen.[26]

Frage 7

Die Vorschriften des deutschen Finanzverfassungsrechts (insbesondere Art. 115 Abs. 1 GG) wurden seit Beginn der Staatsschuldenkrise dahingehend gedeutet, dass die Beteiligung der Bundesrepublik Deutschland an den verschiedenen potentiell haushaltswirksamen »Rettungsmaßnahmen« einer

25. For the current procedures see ECB, ELA Procedures, 17 October 2013; http://www.ecb.europa.eu/pub/pdf/other/elaprocedures.en.pdf?29948d8a86e0bc67f16acbc995f8909b.
26. Gesetz zur Änderung des Finanz- und Personalstatistikgesetzes v. 22.5.2013, BGBl. I S. 1312; s. insgesamt auch den Bericht der Kommission an das Europäische Parlament und den Rat, Zwischenbericht über die Umsetzung der Richtlinie 2011/85/EU des Rates über die Anforderungen an die haushaltspolitischen Rahmen der Mitgliedstaaten, COM(2012)761 final.

gesetzlichen Grundlage bedarf. Streitig waren allerdings Umfang und Ausgestaltung der Mitwirkung des Bundestages an der Verwaltung dieser Mittel. Das Bundesverfassungsgericht hat in seinen Entscheidungen zu den verschiedenen Maßnahmen (dazu im Einzelnen Frage 9) in Analogie zum Begriff der *Integrationsverantwortung* den der *Haushaltsverantworung* des Deutschen Bundestages entwickelt. Danach sind Haftungsautomatismen für Schulden anderer Mitgliedstaaten verfassungsrechtlich verboten; der Bundestag muss vielmehr über jede einzelne ausgabenwirksame Hilfsmaßnahme selbst und im Regelfall im Plenum entscheiden.[27] Die gesetzlichen Grundlagen für die Beteiligung Deutschlands an den Griechenlandhilfen, der EFSF und dem ESM tragen dem Rechnung.[28]

Insoweit die Maßnahmen zur Bewältigung der Euro-Staatsschuldenkrise außerhalb des unionsrechtlichen Rahmens im engen Sinne getroffen worden sind (ESMV, SKSV), greifen nach der Rechtsprechung des Bundesverfassungsgerichts die gleichen Informationspflichten der Bundesregierung gegenüber Bundestag und Bundesrat wie im Hinblick auf Angelegenheiten der Europäischen Union (Art. 23 Abs. 2 GG).[29]

Die Beteiligung Deutschlands an den verschiedenen Maßnahmen unterliegt damit umfassender demokratischer Kontrolle durch den deutschen Bundestag.

Frage 8

Deutschland verfügte auch schon vor dem Abschluss des SKSV (seit 2009) über eine Schuldenbremse im nationalen Recht (Art. 115 Abs. 2 GG[30]; Übergangsregelung in Art. 143d GG). Danach darf ab dem Jahr 2016 der Bund

27. BVerfGE 129, 124 (181 f.); 130, 318 (342 ff.).
28. S. Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik (Währungsunion-Finanzstabilitätsgesetz – WFStG), BGBl. 2010 I S. 537; Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus (Stabilisierungsmechanismusgesetz – StabMechG), BTBl. 2010 I, S. 627, zuletzt geändert durch Gesetz v. 23.05.2012, BGBl. I, S. 1166; Gesetz zum Vertrag vom 2 Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus, BGBl. 2012 II, S. 981; Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMFinG), BGBl. 2012 I, S. 1918.
29. BVerfGE 131, 152.
30. Eingeführt durch Gesetz v. 29.07.2009 (BGBl. I S. 2248) mit Wirkung zum 01.08.2009.

nur noch ein Haushaltsdefizit von 0,35 des Bruttoinlandsprodukts aufweisen, wobei mit dem Abbau des Defizits 2011 begonnen werden musste. Die Länder dürfen ab dem Haushaltsjahr 2020 keine Neuverschuldung mehr aufweisen. Für die sonstigen öffentlichen Haushalte gelten weitgehend Kreditaufnahmeverbote. Die Einzelheiten regelt in Deutschland das Haushaltsgrundsätzegesetz.[31] Diese grundsätzlichen Regeln werden durch den Stabilitätsrat institutionell begleitet.[32]

In Umsetzung des SKSV hat der deutsche Gesetzgeber am 15.07.2013 das Gesetz zur innerstaatlichen Umsetzung des Fiskalvertrags[33] erlassen, durch das das Haushaltsgrundsätzegesetz, das Stabilitätsratsgesetz sowie weitere finanzverfassungsrechtliche Vorschriften den Vorgaben des SKSV entsprechend angepasst werden. Danach ist davon auszugehen, dass die deutsche Rechtslage den Anforderungen des Art. 3 Abs. 2 SKSV entspricht.[34] Für die Erfüllung der Verpflichtungen aus den Art. 4, 5 und 6 SKSV wurden – soweit ersichtlich – keine gesetzlichen Vorschriften erlassen. Der SKSV schreibt solche Vorschriften allerdings auch nicht zwingend vor, sondern verlangt lediglich ihre Beachtung. Soweit diese Regelungen mit Vorschriften des reformierten Stabilitäts- und Wachstumpaktes inhaltlich identisch sind, wären solche innerstaatlichen Vorschriften auch gar nicht zulässig, da mit ihnen der europarechtliche Ursprung (*in concreto* die einschlägigen Verordnungen) verschleiert würde.

Frage 9

Überblick

Das deutsche Bundesverfassungsgericht ist im Rahmen der Euro-Staatsschuldenkrise mehrfach angerufen worden und hat in einer Reihe von Grundsatzentscheidungen die verfassungsrechtlichen Maßstäbe der deutschen Mitwirkung an der Euro-Rettungspolitik entwickelt bzw. konkretisiert.[35] Da-

31. Gesetz über die Grundsätze des Haushaltsrechts des Bundes und der Länder (Haushaltsgrundsätzegesetz – HGrG) vom 19.08.1969, BGBl. I S. 1273.
32. Gesetz zur Errichtung eines Stabilitätsrates und zur Vermeidung von Haushaltsnotlagen, BGBl. 2009 I S. 2702.
33. Gesetz zur innerstaatlichen Umsetzung des Fiskalvertrags (FiskVtrUG) v. 15.07.2013 BGBl. I S. 2398; Geltung ab 19.07.2013.
34. S. auch die Erläuterung zum Gesetzentwurf, BT-Drucks. 17/12058, S. 8.
35. Wegen der Zahl und des Umfangs der Verfahren können hier nicht alle Aspekte erläutert werden. Sämtliche Entscheidungen (in Teilen auch in englischer Übersetzung) können von der Internetseite des Bundesverfassungsgerichts

bei hat es auf seine frühere Rechtsprechung zu den verfassungsrechtlichen Grenzen der europäischen Integration sowie zur Beteiligung Deutschlands an der dritten Stufe der WWU zurückgreifen können. Einige der neuen Entscheidungen betreffen dabei im Kern Fragen, die nicht spezifisch auf die WWU bezogen sind (insbesondere die Reichweite der Informations- und Mitwirkungsrechte des Deutschen Bundestages in Angelegenheiten der Europäischen Union). In seinen Urteilen vom 7. September 2011 zu den Griechenlandkrediten und zur EFSF sowie in seinem Urteil (im Verfahren auf Erlass einer einstweiligen Anordnung) zu ESM und SKSV vom 12. September 2012 hat es sich jedoch WWU-spezifisch geäußert. Für die Entscheidung zum Hauptsacheverfahren betreffend den ESM und den SKSV hat das Bundesverfassungsgericht auch verfassungsrechtliche Klärungen hinsichtlich der Maßnahmen der EZB angekündigt. Die Entscheidung war ursprünglich einmal für Oktober 2013 angekündigt. Bei Abfassung dieses Reports war aber noch kein Verkündungstermin bekannt. Weitere Verfassungsbeschwerden sind vom Bundesverfassungsgericht bisher nicht behandelt worden, werden aber auf Grundlage der ausgewählten »Pilotverfahren« entschieden werden.

Maßstäbe der Beteiligung der Bundesrepublik Deutschlands an der WWU vor der Staatsschuldenkrise

Die maßgeblichen Normen des deutschen Grundgesetzes (GG) finden sich insbesondere in der Präambel und in Art. 23 Abs. 1 GG (Ziel und verfassungsrechtliche Grenzen der Mitwirkung Deutschlands an der Europäischen Union) sowie in Art. 88 GG, der in Ergänzung des Art. 23 Abs. 1 S. 2 GG erlaubt, die Aufgaben und Befugnisse der Bundesbank im Rahmen der Europäischen Union der Europäischen Zentralbank zu übertragen, die unabhängig ist und dem vorrangigen Ziel der Preisstabilität verpflichtet ist.

Das Bundesverfassungsgericht hat in seiner Entscheidung über das Zustimmungsgesetz zum Vertrag von Maastricht 1993 ausgeführt, dass die WWU im Vertrag von Maastricht als Stabilitätsgemeinschaft ausgestaltet sei und dass diese Ausgestaltung Grundlage und Gegenstand des deutschen Zustimmungsgesetzes sei.[36] Das Bundesverfassungsgericht geht insoweit von einem grundsätzlichen Gleichlauf der europarechtlichen und verfassungsrechtlichen Anforderungen aus. Soweit die WWU dieses Konzept nicht kontinuierlich im Sinne des vereinbarten Stabilitätsauftrags weiterentwickeln

(www.bundesverfassungsgericht.de) heruntergeladen werden.

36. BVerfGE 89, 155 (205).

könne, verlasse sie die vertragliche Grundlage und bei ihrem Scheitern stünden ihre Vorgaben auch einer Lösung der Bundesrepublik aus dieser Gemeinschaft als *ultima ratio* nicht entgegen.[37] Ein solches, aus der Rolle der Mitgliedstaaten als Herren der Verträge folgendes Austrittsrecht (*actus contrarius*) war im Vertrag von Maastricht zwar noch nicht vorgesehen, ist aber zwischenzeitlich für die EU als Ganzes in Art. 50 EUV verankert. Gleichwohl sah das Bundesverfassungsgericht in seiner Maastricht-Entscheidung jedoch auch verfassungsrechtlichen Raum für die Weiterentwicklung der WWU hin zu einer (wirtschafts-)politischen Union; ein solcher Schritt erfordere dann allerdings eine erneute Betätigung des gesetzgeberischen Willens.[38]

Im Jahr 1998 musste das Bundesverfassungsgericht auch über die Verfassungsmäßigkeit des Eintritts Deutschlands in die Dritte Stufe der WWU zum 1. Januar 1999 urteilen. Dabei verwies das Bundesverfassungsgericht darauf, dass die WWU im Vertrag von Maastricht angelegt sei und erkannte in der Teilnahme an der dritten Stufe weder eine Verletzung der demokratischen Mitwirkungsrechte der Bürger (Art. 38 I GG) noch des Eigentumsgrundrechts (Art. 14 GG).[39]

In seiner Entscheidung über das Zustimmungsgesetz zum Vertrag von Lissabon entwickelte das Bundesverfassungsgericht sodann den in früheren Entscheidungen nur angedeuteten integrationsfesten »Identitätskern« des Grundgesetzes und zählte ausdrücklich auch die »fiskalischen Grundentscheidungen über Einnahmen und [...] Ausgaben der öffentlichen Hand« hierzu.[40] Danach läge eine Verletzung des Demokratieprinzips durch eine Übertragung des Budgetrechts des Deutschen Bundestages dann vor, wenn »die Festlegung über Art und Höhe der den Bürger treffenden Abgaben in wesentlichem Umfang supranationalisiert würde«.[41] Insbesondere an diese letzte Formulierung knüpfte das Bundesverfassungsgericht in allen Entscheidungen zur Euro-Rettungspolitik maßgeblich an.

37. BVerfGE 89, 155 (204).
38. BVerfGE 89, 155 (207).
39. BVerfGE 97, 350.
40. BVerfGE 123, 267 (359).
41. BVerfGE 123, 267 (361).

Entscheidungen über die Euro-Rettungspolitik

Verfahren wg. Griechenland-Krediten, EFSF, ESFM etc.

Zunächst lehnte das Bundesverfassungsgericht am 7. Mai 2010 einen Eilantrag ab, der gegen die deutsche Rechtsgrundlage für die Griechenlandhilfen (das WFStG[42]) gerichtet war. Maßgeblich hierfür war insbesondere die notwendige Folgenabwägung, die aber vorrangig der Bundesregierung bzw. dem Deutschen Bundestag obliegt.[43] Am 9. Juni 2010 lehnte das Bundesverfassungsgericht auch den Erlass einer einstweiligen Anordnung ab, die gegen die deutsche Rechtsgrundlage für die Übernahme von Gewährleistungen im Rahmen der EFSF (StabMechG) sowie gegen praktisch alle zu diesem Zeitpunkt ergriffenen »Rettungsmaßnahmen« einschließlich der VO Nr. 407/2010[44] sowie des EZB-Programms für die Wertpapiermärkte[45] beantragt worden war.

Maßgeblich für das Bundesverfassungsgericht war dabei insbesondere, dass die Einschätzung der Bundesregierung – der insoweit die Prärogative zukomme – hinsichtlich der Gefährdungen der Stabilität des Euro-Währungsgebiets als Folge eines Ausscheidens Deutschlands aus den Rettungsbemühungen jedenfalls nicht eindeutig widerlegt sei.[46] Diese beiden Verfahren wurden im Hauptsachverfahren – ergänzt um ein weiteres Verfahren – verbunden und vom Bundesverfassungsgericht am 7. September 2011 entschieden. Sämtliche Verfassungsbeschwerden wurden dabei zurückgewiesen. Inhaltlich zog das Bundesverfassungsgericht gleichwohl verfassungsrechtliche Grenzen für die Beteiligung Deutschlands an weiteren finanzwirksamen Stabilitätsmechanismen, die es aus der Haushaltsverantwortung des Deutschen Bundestages (in Parallele zur in der Lissabon-Entscheidung entwickelten Integrationsverantwortung) herleitete und gleichzeitig (ebenfalls in Anknüpfung an die Lissabon-Entscheidung) dem integrationsfesten Identitätskern des GG zuwies. Danach ist es der Bundesrepublik Deutschland verfassungsrechtlich verboten, sich Haftungsautomatismen gleich welcher

42. Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik, BGBl. 2010 I S. 537.
43. BVerfGE 125, 385 (394).
44. Verordnung (EU) Nr. 407/2010 des Rates vom 11.05.2010 zur Einführung eines Europäischen Finanzstabilisierungsmechanismus, ABL. 2010 Nr. L 228/1.
45. Beschluss der Europäischen Zentralbank vom 14.05.2010 zur Einführung eines Programms für die Wertpapiermärkte (EZB/2010/5), ABl. 2010 Nr. L 124/8.
46. BVerfGE 126, 158 (169).

Rechtsnatur (ob völkerrechtlich oder europarechtlich) zu unterwerfen, auf deren Grundlage die Bundesrepublik für die Handlungen anderer EU-Mitgliedstaaten in Haftung genommen werden könnte, da hierdurch die finanzielle Handlungsfähigkeit (Haushaltsautonomie) verloren gehen könnte.[47] Ein betragsmäßige Grenze für die Zulässigkeit der Übernahme von Haftungsrisiken zog das Bundesverfassungsgericht allerdings nicht. In Deutschland wird dieses Diktum gleichwohl weitläufig als mehr oder weniger kategorische Absage an Eurobonds oder einen Schuldentilgungsfonds (wie er vom deutschen Sachverständigenrat vorgeschlagen worden ist) verstanden.[48]

Verfahren betreffend die Mitwirkungs- und Informationsrechte des Bundestages und seiner Abgeordneten

Zwei Verfahren, die den Umfang der Mitwirkungs- und Informationsrechte des Deutschen Bundestages im Hinblick auf die Euro-Rettungspolitik betrafen, wurden vom Bundesverfassungsgericht im Februar und Juni 2012 entschieden.[49] Danach muss die Haushaltsverantwortung des Deutschen Bundestages grundsätzlich vom Plenum ausgeübt werden und darf nur ausnahmsweise auf Ausschüsse übertragen werden. Ferner interpretierte das Bundesverfassungsgericht den Begriff der »Angelegenheiten der Europäischen Union« in Art. 23 Abs. 2 GG, der die Reichweite der Informationspflichten der Bundesregierung gegenüber Bundestag und Bundesrat bestimmt, dahingehend, dass auch völkerrechtliche Verträge, die zum Unionsrecht in einem Ergänzungs- oder Näheverhältnis stehen (in concreto der ESMV und der SKSV) zu diesen Angelegenheiten gehören.

47. BVerfGE 129, 124 (180).
48. S. hierzu *Heun/Thiele*, JZ 2012, S. 973 ff. (für verfassungsrechtliche Zulässigkeit, aber europarechtliche Unzulässigkeit von Eurobonds); *Mayer/Heidfeld*, NJW 2012, S. 422 ff.; *dies*., ZRP 2012, S. 129 ff. (für eine begrenzte Zulässigkeit bestimmter Eurobonds-Konzepte); *Müller-Franken*, NVwZ 2012, S. 1201 ff.; *ders*., JZ 2012, S. 219 ff. (für eine europarechtliche und verfassungsrechchtliche Unzulässigkeit eines Schuldentilgungsfonds sowie von Eurobonds).
49. BVerfGE 130, 318; 131, 152.

Verfahren betreffend den ESM, Fiskalpakt und Maßnahmen der EZB (TARGET-Salden und SMP/OMT)

Im Jahr 2012 wurde eine Reihe von Verfassungsbeschwerden[50] sowie ein Organstreitverfahren gegen die Ratifikation der Einfügung des neuen Art. 136 Abs. 3 AEUV sowie gegen die Ratifikation des ESMV sowie des SKSV erhoben worden. In diesen Verfahren wurden jeweils Eilanträge mit dem Ziel gestellt, die Ausfertigung und Verkündung der Zustimmungsgesetze durch den Bundespräsidenten im Verfahren der einstweiligen Anordnung zu untersagen. Im Kern stützten sich die Beschwerden vor allem auf eine Verletzung der Haushaltsautonomie des Bundestages, da mit dem ESM-Vertrag eine unbegrenzte Haftung der Bundesrepublik begründet und durch den SKSV die Haushaltsautonomie des Bundestages ebenfalls verfassungswidrig beschränkt werde.

Im Verlauf des Verfahrens wurden dann weitere Gegenstände durch zusätzliche Anträge der Beschwerdeführer in das Verfahren eingeführt. Dies gilt namentlich für die Ankündigung notfalls unbegrenzter Anleihenkäufe durch die EZB im Rahmen des OMT-Programms sowie für die im Verlauf der Euro-Staatsschuldenkrise im Eurosystem aufgelaufenen Salden des Zahlungsverkehrssystems TARGET2.

Über die Anträge auf Erlass einer einstweiligen Anordnung entschied das Bundesverfassungsgericht (nach einer mündlichen Verhandlung im Juli 2012[51]) am 12. September 2012.[52] Die Ratifikation des ESMV hielt das Bundesverfassungsgericht dabei aus verfassungsrechtlicher Perspektive nur mit der Maßgabe für zulässig, dass völkerrechtlich sichergestellt werde, dass die Haftung Deutschlands im Einklang mit Art. 8 Abs. 5 S. 1 ESMV auf den Ka-

50. Das Bundesverfassungsgericht hat dabei insgesamt sechs Verfahren, eines davon eine von mehr als 12.000 deutschen Bürgern unterstützte Verfassungsbeschwerde, zur mündlichen Verhandlung und Entscheidung ausgewählt. Weitere, nicht ausgewählte Verfahren werden zu gegebener Zeit vom Bundesverfassungsgericht im Einklang mit dem »Pilotverfahren« entschieden werden.
51. BVerfG, Pressemitteilung Nr. 47/2012 vom 02.07.2012.
52. 2 BvR 1390/12 u.a., NJW 2012, S. 3145 ff. Am gleichen Tag wies das Bundesverfassungsgericht überdies einen Antrag auf Erlass einer einstweiligen Anordnung zurück, mit der begehrt wurde, die Ratifikationsausfertigung des Art. 136 Abs. 3 AEUV, des ESMV und des Fiskalpakts bis zur EuGH-Entscheidung in der Rs. 370/12 (Pringle) zu untersagen sowie die VO Nr. 1176/2011 für einstweilen unanwendbar zu erklären (2 BvR 1824/12).

pitalanteil am ESM beschränkt bleibe[53] und dass Art. 32 Abs. 5, Art. 34 und Art. 35 Abs. 1 ESMV einer umfassenden Information des Bundestages und des Bundesrates nicht entgegenstünden. Das Bundesverfassungsgericht bestätigte damit im Kern seine Überlegungen zur Haushaltsverantwortung des Bundestages und zu deren Ausübung durch ein informiertes Plenum. Eine betragsmäßige Begrenzung möglicher Haftungsübernahmen zog das Bundesverfassungsgericht erneut nicht; in den bis dahin erreichten Summen sah es jedenfalls noch keine evidente Überschreitung der Einschätzungsprärogative des Bundestages hinsichtlich der Tragbarkeit von Risiken.[54] Bezüglich der durch den SKSV begründeten Beschränkungen der Haushaltsautonomie (insb. die Schuldenbremse der Art. 3, 4 SKSV) sah das Bundesverfassungsgericht keine verfassungsrechtlichen Probleme. Beschränkungen der gegenwärtigen Haushaltsautonomie zur Sicherung der zukünftigen Haushaltsautonomie könnten sowohl verfassungsrechtlich als auch völker- oder europarechtlich vorgesehen werden.[55] Die Prüfung der Anträge betreffend die EZB behielt sich das Bundesverfassungsgericht für das Hauptsacheverfahren vor.

Am Rande äußerte sich das Bundesverfassungsgericht dabei – unter Verletzung der alleinigen Auslegungszuständigkeit des Gerichtshofs der Europäischen Union nach Art. 267 Abs. 3 AEUV – auch zur Auslegung des sog. »Verbots der monetären Finanzierung« (Art. 123 AEUV), und zwar mit Blick auf die Anleihenkäufe der EZB sowie die Diskussion um einen möglichen Zugang des ESM zur Zentralbankfinanzierung durch das Eurosystem (s. dazu auch unten *Frage 11*). Eine Kapitalaufnahme des ESM beim Eurosystem sei – gleichgültig ob mit oder ohne Hinterlegung von Staatsanleihen der Mitgliedstaaten als Sicherheiten – nach Art. 123 Abs. 1 AEUV ausgeschlossen. Der ESM könne auch kein »öffentliches Kreditinstitut« i.S. von Art. 123 Abs. 2 AEUV darstellen, da seine Mittel ja unmittelbar den Mitgliedstaaten zu Gute kämen. Eine Grenze für Sekundärmarktkäufe von Staatsanleihen der Mitgliedstaaten des Euro-Währungsgebiets (die in Art. 123 Abs. 1 AEUV dem Wortlaub nach nicht erfasst sind und in Art. 18 EZB-Satzung ausdrücklich erlaubt sind) sieht das Bundesverfassungsgericht dann als erreicht an, wenn der Erwerb am Sekundärmarkt auf eine »von den Kapitalmärkten unabhängige Finanzierung der Haushalte der Mitgliedstaaten zielt«.[56] Bei derar-

53. Nach Auffassung des Berichterstatters hätte es dieser völkerrechtlichen Klarstellung nicht bedurft, da die Vorschriften des ESMV diesbezüglich völlig eindeutig sind, s. *Herrmann*, EuZW 2012, S. 805 (808 f.).
54. BVerfG, NJW 2012, S. 3145 ff. (Rdnr. 271).
55. BVerfG, NJW 2012, S. 3145 ff. (Rdnr. 224 f.).
56. BVerfG, NJW 2012, S. 3145 ff. (Rdnr. 174).

tigen Anleihenkäufen handele es sich um eine ebenfalls verbotene »Umgehung« des Verbots der monetären Finanzierung;[57] als Grundlage für ein derartiges Umgehungsverbot verwies das Bundesverfassungsgericht auf Erwägungsgrund Nr. 7 der VO Nr. 3603/93,[58] die allerdings an die Mitgliedstaaten (und nicht an die EZB) gerichtet ist. Unter welchen Voraussetzungen ein »Abzielen auf eine marktunabhängige Finanzierung« gegeben sein soll, erläutertete das Bundesverfassungsgericht nicht.

Mit Datum vom 17. Dezember 2013[59] hat das Bundesverfassungsgericht die das OMT-Programm betreffenden Beschwerden vom Hauptverfahren abgetrennt und am 14. Januar 2014 (veröffentlicht am 7. Februar 2014)[60] dem Gerichtshof der Europäischen Union zwei Fragen (weiter ausdifferenziert) zur Vorabentscheidung vorgelegt. Die Entscheidung im Hauptsachverfahren (ESM und Fiskalpakt) soll am 18. März 2014 verkündet werden.

Frage 10

Die Frage betrifft Deutschland als Mitglied des Euro-Währungsgebiets nicht.

Währungspolitik

Frage 11

Überblick

Die Europäische Zentralbank bzw. das Eurosystem als Ganzes haben in der globalen Finanzkrise seit dem Jahr 2007 sowie der europäischen Staatsschuldenkrise seit dem Jahr 2010 eine Reihe unkonventioneller geldpolitischer Sondermaßnahmen beschlossen, die wesentlich dazu beigetragen haben, einen Zusammenbruch der Finanzmärkte sowie ein Auseinanderbrechen des

57. BVerfG, ebd.
58. Verordnung (EG) Nr. 3603/93 des Rates vom 13. Dezember 1993 zur Festlegung der Begriffsbestimmungen für die Anwendung der in Artikel 104 und Artikel 104b Absatz 1 des Vertrages vorgesehenen Verbote, ABl. 1993 Nr. L 332/1.
59. Abrufbar unter http://www.bundesverfassungsgericht.de/entscheidungen/rs20131217_2bvr139012.html.
60. Abrufbar unter http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813.html.

Euro-Währungsgebiets zu verhindern. Zu diesen Sondermaßnahmen gehörten insbesondere:

- Allgemeine Ausweitungen des Spektrums der notenbankfähigen Sicherheiten;
- Übergang zur Vollzuteilung bei Refinanzierungsoperationen;
- Längerfristige Refinanzierungsgeschäfte (LTRO; 3 Jahre Laufzeit);
- Absenkung der Mindestreserveverpflichtung;
- Zulassung umfangreicher Emergency Liquidity Assistance (ELA) durch die nationalen Zentralbanken einiger Peripheriestaaten;
- Aussetzung der Relevanz von Ratings für Staatsanleihen der Mitgliedstaaten des Euro-Währungsgebiets, die finanzielle Hilfe des EFSF bzw. ESM erhalten;
- Ankauf von Staatsanleihen von Mitgliedstaaten des Euro-Währungsgebiets zur Sicherung der Transmission geldpolitischer Impulse (SMP bzw. OMT).

Unabhängig von diesen Sondermaßnahmen haben sich im Zahlungsverkehrssystem des Eurosystems (TARGET2) erhebliche Überschuss- bzw. Defizitpositionen einzelner nationaler Zentralbanken des Eurosystems herausgebildet, die insbesondere auf Kapitalflucht aus den Peripheriestaaten und dem weitgehenden Zusammenbruch des grenzüberschreitenden Interbankenmarkts beruhen.[61]

In Deutschland (einschließlich von Seiten der Bundesbank)[62] wird ein Großteil der o.g. Maßnahmen kritisch gesehen und auch rechtlich für fragwürdig gehalten. Vor diesem Hintergrund sind gegen die EZB auch von Privatpersonen Klagen vor dem Gerichtshof der Europäischen Union erhoben worden (zu den diesbezüglichen Beschwerden vor dem Bundesverfassungsgericht s. o. Frage 9). Auch wurde von Seiten einzelner Politiker (namentlich des früheren hessischen Europaministers *Hahn*) die Erhebung einer Nichtig-

61. S. Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, Jahresgutachten 2011/12, S. 83 ff.
62. S. hierzu insbesondere die Stellungnahme der Deutschen Bundesbank im ESM-Verfahren gegenüber dem Bundesverfassungsgericht vom 21. Dezember 2012, in der die EZB-Maßnahmen einer Generalkritik unterzogen werden. Inwieweit die Bundesbank selbst mit ihrer Stellungnahme gegen das Unionsrecht verstoßen hat (in Betracht kommen hier namentlich Art. 14.3 der EZB-Satzung sowie der Grundsatz der loyalen Zusammenarbeit von Mitgliedstaaten und EU-Institutionen (Art. 4 Abs. 3 EUV), der *mutatis mutandis* auch für das Verhältnis der Eurosystem-Mitglieder untereinander gelten muss) bedarf hier keiner Beantwortung.

keitsklage der Bundesrepublik bzw. von Bundesländern gegen die EZB gefordert.

Die Kritik konzentriert sich dabei vorrangig auf die (angekündigten) Staatsanleihenkäufe im Rahmen des SMP bzw. des OMT sowie auf die TARGET2-Salden. Die Ausweitung des Sicherheitenrahmens wird zwar politisch (insbesondere von der Bundesbank) kritisiert; der Vorwurf des Rechtsbruchs wird insoweit aber – soweit ersichtlich – nicht erhoben.[63] Auch die angestiegene Nutzung von ELA – die jedenfalls in Teilen die TARGET2-Salden erst ermöglich hat – wird deutlich weniger diskutiert.[64]

63. Das Kreditgeschäft des Eurosystems steht gemäß Art. 18.1 2. Spiegelstr. EZB-Satzung unter dem Vorbehalt der Gestellung »ausreichender Sicherheiten« durch die Darlehensnehmer. In Ziff. 1.5 des Anhangs der geldpolitischen Leitlinien der EZB verweist diese (auf Grundlage des Art. 18.2 EZB-Satzung) diesbezüglich auf den einheitlichen Sicherheitsrahmen, der in Kapitel 6 näher ausgestaltet ist.). Soweit die Ausweitung des Katalogs notenbankfähiger Sicherheiten mit geldpolitischen Gründen (zur Sicherung und Erleichterung der Finanzierung der Marktteilnehmer wg. Problemen im Geldmarkt) vorgenommen und den erhöhten Risiken durch angemessene Abschläge Rechnung getragen worden ist – beides kann hier nicht im Einzelnen erörtert werden – bestehen gegen diese Maßnahmen keine rechtlichen Bedenken (wie hier auch *Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, S. 80 ff.; a.A. *Siekmann*, Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise, Institute for Monetary and Financial Stability, Working Paper Series No. 65 (2012)). Das Gleiche gilt für die sog. Vollzuteilung bei Refinanzierungsgeschäften, die Absenkung der Mindestreserve und die LTROs. In allen diesen Fragen genießt die EZB einen weiten, rechtlich nur durch die primäre Zielverpflichtung eingegrenzten Beurteilungsspielraum (dazu eingehend *Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, S. 84 ff.).

64. Die ELA-Maßnahmen sind rechtlich auf Art. 14.4 EZB-Satzung gestützt, d.h. die nationalen Zentralbanken dürfen auf eigene Rechnung und eigenes Risiko Liquiditätshilfen an nationale Banken gewähren. Hierfür gelten die allgemeinen rechtlichen Grenzen für das Handeln nationaler Zentralbanken im Eurosystem sowie ein Untersagungsrecht des EZB-Rates (mit Zweidrittel-Mehrheit); im Einzelnen zu ELAs *Radtke*, Liquiditätshilfen im Eurosystem, 2010; an der Rechtmäßigkeit der ELAs während der Euro-Staatsschuldenkrise zweifelnd *Siekmann*, Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise, Institute for Monetary and Financial Stability, Working Paper Series No. 65 (2012), S. 19 f.

Rechtmäßigkeit der Anleihenkäufe

Die EZB unterliegt als Organ der EU grundsätzlich einer umfassenden Bindung an die Verträge (Art. 13 Abs. 2 EUV) und der gerichtlichen Kontrolle durch den Gerichtshof der Europäischen Union (Art. 35.1 EZB-Satzung).

Grundlegende Aufgabe des von der EZB geleiteten Eurosystems ist die Festlegung und Ausführung der Geldpolitik der Union (für die Mitgliedstaaten des Euro-Währungsgebiets) als ausschließliche Zuständigkeit (Art. 3 Abs. 1 lit. c), Art. 127 Abs. 2 1. Spiegelstr. AEUV). Primäres Ziel ist dabei die Wahrung der Preisstabilität (Art. 127 Abs. 1 S. 1 AEUV) des Euro, aber auch – vermittelt über Art. 13 Abs. 1 S. 1 EUV – die Wahrung der Stabilität des Euro als Währung der Europäischen Union insgesamt (Art. 3 Abs. 4 EUV). Die EZB ist damit prinzipiell – anders als von der Bundesbank behauptet – durchaus auch berechtigt, Maßnahmen mit dem Ziel zu ergreifen, ein Auseinanderbrechen des Euro-Währungsgebiets zu verhindern. Sekundär ist das Eurosystem auch zur Unterstützung der Wirtschaftspolitik in der Union verpflichtet, soweit dies ohne Beeinträchtigung der Preisstabilität möglich ist. Zur Wirtschaftspolitik in diesem Sinne gehören nach der Auslegung des EuGH in der Rechtssache *Pringle* wohl auch die Aufrechterhaltung der Zahlungsfähigkeit von Mitgliedstaaten und die Wahrung der Stabilität des Euro-Währungsgebiets als Ganzes.[65]

Die Verträge definieren weder, was rechtlich unter »Geldpolitik« zu verstehen ist (vielmehr legt das Eurosystem diese fest, Art. 127 Abs. 2 1. Spiegelstr. AEUV), noch was mit Preisstabilität gemeint ist. Auch die der EZB zur Verfügung stehenden geldpolitischen Instrumente werden in der Satzung der EZB nicht-abschließend aufgezählt (vgl. Art. 20 EZB-Satzung). Allgemein wird man unter Geldpolitik den Einsatz geldpolitischer Instrumente zur Erreichung geldpolitischer (Zwischen-)Ziele verstehen dürfen. Preisstabilität hat das Eurosystem selbst als einen Anstieg des HVPI von weniger als 2 % gegenüber dem Vorjahr definiert.

Insgesamt schafft das Unionsrecht damit einen weiten rechtlichen Rahmen für die Geldpolitik des Eurosystems, bei dessen Ausfüllung den Organen der EZB überdies ein weiter Beurteilungsspielraum zustehen muss. Relevante rechtliche Grenzen stellen insoweit lediglich die Art. 123 und 124 AEUV dar sowie die primäre Verpflichtung des Eurosystems auf die Wahrung der Preisstabilität.

65. EuGH, Rs. C-370/12, Thomas Pringle/Governmenet of Ireland, Urt. vom 27.11.2012, Rdnr. 51 ff.

Die Käufe von Staatsanleihen im Rahmen des SMP bzw. die angekündigten Käufe von Staatsanleihen im Rahmen des OMT fallen als Offenmarktgeschäfte unter Art. 18.1 1. Spiegelstr. der EZB-Satzung. Es handelt sich bei Ihnen um den »endgültigen Ankauf [...] börsengängiger Wertpapiere« [*marketable instruments*], soweit die Staatsanleihen zum Handel an einem geregelten Markt i.S. der Richtlinie 2004/39/EG zum Handel zugelassen sind.[66] Dass der Handel mit Staatsanleihen von Krisenstaaten möglicherweise faktisch zum Erliegen gekommen ist, spielt hierfür entgegen der Auffassung einzelner Kommentatoren[67] sowie wohl auch der EZB selbst[68] keine Rolle.[69] Auch ein Verstoß gegen das Verbot der monetären Staatsfinanzierung nach Art. 123 Abs. 1 AEUV liegt mit dem Ankauf an den Sekundärmärkten nicht vor. Art. 123 Abs. 1 AEUV verbietet lediglich den »unmittelbaren Erwerb von Schuldtiteln« von den Mitgliedstaaten, hingegen nicht den mittelbaren Erwerb am Sekundärmarkt. Ob sich aus dem 7. Erwägungsgrund der Präambel der VO Nr. 3603/93 ein das Eurosystem adressierendes Verbot der Umgehung des Art. 123 Abs. 1 AEUV mit dem Inhalt konstruieren lässt, wie das Bundesverfassungsgericht es in seiner Entscheidung vom 12. September 2012. Sowie in seinen Vorlagebeschluss vom 17. Januar 2014 (dazu sogleich unten) getan hat, muss bezweifelt werden, da die Gefahr einer Umgehung des Verbots durch das Eurosystem mit der durch nationale Maßnahmen vor der Einführung des Euro nicht vergleichbar ist. Ungeachtet dessen hat die EZB im Verfahren vor dem Bundesverfassungsgericht die Existenz eines Umgehungsverbots akzeptiert.[70] Operationalisierbar ist ein derartiges Umgehungsverbot ohnehin praktisch nicht. Allenfalls, wenn Marktteilnehmer die Staats-

66. S. Leitlinie der Europäischen Zentralbank vom 20. September 2011 über geldpolitische Instrumente und Verfahren des Eurosystems, EZB/2011/14, ABl. 2011 Nr. L 331/1, Art. 1 i.V.m. Abschnitt 6.2.1 des Anhangs 1 (inhaltlich im wesentlichen identisch mit der EZB/2000/7).
67. S. insbesondere *Seidel*, EuZW 2010, S. 521.
68. In der Stellungnahme der EZB zum ESM-Verfahren vor dem Bundesverfassungsgericht führt die EZB aus, dass Voraussetzung auch sei, dass das Forderungspapier auf einem Markt gehandelt und ein Marktpreis festgesetzt wird (*Schorkopf*, Stellungnahme der EZB zu 2 BvR 1390/12 u.a., 16. Januar 2013, S. 9). Dieses Kriterium ist aber insoweit redundant, als ein *mittelbarer* Erwerb anders als auf einem derart beschriebenen Markt gar nicht möglich wäre.
69. S. *Herrmann*, EuZW 2010, S. 645 f.
70. *Schorkopf* (Fn. 68), S. 14.

anleihen nur noch erwerben würden, um sie unmittelbar an das Eurosystem weiterzureichen, könnte ein Verstoß vorliegen.[71]

Die im Rahmen des SMP erworbenen Anleihen wurden von der Umschuldung Griechenlands ausgenommen. Für das OMT hat die EZB hingegen angekündigt, dass sie keinen »preferred creditor«-Status in Anspruch nehmen möchte (worauf im Wesentlichen der Erfolg der OMT-Ankündigung begründet sein dürfte). Das bedeutet, dass die EZB bei einer möglichen Umschuldung an den nach dem dann jeweils geltenden Recht zu treffenden Entscheidungen der Gläubiger mitwirken und sie hinnehmen müsste. Entgegen der ursprünglichen Auffassung der EZB ist diese hieran durch das Verbot der monetären Staatsfinanzierung nicht gehindert.[72] Bereits vom Wortlaut des Art. 123 Abs. 1 AEUV wird diese Konstellation nicht erfasst. Die aus einer Umschuldung resultierenden Ausfälle stellen überdies das mit dem Erwerb von Wertpapieren (im Rahmen der Offenmarktgeschäfte) typischerweise verbundene Risiko dar (das im Anleihekurs, den Zinsen oder – bei Sicherheiten dem Risikoabschlag – abgebildet wird).[73]

Das Bundesverfassungsgericht hat zu diesen Fragen mit Beschluss vom 14. Januar 2014, veröffentlicht am 7. Februar 2014, ein Vorabentscheidungsverfahren beim Gerichtshof der Europäischen Union eingeleitet.[7471a] Danach geht das Bundesverfassungsgericht davon aus, dass die Ankündigung notfalls unbeschränkter Anleihenkäufe – entgegen der vorliegend vertretenen Auffassung – eine Verletzung des Mandats der EZB darstellt, weil es sich dabei – erstens – um „Wirtschaftspolitik“ handele, und dass – zweitens – die Anleihenkäufe ein Verbot der Umgehung des in Art. 123 Abs. 1 AEUV enthalte-

71. S. auch *Sester*, EWS 2012, S. 80 ff.; *ders*., EWS 2013, S. 451 ff.; *Steinbach*, EuZW 2013, S. 918 ff. und *Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, die alle im Ergebnis von der Rechtmäßigkeit der Anleihenkäufe ausgehen; a.A. *Siekmann*, Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise, Institute for Monetary and Financial Stability, Working Paper Series No. 65 (2012), S. 37 ff., der von einer Überschreitung des Kompetenzrahmens (Mandats) der EZB ausgeht, da es sich um fiskalpolitische Maßnahmen handele.

72. A.A. *Sester*, EWS 2012, S. 80 (85); wie hier wohl *Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, S. 78.

73. Mangels zur Verfügung stehender detaillierter auch technischer Informationen über den genauen Ablauf muss eine rechtliche Bewertung des von der EZB (wohl) gebilligten bzw. sogar initiierten Umtauschs von Schuldtiteln in langlaufende Staatsanleihen hier unterbleiben (bzw. bleibt dem irischen Report vorbehalten).

74. Abrufbar unter http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813.html.

nen sog. „Verbots der monetären Finanzierung“ darstellen. Hierfür sprechen aus Sicht des Bundesverfassungsgerichts bestimmte Charakteristika des Programms, auf deren jeweilige Bedeutung für eine etwaige Unionsrechtswidrigkeit die vorgelegten Fragen (eine, in zwei Unterfragen aufgeteilte Hauptfrage; eine zweite hilfsweise, ebenfalls aufgestellte und inhaltlich gleichbedeutende Frage) abzielen (Konditionalität, Selektivität, Parallelität, Umgehung von Bedingungen der EFSF/ESM-Konditionalität, Volumen, Eingriff in die Marktpreisbildung, Eingriff in die Marktlogik, Übernahme des Ausfallrisikos, Beteiligung an einem Schuldenschnitt). Nach Auffassung des Bundesverfassungsgerichts stellte die Ankündigung der Anleihenkäufe für den Fall der Bejahung der Verletzung der genannten Vorschriften dann auch offensichtliche und strukturbedeutsame Verstöße gegen die Kompetenzordnung der Unionsverträge dar (Ultra-vires-Handeln). Insoweit hätten die Verfassungsorgane der Bundesrepublik Deutschland durch das Nichteinschreiten (den Versuch der Verhinderung des Handelns der EZB) dann verfassungsmäßige Rechte der Bürger sowie des deutschen Bundestages verletzt, weswegen den Beschwerden bzw. Anträgen stattzugeben sei. Gleichzeitig deutet das Bundesverfassungsgericht an, dass bei einer bestimmten primärrechtskonformen Auslegung des OMT-Programms kein solcher offensichtlicher Ultra-vires-Akt vorläge. Die Entscheidung für den Fall, dass der Gerichtshof zu einer abweichenden Beurteilung der OMT-Primärrechtskonformität käme, hält sich das Bundesverfassungsgericht offen, deutet aber an, dass dann möglicherweise ein Verstoß gegen die verfassungsrechtlich unveräußerliche Identität des Grundgesetzes (Haushaltsverantwortung des Deutschen Bundestages) vorliegen könnte.

Die Problematik der TARGET2-Salden

Mit besonderer Leidenschaft – bis hin zu Strafanzeigen eines Münchner Strafrechtsprofessors gegen den gesamten Vorstand der Deutschen Bundesbank wg. Untreue[75] – wird die von *Hans-Werner Sinn*[76] (auf Hinweis des ehemaligen Bundesbankpräsidenten *Schlesinger*) aufgebrachte »Problematik« der sog. TARGET2-Salden geführt. Fundierte europarechtliche bzw. verfassungsrechtliche Analysen der TARGET2-Salden liegen bislang nicht

75. S. Dazu *Schünemann*, ZIS 4/2012, S. 84 ff.
76. S. lediglich *Sinn*, Die TARGET-Falle, 2012.

vor.[77] Aus deutscher Sicht werden die Saldenbeträge, die sich infolge der Zahlungs- und Kapitalverkehrsströme während der Euro-Staatsschuldenkrise in den Bilanzen des Eurosystems angehäuft haben, als Haftungsproblem jedenfalls für den Fall des Auseinanderbrechens des Euro-Währungsgebiets gesehen (mit dem daran anknüpfenden rechtlichen Argument, dass in verfassungswidriger Weise die Haushaltsautonomie des Bundestages verkürzt würde, weil der Bundestag (1) dieser »Haftungsübernahme« nie zugestimmt habe und (2) in dieser Höhe auch nicht zustimmen könne. Dieser Vorwurf ist auch Gegenstand der Prüfung durch das Bundesverfassungsgericht im Hauptsacheverfahren betreffend den ESM und den Fiskalpakt (s. dazu oben Frage 9)).

Europarechtlich ist die EZB kraft Art. 127 Abs. 2 4. Spiegelstr. AEUV und Art. 22 EZB-Satzung dazu berufen, Zahlungsverkehrssysteme für das Euro-Währungsgebiet, die EU sowie im Verkehr mit Drittstaaten zu betreiben und deren reibungsloses Funktionieren zu unterstützen. Mit dem als Echtzeit-Brutto-Zahlungsverkehrssystem ausgestalteten TARGET2 leistet die EZB hierzu ihren Beitrag. Positive und negative Salden entstehen in TARGET2 deshalb, weil das Eurosystem ein dezentral organisiertes quasiföderales Zentralbanksystem darstellt, in dem Transaktionen vermittelt über die nationalen Zentralbanken vorgenommen werden und somit Gläubiger-Schuldner-Beziehungen zwischen den nationalen Zentralbanken und der EZB überhaupt erst ermöglicht werden. In einem zentralisierten System, in dem die derzeitigen nationalen Zentralbanken lediglich Zweigstellen der EZB darstellen würden, wären die Salden schlicht nicht existent. Derzeit entstehen sie, wenn die Geldströme (als Zahlungs- oder Kapitalverkehrsströme) zwischen den Mitgliedstaaten über mittlere und längere Zeiträume nicht ausgeglichen sind. Sie bilden die Verteilung des Zentralbankgeldes innerhalb des Währungsraumes ab. Die prinzipiell unbegrenzte Übertragbarkeit gesetzlicher Zahlungsmittel bzw. von Bankguthaben innerhalb des Euro-Währungsgebietes ist eine rechtliche Grundvoraussetzung für die gemeinsame Währung. Jede Beschränkung dieser Übertragbarkeit – und sei es auch nur durch die Verpflichtung zur Gestellung von Sicherheiten – würde eine Sollbruchstelle der Währungsunion schaffen und den Grundsatz, dass innerhalb des Euro-Währungsgebiets jeder Euro gleich gilt, verletzen. Sofern man in den Salden tatsächlich ein Problem sieht (selbst für den Fall des Auseinanderbrechens des Euro-Währungsgebiets sind die finanziellen Folgen nicht eindeutig,

77. Die Sicht der Bundesbank findet sich in ihrer Stellungnahme zum ESM/Fiskalpakt-Verfahren vom 21. Dezember 2012, S. 18 ff.

können hier aber nicht ausführlich erörtert werden),[78] so liegt die Ursache des Problems doch eher im Bereich der Schöpfung von Zentralbankgeld (auch durch ELAs) und sollte ggfs. auch dort angegangen werden.[79]

Zusammenfassung

Die rechtlichen Bedenken, die gegenüber den »unkonventionellen Maßnahmen« des Eurosystems während der Finanz- und Staatsschuldenkrise geäußert worden sind, greifen im Ergebnis nicht durch. Klare Verstöße gegen rechtliche Verbote, insbesondere des Art. 123 AEUV, sind nicht überzeugend begründbar. Für die rechtliche Bewertung ist darüber hinaus wesentlich, dass der EZB bei ihren Entscheidungen ein weiter Beurteilungsspielraum zukommt, der ein strikte Kontrolle durch Gerichte, die mit geldpolitischen Laien besetzt sind, entgegenstehen muss.[80]

Frage 12

Die Konzeption der Bankenunion als wirksames Instrument zur Behebung eines konstruktiven Defizits des Vertrags von Maastricht dient der langfristigen Sicherung der Stabilität des Euro-Währungsgebiets. Die Finanzkrise seit 2007 und die Euro-Staatsschuldenkrise seit 2010 haben offengelegt, welche Schicksalsgemeinschaft (negative feedback loop) zwischen nationalen Finanzsystemen und nationalen Staatshaushalten nach wie vor im Euro-Währungsgebiet herrscht. In Krisenzeiten führt dieser Zusammenhang zu einer – mit dem Binnenmarktziel unvereinbaren – Segregation der nationalen Finanzmärkte.

Die Übertragung eines zentralen Bestandteils der Beaufsichtigung über Kreditinstitute auf die EZB (einheitlicher Aufsichtsmechanismus – SSM) wirft dabei einige Fragen bezüglich der Vereinbarkeit mit dem EU-Primärrecht sowie der praktischen Ausgestaltung in der Zusammenarbeit mit

78. S. Ansätze hierzu (im Kontext der Sekundärmarktkäufe) bei *Herrmann*, EuZW 2012, S. 805 (811); s. auch die Stellungnahme der Deutschen Bundesbank vom 21. Dezember 2012, S. 24 ff. (allerdings ohne differenzierte Argumentation, die im Wesentlichen auf politisch-ökonomische quasi-Zwänge abstellen will: »... werden die im Eurosystem entstehenden Verluste ökonomisch gesehen aber am Ende durch die Steuerzahler der verbliebenen Mitgliedstaaten getragen werden müssen.«).
79. So im Ergebnis auch die Deutsche Bundesbank in ihrer Stellungnahme vom 21. Dezember 2012 sowie die EZB, Monatsbericht Oktober 2011, S. 36 ff.
80. Ebenso *Thiele*, Das Mandat der EZB und die Krise des Euro, 2013, S. 39 f.

den nationalen Aufsichtsbehörden der Euro-Teilnehmerstaaten sowie mit den Nicht-Teilnehmer-Ländern auf.

Die Wahl der Rechtsgrundlage für die maßgebliche Verordnung, Art. 127 Abs. 6 AEUV ist insbesondere in Deutschland auf Kritik gestoßen.[81] So soll der Wortlaut (»können besondere Aufgaben [...] übertragen werden«) eine so weitreichende Kompetenzverlagerung auf die EZB nicht zulassen. Der systematische Vergleich mit Art. 127 Abs. 1 AEUV, der Zentralnorm für die Geldpolitik, zeige, dass eine derartige Aufgabenerweiterung nicht in das Konzept der Verträge passe. Der Wortlaut des Art. 127 Abs. 6 AEUV verbietet eine Übertragung in der jetzigen Ausgestaltung jedoch nicht, da nicht alle Aufsichtsaufgaben für alle Banken übertragen werden. Hierfür sprechen insbesondere auch teleologische Überlegungen.

Da Art. 127 Abs. 6 AEUV nicht eindeutig regelt, ob es sich um eine Übertragung der Verbandskompetenz von den Mitgliedstaaten auf die EU im Wege der Sekundärrechtssetzung handelt, oder ob lediglich eine der EU prinzipiell bereits übertragene (dann aber wohl konkurrierende, noch nicht ausgeübte Kompetenz) Kompetenz lediglich dem Organ EZB übertragen werden soll, hat der deutsche Gesetzgeber unter Verweis auf seine Integrationsverantwortung nach Art. 23 Abs. 1 S. 2 GG[82] einen Gesetzesbeschluss gefasst, der der Bundesregierung die Zustimmung im Rat überhaupt erst gestattet.[83]

Ob die der EZB übertragenen Aufgaben der Bankenaufsicht (Zulassung von Kreditinstituten, Genehmigung qualifizierter Beteiligungen, Stresstests, Eigenkapitalvorschriften) mit dem zentralen Ziel der EZB, die Preisstabilität durch Geldpolitik zu gewährleisten, im Einklang stehen, wird ebenfalls kritisch diskutiert; dass beide Aufgaben grundsätzlich miteinander in Konflikt geraten können, und es daher institutioneller Absicherungen zur Vermeidung bzw. Entschärfung der Konflikte bedarf, ist offensichtlich. Die Regelungen der Art. 24 ff. der VO (Fassung 12.09.2013) bieten hierfür grundsätzlich eine geeignete Grundlage, die sich aber in der Praxis bewähren muss. Bereits bislang bestand auch bei den geldpolitischen Entscheidungen stets die Möglichkeit, dass die EZB als lender of last resort agiert, was mit ihrem Mandat durchaus vereinbar ist (s. hierzu auch Frage 11 und Frage 13).

81. S. insbesondere *Herdegen*, WM 2012, S. 1889 ff.; *Brandi/Gieseler*, BB 2012, S. 2646 ff.
82. S. BT-Drucks. 17/13470, S. 1 und 4.
83. Gesetz zum Vorschlag für eine Verordnung des Rates zur Übertragung besonderer Aufgaben im Zusammenhang mit der Aufsicht über Kreditinstitute auf die Europäische Zentralbank, BGBl. 2013 II S. 1050.

Im Hinblick auf die Legitimation der EZB versucht die Verordnung (Fassung 12.09.2013) den Spagat zwischen Unabhängigkeit der EZB (Art. 19) und Verantwortlichkeit gegenüber Rat und Parlament durch Berichtspflichten (Art. 20 ff.). Im Hinblick auf das Europäische Parlament werden diese Verpflichtungen durch eine Interinstitutionelle Vereinbarung konkretisiert.[84] Eine Weisungsabhängigkeit der EZB bei ihren Aufsichtsentscheidungen wäre mit der vertraglich garantierten (aber jedenfalls in Art. 130 S. 1 AEUV auf die vertraglich übertragenen Aufgaben beschränkten) Unabhängigkeit der EZB vereinbar gewesen, hätte aber wiederum die Frage nach anweisenden Institution sowie deren demokratischer Verantwortlichkeit aufgeworfen.

Die Einbindung der Nicht-Euro-Teilnehmerstaaten in den SSM erfolgt lediglich auf der Grundlage der Freiwilligkeit dieser Mitgliedstaaten (Art. 7 der VO, Fassung 12.09.2013). Angesichts der Tatsache, dass Art. 127 Abs. 6 AEUV in Art. 139 Abs. 2 AEUV gerade keine Erwähnung findet, erscheint diese Lösung rechtlich nicht zwingend. Grundsätzlich wäre auch eine verpflichtende Übertragung der Aufsichtsfunktionen über Kreditinstitute in der gesamten EU möglich gewesen. Diese war aber politisch wohl nicht durchsetzbar und hätte vorausgesetzt, dass die betroffenen Mitgliedstaaten sich verbindlichen Entscheidungen des EZB-Rates unterwerfen, in dem sie nicht vertreten sind.

Die Zusammenarbeit der EZB mit den nationalen Aufsichtsbehörden und die daran anknüpfenden Rechtsschutzfragen sind von besonderer Komplexität, was sich aus den unterschiedlichen Formen von Aufgaben und ihre Aufteilung zwischen EZB und nationalen Aufsichtsbehörden sowie der komplizierten (An-)Weisungsstruktur zwischen beiden (s. insbesondere Art. 6 der VO, Stand 12.09.2013) ebenso ergibt wie aus der Mischung aus EU-Recht, EU-induziertem nationalen Recht und EU-unbeeinflussten nationalem Recht. Im vorgegebenen Rahmen können diese Fragen hier nicht behandelt werden.

Frage 13

Die EZB hat derzeit ein primäres Ziel (die Wahrung der Preisstabilität, insb. Art. 127 Abs. 1 S. 1 AEV) sowie sekundäre Ziele (Unterstützung der allgemeinen Wirtschaftspolitik in der Union; Art. 127 Abs. 1 S. 2 AEUV). Darüber hinaus ist die EZB – soweit dies ohne Beeinträchtigung des primären Ziels – als Organ der Union an die Ziele der Union insgesamt gebunden

84. S. Entwurf der entsprechenden Vereinbarung sowie die diesbezügliche Erklärung der Präsidenten von EZB und EP, abrufbar auf der Seite des Europäischen Parlaments.

(Art. 13 Abs. 1, Abs. 2 EUV), darunter die Ziele des Art. 3 EUV sowie die Grundsätze des Art. 119 Abs. 2 AEUV. Zu diesen zählt insbesondere die Einführung und Bewahrung einer einheitlichen Währung, des Euro, für die Mitgliedstaaten, die diesen bereits eingeführt haben. Darüber hinaus wäre auch eine – wiederum durch die Preisstabilität begrenzte – Verpflichtung des Eurosystems auf die Wahrung von förmlichen Wechselkursvereinbarungen bzw. die Beachtung wechselkurspolitischer Orientierungen möglich (Art. 218 AEUV).

Soweit die Wahrung der Finanzstabilität zur Sicherung der einheitlichen Geldpolitik und Wahrung der Integrität des Euro-Währungsgebiets erforderlich ist, darf dieses Ziel – sofern ohne Beeinträchtigung der Preisstabilität möglich – vom Eurosystem mitverfolgt werden. Währungsstabilität und Finanzstabilität sind Voraussetzungen der Preisstabilität. Dies bringt es mit sich, dass der EZB im Hinblick auf die Finanzmarktteilnehmer notwendig die Rolle eines *lender of last resort* zukommt. Ein Finanzystem, das auf einem exogenen, vollständig vorgegebenen Zahlungsmittel basiert, aber gleichzeitig Forderungen auf dieses als Zahlungsmittelersatz jedenfalls faktisch duldet, ist erheblich stärker vom Kollaps bedroht, als ein System des *fiat money*, in dem das letzte Solutionsmittel von einer Zentralbank unbeschränkt hergestellt werden kann (so dass im Ergebnis jedenfalls theoretisch alle Forderungen im Finanzsystem beglichen werden könnten). Im Hinblick auf die Mitgliedstaaten des Euro-Währungsgebiets kommt der EZB eine vergleichbare Rolle grundsätzlich nicht zu. Gleichwohl hat die EZB richtigerweise mit der OMT-Ankündigung eine Situation geschaffen, die die Situation der Euro-Währungsgebiets-Mitgliedstaaten derjenigen von Staaten mit eigener Währungssouveränität annähert. Bis zu diesem Zeitpunkt operierten sämtliche Euroteilnehmer nämlich unter den Bedingungen einer Fremdwährung, allerdings bei gleichzeitiger nahezu[85] vollständiger Kapitalverkehrsfreiheit mit der korrespondierenden Gefahr der vollständigen monetären Austrocknung.[86]

Die Vielgestaltigkeit der Ziele des Eurosystems sowie seine Unabhängigkeit bringen es notwendig mit sich, dass das Eurosystem einen weiten Beurteilungsspielraum beim Einsatz seiner Instrumente besitzen muss, der auch im Rahmen des Art. 35 EZB-Satzung nur beschränkt – und von vornherein nur durch den Gerichtshof der Europäischen Union – gerichtlich kontrollierbar sein kann. Die Vorrangigkeit des Ziels der Wahrung der Preisstabilität ist

85. Das Beispiel Zyperns hat gezeigt, in welchem Rahmen Beschränkungen des freien Kapitalverkehrs zur Abwehr von Kapitalflucht innerhalb des Binnenmarktes möglich sind.

86. S. dazu *Herrmann*, EuZW 2012, 805 (806).

dabei jedoch die unverzichtbare Voraussetzung dafür, dass überhaupt eine Kontrolle möglich wird. Sie ist überdies aus Sicht des deutschen Verfassungsrechts zwingend gefordert (u.a. Art. 88 S. 2 GG).

Eine Neuorientierung der Ziele des Eurosystems ist daher weder erforderlich noch wünschenswert. Allenfalls wäre zu erwägen, die Rolle, die die EZB im Rahmen der Finanzaufsicht künftig spielen soll, durch eine Vertragsänderung stärker normativ vorzuformen.

Frage 14

Das Eurosystem legt die Geldpolitik der Union (für das Euro-Währungsgebiet) als ausschließliche Zuständigkeit fest und führt diese durch (Art. 127 Abs. 1 1. Spiegelstr., Art. 3 Abs. 1 lit. c) AEUV). Es unterliegt dabei nach Art. 35 EZB-Satzung der gerichtlichen Kontrolle, wobei das Instrument der Nichtigkeitsklage (Art. 263 AEUV) die zentrale Rolle spielt.

Die Festlegung der Geldpolitik umfasst die Definition des Begriffs der Preisstabilität, die Entscheidung über die geldpolitische Strategie (inflation targeting, Geldmengensteuerung, Zinssteuerung, Mehrsäulenstrategien) sowie über die prinzipielle Nutzung bestimmter Instrumente. Die Durchführung erfolgt durch die Ermittlung und Bewertung stabilitätspolitischer Gefahren sowie die Festlegung der zentralen Refinanzierungszinssätze, durch den Abschluss von begrenzten oder unbegrenzten Refinanzierungsgeschäften, die Festlegung der Mindestreservesätze und der notenbankfähigen Sicherheiten sowie der Nutzung anderer Instrumente im Einzelfall (z.B. Anleihenkäufe). Ganz überwiegend werden diese Entscheidungen in formaler rechtlicher Form getroffen (mit Ausnahme der Zinssatzbeschlüsse) und stellen somit angreifbare Handlungen im Verfahren der Nichtigkeitsklage (Art. 263 Abs. 1 AEUV) dar. Soweit es sich um Rechtsakte handelt, haben diese sämtlich »Verordnungscharakter« i.S.d. Art. 263 Abs. 4 AEUV, so dass sie der erleichterten Klagemöglichkeit durch natürliche und juristische Personen ausgesetzt sind. Auf diese Weise wird insbesondere Finanzmarktteilnehmern prinzipiell die Möglichkeit eröffnet, Beschlüsse der EZB gerichtlich überprüfen zu lassen.

Bei der Festlegung und Durchführung der Geldpolitik muss der EZB – auch vor dem Hintergrund ihrer Unabhängigkeit – ein weiter Beurteilungsspielraum zukommen. Soweit es um die Ermittlung der stabilitätspolitischen Risiken sowie um die diesbezügliche Strategie und die daraus gezogenen Schlüsse (z.B. Zinshöhe, Umfang der Refinanzierungsgeschäfte) geht, kann der Gerichtshof sinnvollerweise nur überprüfen, ob der EZB offensichtliche Fehler unterlaufen sind oder sie sich offensichtlich von ihrem primären Auf-

trag der Sicherung der Preisstabilität entfernt bzw. diesen verfehlt. Beides erscheint angesichts der Struktur der EZB praktisch ausgeschlossen.

Was die Beachtung der rechtlichen Grenzen angeht, also z.B. die Beachtung der Art. 123, 124 AEUV oder der EZB-Satzung, erscheint eine dichtere Kontrolle möglich, die jedoch ebenfalls die Einschätzungsprärogativen der EZB zu achten hat. Eine Grenzziehung zwischen zulässiger und notwendiger judikativer Ausfüllung rechtlicher Schranken der Geldpolitik und unzulässiger Inhaltskontrolle geldpolitischer Entscheidungen erscheint aber abstrakt kaum möglich. Der – untaugliche – Versuch des Bundesverfassungsgerichts, aus Art. 123 AEUV ein »Umgehungsverbot« abzuleiten (s. dazu oben Frage 9), ist hierfür im negativen Sinne beispielhaft. Vor der judikativen Setzung strikter, z.B. quantitativer Grenzen für die Anleihenkäufe kann hingegen nur gewarnt werden, weil diese stets die Gefahr der Spekulation von Seiten der Marktteilnehmer gegen die EZB mit sich brächten.

Offene Frage

Frage 15

Die Bewältigung der Euro-Staatsschuldenkrise hat sich für das Europarecht wiederholt als schwerwiegende Herausforderung erwiesen. Bei der Schaffung der notwendigen Instrumente bzw. der Änderung bestehender Institutionen, Regeln und Verfahren haben sich (erneut) Flexibilitätsgrenzen gezeigt, die sich aus dem strikten Einstimmigkeitsprinzip (plus Ratifikationserfordernis) im Vertragsänderungsverfahren sowie dem dortigen Mitspracherecht der Nicht-Euro-Teilnehmerstaaten auch bei Änderungen, die sie gar nicht oder jedenfalls noch nicht betreffen, ergeben. Dieses Mitspracherecht gilt z.B. auch für die an sich durch Sekundärrechtsakt mögliche Ersetzung des Protokolls über das Verfahren bei einem übermäßigen Defizit nach Art. 126 Abs. 14 AEUV.

Die im Unionsrecht bereits bestehenden Möglichkeiten zur Flexibilisierung und Differenzierung haben sich weitgehend als ungenügend erwiesen. Das allgemeine Verfahren der verstärkten Zusammenarbeit erlaubt bereits keine Abweichungen vom Primärrecht, welches aber die Kernregelungen für die WWU auch inhaltlich fixiert. Auch die Sonderregelung des Art. 136 Abs. 1 AEUV enthält eine – in ihrer genauen Bedeutung unklare – Beschränkung auf eine Verstärkung der Koordinierung und Überwachung »nach den einschlägigen Bestimmungen der Verträge«. Die Ermächtigungsgrundlage

zum Erlass von Definitionen der in den Art. 123 bis 125 AEUV enthaltenen Definitionen, die nach Auffassung des Berichterstatters ohne Zweifel hätte genutzt werden können, um z.B. die Zulässigkeit des ESM klarzustellen (auch Art. 136 Abs. 3 AEUV enthält ja nur eine Klarstellung), und die sogar nur eine qualifizierte Mehrheit im Rat voraussetzt, ist hingegen bemerkenswerter Weise nicht genutzt worden – und wird wohl auch nicht zur Klarstellung der Bedingungen für die Zulässigkeit von Sekundärmarktkäufen von Anleihen durch das Eurosystem genutzt werden.

Erforderlich erscheint dem Berichterstatter eine Ergänzung der Vertragsänderungsverfahren um ein weiteres Verfahren, dass relative Änderungen und Ergänzungen (inter se) der in Art. 139 Abs. 2 AEUV genannten Vertragsbestimmungen nur durch die Mitgliedstaaten des Euro-Währungsgebiets erlaubt. Auf diese Art und Weise hätte z.B. der SKSV unmittelbar in die Verträge integriert werden können und die Sanktionsnorm des Art. 126 AEUV hätte verschärft werden können.

GREECE

Katerina Iliadou, Elias Karakitsos and Dimitris Tsibanoulis[1]

'Competition that stimulates, cooperation that strengthens, and solidarity that unites', Jacques Delors

Economic policy

EU legal order

Question 1

Article 3 of the TEU, when declaring the principles of the EU, mentions, among others, that '*the Union's aim is to promote peace, its values, and the well-being of its peoples*' as well as the establishment of an internal market. It declares that the Union 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress ...' and that 'it shall promote economic, social and territorial cohesion, and solidarity among Member States'.

In Part Three of the TFEU, entitled 'Union Policies and Internal Actions', Title I is dedicated to the Internal Market, Title VIII to the Economic and Monetary Policy, Title IX to the Employment, and Title X to the Social Policy. De-

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spite the fact that the policies introduced by the provisions of each Title are, theoretically, legally equivalent, there is a significant material differentiation and gap as to the concretization by the respective legal provisions of their legal content and the means provided for the achievement of the respective declared goals and, accordingly, with respect to their implementation.

While those relating to the price stability aspect of monetary policy have a specific and, at least literally, indisputable content, other provisions remain as blanket norms or programmatic declarations. These include the provisions establishing some of the Treaties' fundamental principles, which from a legal policy point of view and hierarchical order are equivalent to the first, notably a highly competitive social market economy (entailing undistorted functioning of the internal market), price stability, full employment, and social progress and conditions favouring balanced economic growth.

Such imbalances (disequilibria) have been made especially clear by the eruption of the Eurozone crisis. When the euro was first conceived and designed, the concerns about crisis management were not institutionally addressed. Nor was a remedy for a possible euro pathology envisaged in the Treaties establishing the common currency. As a result, when troubles appeared, the Treaties' provisions hindered the adoption of decisive measures which could alleviate the consequences of the crisis and tackle issues of legal certainty and predictability throughout the Eurozone.

It should be noted that the financial stability objective is not identical to 'price stability'. It is broader, since it also entails the effective promotion of the goals of maximum employment. Thus, price stability and full employment should be understood as the two equivalent legs of financial stability. The financial crisis and, especially, the Eurozone crisis illustrated the boundaries set by the Treaties to the possibilities for EU bodies to effectively tackle the crisis. As long as monetary policy was understood in Manichaestic terms as entailing only the price stability objective, ignoring that of full employment, the achievement of financial stability was undermined. To tackle the Eurozone crisis, restoration of financial stability needed to be understood as implementing the achievement of price stability and full employment. That did not happen and the separation of monetary and economic policy threatens to be detrimental for the European Union. This is particularly so when the Treaties set limits to the ECB's role, preventing it from working in close cooperation with other competent EU institutions to achieve the one equally valid objective – the dual mandate of financial stability and full employment. Such an important lacuna threatens to worsen the institutional lameness of the EU, despite the ECB and the European Commission's efforts to restore equi-

librium through recent generous teleological interpretations of the Treaties to save Europe's weaker economies from sovereign default.

In that respect, it has been convincingly argued by Athanassiou that the measures taken (till then) conformed with the EU treaties and especially *that '(1) art. 125 TFEU is compatible with the extension of Union or Member State temporary financial assistance to Euro area Member States in difficulty; (2) art. 122(2) TFEU was an adequate and sufficient legal basis for the adoption of Council Regulation 407/2010, establishing the European Financial Stabilisation Mechanism, and for the extension of Union financial assistance to Member States in difficulty; (3) the Securities Markets Programme is consistent with the rationale and objectives of the monetary financing prohibition and purchases conducted under it do not circumvent art. 123 TFEU; (4) a Treaty amendment was indispensable to establish a Euro area support fund and the choice of art. 136 TFEU was appropriate also for clarifying the scope of art. 125 TFEU.'*[2]

Further, the Court of Justice of the EU in its Pringle Decision of 27 November 2012 (Case C-370/12) judged that Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty between EU member states establishing the European stability mechanism concluded at Brussels on 2 February 2012 (the 'ESM Treaty') or the ratification of that treaty by those Member States.

Nevertheless, it is not feasible to handle the Eurozone crisis without the means and tools provided in the Treaties, using simply ad hoc contractual arrangements in the form of international agreements, as is the case so far.

EMU needs to be overhauled with new formal rules to achieve better budgetary, economic and financial surveillance, and supervision, followed by resolution tools, safeguarding timely action to avoid systemic crisis. Such mechanisms lack however the substantive content: the material ingredients needed to achieve a full economic, banking, fiscal, and political union, while safeguarding the fundamental principles of the Treaties.

The Treaties need mechanisms and tools to enable the creation of policies for real convergence and growth. Without these necessary material remedies

2. Phoebus Athanassiou, Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible (and What is Not)', European Law Review 2011, 558.

against crisis, the vicious circle of tight monetary and fiscal policy cannot be broken and will ultimately lead to the disintegration of the euro.

Question 2[3]

At the root of the EU debt crisis lies the divergence in real magnitudes, of growth, productivity, and competitiveness between Member States, and in particular between periphery and core countries, during the first ten years of EMU.

Despite this, the EC's 'blueprint for a deep and genuine economic and monetary union'[4] is promoting the wrong remedies. With divergence as the cause of the crisis, policies to encourage convergence should have been the basis for overhauling the system.

Instead, the new architecture and its governance offer a reactive system, identifying and monitoring real divergence between Member States and taking measures to simply prevent the divergence from growing to levels that would trigger another crisis.

The measures are punitive: they impose austerity through corrective action on fiscal and monetary policy as now applied to periphery Member States. This punitive approach to preventing another crisis will certainly not reverse growing real divergence, reflected in increasing inequality of income between and within Member States. These negative conditions are resisted by national electorates who increasingly favour political parties that promote nationalism over federalism. The next financial crisis is not far away and it may well trigger the break up of the euro.

Yet, the EMU can be salvaged if real convergence becomes the top priority policy objective and the current use of fiscal and monetary policy to reduce the negative impact of business cycles on real convergence is reviewed.

To save the euro we need to return to first principles, namely to the theoretical models that form the intellectual basis for real convergence and the use of fiscal and monetary policy in a monetary union. If these basic theoretical models have broken down, then we need to revise them to establish the new architecture of EMU. This is the aim of this report. It suggests how policies should be designed in the light of a breakdown of the Efficient Market Hypothesis (EMH) and the New Consensus Macroeconomics (NCM), models

3. The answer to this Question entails a brief analysis of the Economic Principles of the issues raised in the Questionnaire.
4. Communication from the Commission: A blueprint for deep and genuine economic and monetary union, 28/11/12.

which have formed the backbone of the old EMU architecture that led to the crisis. An analysis of the above is presented in the answers to questions 11 – 13.

Question 3

I. Union Legal Order

As already pointed out in the Commission's Blueprint, the primary EU legal order can provide the legal basis for steps towards a deeper EMU, mainly in respect of short and medium term. For example, considering the Commission Communication on the *introduction of a Convergence and Competitiveness Instrument – CCI* [COM(2013) 165 final], we may agree that Article 121 (6) combined with Article 136 (1) TFEU could be considered as an appropriate legal basis for the adoption of measures within the framework of the new contractual approach to the implementation of structural reform measures and mainly for the conclusion of mutually agreed 'contractual arrangements' on structural reforms envisaged by Member States facing difficulties where such reforms affect the entire Euro area. However, such arrangements would have no legally binding character, since legally binding agreements could be concluded only on the basis of the flexibility clause (Article 352 TFEU) and under the procedural and substantial conditions set therein.

The establishment of a 'financial support mechanism' seems to exceed the scope of application of the aforementioned Articles 121 (6) and 136 (1) (b) TFEU; this mechanism could be established as a 'Fund', designed to boost economic, social, and territorial cohesion in the EU as a whole, according to the provisions of Article 175 (3) TFEU in conjunction with Protocol No. 28, following the ordinary legislative procedure and under the condition of non violation of Article 125 TFEU. Ex ante coordination of national plans for economic policy reforms could also be based on Articles 121 (6) and 136 (1) (b) TFEU, bearing in mind that the final decisions would rely on national decisions, since the EU would only have non-binding coordination competencies (see the Commission Communication on '*Ex ante coordination of plans for major economic policy reforms*' – March 20th, 2013).

On the other hand, more decisive and ambitious steps towards budgetary and economic integration, such as the proposals on centralizing debt issuing in the Euro-area or on the establishment of an autonomous euro area budget, presuppose indisputable EU competencies and a clear mandate to proceed with the issuance of legally binding decisions. These could only be achieved through a related revision of the Treaties according to the ordinary procedure

of Article 48 TFEU, to integrate into the primary EU legal order at least the basic characteristics, principles and mechanisms that will apply and to establish a clear institutional framework for the related necessary secondary legislation. A revision of primary EU law will create clarity, legal certainty, and stability, essential conditions to establish legal obligations for compliance by Member States and to justify control mechanisms.

II. Constitutional Legal Order

With respect to Greek Law, since the enactment of the Constitution of 1975 that preceded accession to the European Communities (1981), the Greek constitutional order has been constructed in a way that facilitates the process of European Integration. The relevant provisions are included in Article 28, as revised in 2001 and currently in force.

More specifically, two provisions included in this Article are considered to form the foundation for the participation of Greece to the European Integration Process viz: '*2. Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law sanctioning the treaty or agreement. 3. Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, insofar as this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.'* To date, cumulative application of these two paragraphs, combining the procedural conditions of paragraph 2 and the substantial limits set out in paragraph 3, has been considered as formulating the appropriate constitutional framework allowing participation to the European Integration process without serious objections or constitutional problems and debates.

Due to its open character, the same constitutional provisions may be regarded as an appropriate basis for further progress towards a genuine and deeper EMU, as envisaged in the main policy documents. The same could also apply to the establishment of an eventual EU right of veto over national budgets as well as for the establishment of an autonomous euro area budget.

Nevertheless, budget powers are entrusted to the Parliament, which according to Article 79 of the Constitution is responsible for approving the annual State budget in the course of its regular annual session, further consider-

ations arise: Objections could be raised that the attribution of budgetary powers to institutions beyond the directly elected Parliament constitutes a violation of the '*foundations of democratic government*', which set explicit limits on the attribution of powers to institutions beyond the national borders. Changes therefore have to address prima facie safeguards to ensure democratic legitimacy and accountability. This could be done through a constitutional amendment aiming at the enactment of specific rules stipulating the procedures and formalities regarding the participation of the national Parliament to the procedures established within the framework of an eventual enhanced EU cooperation on budgetary issues.

In this respect, Greek constitutional theory argues that the attribution of specific constitutional powers to supranational institutions according to Article 28 may be challenged before the national Courts. That specific issue has yet to be tested, but the possibility cannot be excluded for the future.

Within that framework we may consider the judicial approach expressed by the majority of the plenary session of the Council of the State in the Memorandum Case (case No. 668/2012). In order to affirm the constitutionality of the austerity measures imposed in compliance to the international assistance programme as well as the constitutionality of the procedure that was applied, the Court was based on arguments related to the extreme and exceptional circumstances of emergency due the current economic crisis that put the existence of the State itself at risk (see also under 9 II).

However similar arguments related to the emergency conditions could not apply easily in the future and with respect to standardized mechanisms of the deeper EMU, as proposed.

Question 4

Indisputably, the principle of democracy is one of the common values shared by all EU member States. It is also explicitly declared in Article 2 TEU as a fundamental principle of the EU legal order. Furthermore, according to Article 10 (1) TEU, '*the functioning of the Union shall be founded on representative democracy*'. For such purpose, representation of the EU citizens is ensured through the European Parliament, granting direct democratic legitimacy to its decisions. Additionally, specific procedures and rules are included in primary EU law to render at least indirect democratic legitimacy to the other institutions and mainly the Council, whose members remain accountable to their national parliaments (Article 10 (2) s. b TEU), and the Commission, which as a body is responsible to the European Parliament (Article 17 (8) TEU and 234 TFEU). A specific role is entrusted to the national parlia-

ments, which according to Article 12 TEU shall '*contribute actively to the good functioning of the Union*', as further defined in Protocol 1 on the role of national parliaments in the EU. Moreover, the citizen's right to participate in the democratic life of the Union is provided in the EU Treaty which stipulates explicitly that '*decisions shall be taken as openly and as closely as possible to the citizen*' (Article 10 (3) TEU).

Recent developments as regards to the mechanisms and arrangements that have been adopted during the last years in order to combat the European sovereign debt crisis, aiming to strengthen the legal system of economic governance in the EU, demonstrate a shift of power within the EU institutions. A number of weaknesses in the structures of the EU and the EMU have been revealed and questions raised as to the need for legal modifications of the current system to protect the aforementioned principles and rules of democratic legitimacy. Focusing mainly on the Six- and Two-Packs, the Euro+ Pact, the ESM, and the Treaty on Stability, Coordination, and Governance in the Economic and Monetary Union (Fiscal Pact), we may point out the following brief remarks:

- Inter-governmental methods and instruments – outwith the Community's methods – are opted for, to the detriment of the Treaty provisions, which hold that the European Council shall not exercise legislative powers (Article 15 (1) TEU) and provide for the European Parliament's involvement in the formulation of EU legislation. The European Council thereby acquired de facto key role within the framework of the EU institutional architecture.
- While the Commission's responsibilities regarding legislative initiatives seem to shrivel, it is instead given new powers with regard to monitoring and reporting on compliance with the fixed targets and procedures to the Commission, mainly to the detriment of the European Parliament's role; the latter often seems to remain a passive observer of developments. Practice also reveals the weakness of the European system of governance and the absence of clear political leadership.
- The scope of responsibilities of the ECJ is also expanded, since beyond its Treaty responsibilities regarding the interpretation and application of EU law, the Court is also entrusted with the responsibility to control compliance with provisions adopted beyond the EU legal order such as the obligations arising out of the Fiscal Compact (see Article 273 TFEU).
- National parliaments (at least most of them) have limited capabilities and cannot play an influential role (at least not ex-ante) in decisions adopted by the executive branch of the national governments via the European Council or the Council. This situation is evident in Greece, where various

techniques have been applied to skip the procedures of an in depth parliamentary debate on the obligations arising from the international assistance program.
– Citizens are often troubled by problems of daily routine due to the economic crisis and the 'Civil Society' seems reluctant or unable to participate effectively in public dialogue on the developments that take place. The complexity of the issues involved exacerbates this situation.

Institutional amendments that could eventually address the above described issues may include the following:

– The enhancement of the European Parliament's role as regards the enactment of new legislation. The attribution of new powers to the European Parliament acting together with the Council in order to initiate new legislation on economic and financial issues. This perspective however requires a Treaty revision, since even after the Lisbon Treaty the Commission remains the sole institution with the power to initiate new draft legislation. European Parliament participation in the decision-making procedures of the Council pursuant to Article 121 (2) TFEU may also be considered.
– The fusion of the mandate of the presidency of the Commission with the one of the presidency of the European Council, so as to reinforce the political legitimacy of this institution by ensuring accountability towards the European Parliament. This fusion could be achieved through the adoption of an inter-institutional agreement according to Article 295 TFEU and may be considered to be in line with the existing EU legislation and mainly with the obligation of the Council to take into account the results of the European elections in order to propose the president of the Commission (Article 17 (5) TEU). The perspective of applying direct universal suffrage that will provide direct democratic legitimacy requires a Treaty revision according to the ordinary procedure (Article 48 TEU).
– The clarification and enhancement (e.g. through the adoption of a related inter-institutional agreement) of the functions of the Inter-parliamentary Conference on Economic and Financial Governance (ECOFIN Conference), that was established pursuant to the provisions of Article 13 of the Fiscal Compact, as decided by the Speakers of the Presidents of all Parliaments in the European Union in Nicosia (April 2013). This seeks to increase parliamentary participation decisions on economic governance. As an alternative to this perspective of multilevel parliamentary cooperation, the establishment of a second parliamentary chamber, composed of dele-

gations of national MPs may also be considered. Yet, this requires a Treaty revision and poses questions as to the exact functions and organization of a new institution.
– As regards the Euro Group, possible modifications may include mechanisms aiming to ensure parliamentary control of the decisions adopted, i.e. the establishment of a vice-president of the Commission and of the Council that shall be responsible towards the European Parliament.

The justification of the primacy of EU law which triggers the MS obligation to comply with its requirements is connected to the basic principles of the rule of law. It presupposes both a predefined fundamental general framework defining the tasks and responsibilities of the institutions involved and the acknowledgement of the obligation to respect fundamental rights and liberties, to operate judicial control in an effective way, through the competencies of the national Courts and the EU jurisdiction. Establishing the right to challenge decisions before the Courts therefore seems imperative. Moreover, given the divergent opinions that may be adopted by the national Highest Courts coordination and control mechanisms for judicial competencies beyond national borders should arguably be considered. The organization of judicial systems in federal states may provide good ideas that could be adapted and applied at EU level.

Question 5

Financial sector integration in the European Union has deepened significantly following the introduction of the single currency. However, the international financial crisis revealed the weaknesses of the institutional framework of the European Internal Market, exposed the Eurozone's extreme vulnerability and proved that the Better Regulation target, aptly identified as a necessary and essential part of the FSAP, had failed to achieve necessary cohesion and consistency in the EU.

When the euro was first conceived and designed, concerns about crisis management were not institutionally addressed. The EU Treaty establishing the common currency did not envisage any remedy whatsoever for a possible euro pathology. As a result, when difficulties appeared, credibility was the first victim, due to a lack of legal certainty and predictability. The EU found itself unprepared to tackle what arguably constituted the biggest sovereign debt crisis of modern times.

And while signs of a slight recovery in the real economy began to appear in 2010, the same year the beginning of the sovereign debt crisis in Eurozone

periphery countries occurred. High sovereign debt levels eroded trust in the European banking system. For the weaker sovereigns, the situation became unbearable in summer 2011. The banking system was put under unprecedented pressure and job losses skyrocketed in many EU member states.

In reality, the crisis clearly highlighted the limits and failings of Europe's financial supervision system. The accumulation of excessive risk was not detected. Surveillance and supervision were not effective and not exercised in time. When transnational financial institutions faced problems, the coordination between national authorities was far from optimal. Weaknesses, revealed by the financial crisis have forced a reappraisal of the main macroeconomic forces at play in the euro area, and promoted a rethink of the architecture of EMU that has already led to a substantial overhaul of economic governance arrangements.

The Single Supervisory Mechanism (SSM) for the oversight of banks and other credit institutions, establishing one of the main elements of European Banking Union, was a first and necessary response to the problems in banking revealed by the crisis.

Prior to the introduction of the SSM the report of the European Commission's High-level Expert Group on Bank Structural Reform (Liikanen report) proposed a number of structural reforms, pursuing a significant change in the banking landscape in EU.

First, the proposed mandatory ring fencing mechanism, entailing the separation of retail banking from trading/investment activities, signals a return to traditional banking culture. The reform's proposal aims, inter alia to reduce risk arising from the mixing of two different banking management cultures. Banks will become simpler in structure and therefore easier to monitor. Risk should be reduced by easing banks' complexity and tackling interconnectedness. Corporate Governance of banking institutions will be simpler and more focused, to give a more feasible and coherent working environment. The tasks entrusted to governing and supervisory bodies will be reduced. Thus, a more coherent corporate governance paradigm should be achieved, free from the anomalies and conflicts of interest endemic to controversial and opposing banking objectives. As a result of such separation, funding has more chances to flow to the real economy, to support economic activity, and enhance growth.

Existing institutional disequilibria in the aftermath of the financial crisis and the Eurozone crisis led to a unique and unprecedented fragmentation of

the single European Market. This fragmentation[5] was based on domestic market-driven characteristics predetermining the business possibilities and perspectives of banking entities and enterprises constituting a crucial obstacle to growth and recovery of the distressed Eurozone economies.

Market participants take into consideration de facto discriminatory country driven criteria, which in fact weaken or even invalidate the fundamental operating principles of the EU. For example, the specific conditions related to the local environment of a bank determine decisively its attractiveness for depositors and, accordingly, the interest rate it has to offer to win creditors. In the absence of a European Depositors Guarantee Scheme and under currency risk conditions, depositors are led to the banks of the strong Eurozone economies, where the State is able to intervene in case of a bank's default. Further, the recession in European countries effectively destroys the financing perspectives for local enterprises and the real economy in general. Domestic enterprises in weak Eurozone countries have poor chances to obtain financing and only under very expensive conditions.

The shortcomings in the institutional framework were evident and not supportive of the single market. Financial integration was not followed by the establishment of adequate regulatory and supervisory institutions and essential economic governance frameworks.

Under such circumstances, achieving growth in weak Eurozone economies and, thus, tackling and overcoming the financial crisis, resembles the fight against Lernaean Hydra, the many-headed beast. Addressing these issues is of crucial importance for the European Union and the effective preservation of the fundamental principles and concepts on which it is based.

Moreover, the process of integration in the internal market was also weakened by Member States' unilateral approaches to resolving the problems of their own national credit institutions. Accountable to their parliaments, national governments (as well as central banks and supervisors) cared only about the effects of ailing banks on their domestic financial systems.

The theoretical foundation for this behavior is provided by the financial trilemma:[6] that all three policy objectives – of maintaining global financial

5. Under the terms fragmentation and segmentation we mean the situation in which a business undertaking is required to pay a premium only because it belongs to a specific jurisdiction, irrespective of the undertaking's own risk profile.

6. See Dirk Schoenmaker, Post-Crisis Reversal in Banking and Insurance Integration: An Empirical Survey, Economic Papers 496/April 2013, Avgouleas, Emilios, and Arner, Douglas W., The Eurozone Debt Crisis and the European Banking Union: A

stability, fostering cross-border financial integration and preserving national authority for financial policies – are not compatible. Any two of the three objectives can be combined, but not all three together; one of the three objectives has to be abandoned.

Further, two negative loops have been accurately identified and recognized, exacerbating financial fragmentation: One between sovereigns and banks, where insolvent banks make the sovereign insolvent – and vice versa – and one between deposits and banks, where the risk of redenomination, due to the legal uncertainty surrounding Euro-exit requirements, induces the flight of deposits from the periphery to the core. The first topic was debated during the Euro area Summit of June 29th 2012, where the issue of the 'vicious circle between banks and sovereigns' was formally addressed for the first time at political level together with decisions to help resolve it. A new Bank recapitalisation scheme was to be realised through European direct investments, in order to break the vicious circle between banks and sovereigns. Banks' recapitalisation measures should not be solely national, but pan-European and market-oriented.

The breakthrough of the June 29th Summit's radical proposal constitutes a distinguishing feature of Eurozone policy to date: By participating effectively in the recapitalization of the banks, the Eurozone will be forced to effectively contribute in the economic growth endeavor. Acting as investor, it will inevitably abandon its hitherto impassive stance that leaves recovery under the control of each troubled member state. Accordingly, national factors that distort fair competition within the single market and hinder economic growth in weak states will be constrained.

Following the completion of bank recovery, the European Stability Mechanism (ESM) will be able to place its shares in recapitalized banks on the market, without incurring losses related to the conditions of the economy of the weak state in which the investment was made. If the economy of the weak state starts to recover, both the value of the banks and the ESM's participation increase. Consequently, the risk for the financing states' taxpayers, which currently constitutes a disincentive to financial unity, decreases. It will no longer be in Europe's interest to maintain depreciation of weak member states' economies to allow healthy states' enterprises to invest in them at low-prices; instead a collective interest would emerge, creating prospects for the effective operation of the national banking sector to support the troubled

Cautionary Tale of Failure and Reform (October 1, 2013). University of Hong Kong, Faculty of Law, Research Paper No. 2013/037. Available at SSRN: http://ssrn.com/abstract=2347937 or http://dx.doi.org/10.2139/ssrn.2347937.

states' economic recovery. This community of interests is a very promising success factor since it creates some necessary genuine growth prospects. It will be the first time after the outbreak of the sovereign crisis that the Eurozone operates on market terms to confront the problem. In particular, it will be asked to take effective measures to promote growth of the funded member-states because such measures will be fully consistent with the interests of the financially strong states. It is self-evident that the aforementioned mechanisms require the EU to play a more decisive role in the economic affairs of each state. That is to say, they require the endorsement of united economic and banking supervision, following recognition of the fact that a monetary union cannot survive without a fiscal union.

Apart from the ESM, which was established under a Treaty between member states, the establishment of a banking union, a Single Resolution Mechanism, which has been announced, and a pan-European Deposit Guarantee Scheme, currently under consideration though politically difficult, are necessary prerequisites for an integrated financial framework and a genuine economic and monetary union. All those instruments constitute core requirements for the restoration of a level playing field in the European financial services market and, consequently, for a sound development of the banking sector capable of financing the real economy.

However, there is another negative loop, between austerity and debt sustainability, which needs to be addressed. It has been ascertained that the deeper the austerity programme, the more unsustainable the debt. Imposition of austerity when the economy is in recession creates a deflationary downwards spiral and is a detrimental impediment for growth and convergence. Improvement of supervisory mechanisms is convergence neutral. Mechanisms and tools towards cohesion and creating growth and convergence conditions are the necessary supplement. Apart from the necessary Treaties' amendments, a new 'Financial Services Action Plan' is needed to create demand prerequisites and alleviate the causes of new financial fragmentation. Without it, fragmentation will continue to traumatise the internal market and create insuperable obstacles to growth and convergence. And without these latter prerequisites, no economic, monetary, banking, fiscal, and political union can be achieved.

Legal orders of the Member States

Question 6

The impact on the Greek legal order of the recently adopted EU rules on economic governance has been significant. Already in 2010 a far reaching revision of the system of Greek public expenditure had been initiated to meet the fiscal adjustments imposed due to the crisis. For that purpose, the Parliament enacted Law No 3871/2010, containing substantial amendments to the provisions of Law No 2362/1995 '*On public audit of the state expenditure and other provisions*', aiming at the reorganization of the procedure applicable to drafting and monitoring the execution of the national budget that applies to the Central Government and the regional entities.

The new law establishes the following general principles of fiscal governance: The principle of fair fiscal management, imposing the obligation to manage public revenues in a prudent manner, so as to ensure fiscal sustainability; the principles of accountability and responsibility; the principles of transparency and sincerity. Servicing the public debt in order to ensure fiscal stability is prioritized.

The respective duties and responsibilities of the Minister for Economy and of the State Treasury Office have been established and, moreover, detailed provisions have been included in the Law. Specific rules regarding drafting the National Budget have also been adopted. A 'Parliamentary Budget Office' has been established by the Parliament with the obligation to adopt and review 'Mid-term Strategic Fiscal Plans' to include the fiscal targets for the next three years. The Minister for Economy has been entrusted with detailed responsibilities for ensuring the appropriate execution of the budgets of all governmental bodies and authorities.

Additionally, the recently enacted Law No 4111/2013 included provisions as regards fiscal discipline of Public Enterprises and Private Entities owned by the State. In summary the Law provides:

- the obligation to establish the yearly budget no later than January 31st;
- the obligation to draft monthly execution plans for the budget and to set specific targets for every trimester with regard to each Ministry, including supervised legal entities;
- thorough monitoring of compliance with targets and prompt application of measures to avoid deviations from them;
- reporting obligations on a periodic basis (every trimester);

- possibility to enter into programmatic agreements with the Ministry of Finance in order to ensure budgetary discipline;
- possibility to cut public owned legal entities' budgets in the case of an eventual deviation of more than 10 % from targets and in the absence of correction measures;
- possibility to appoint a Supervisor of the financial operation of state owned legal entities that do not comply with fiscal obligations;
- the power to suspend remuneration of the management of such entities;
- automatic termination of the mandate of the members of the Boards of public enterprises and entities that have annual financial results diverging more than 10 % from the predefined targets.

Further developments, for example the establishment of a specific Committee within the framework of the State Treasury Office to ensure compliance of the national economic governance structures with the respective structures of the EU and the Euro-area, are currently under consideration. Proposals also include also the establishment of a new Fiscal Council with consultative functions (monitoring and reporting) on budgetary issues.

According to the January 2014 interim report of the Parliamentary Budget Office 'The new economic governance in the Euro-area and Greece – The mechanism of surveillance and solidarity under condition after the Memorandum' the new fiscal framework is estimated to be sufficiently appropriate to boost economic growth, on condition it not only limits political discretion on economic issues, but also as provides an opportunity to make structural changes in the country's productive base, improve its infrastructure offer finance to SMEs and stabilise the banking system. Structural problems however related to tax avoidance and evasion and poor collection mechanisms still persist.

Tackling the European Sovereign debt crisis has also stimulated debate on an eventual revision of the Constitution to incorporate provisions on fiscal issues, such as the balanced budget or the debt break rule.

Issues related to the characteristics of the Greek Constitution 1975/2001/2008, and the strict procedural limitations that apply to its revision (two-phase procedure that includes national elections; increased majority requirements; 5 years time period as a condition of an eventual subsequent revision) complicate this debate. Legal scholars point out that the enactment of fiscal rules in the Constitution may be conceived as the imposition of a predefined model of economic policy, contrary to the economic neutrality proclaimed by the Constitution. Moreover, such rules may constitute drastic limits to the Parliament's and to the Government's authority or powers in matters of eco-

nomic and social policy. Other commentators cite the risk of using similar constitutional amendments to impose further restrictions on fundamental social rights enshrined in the Constitution, to the detriment of their normative force and of the social state in general.

In so far as constitutional fiscal rules are conceived as formulating rigid limits, their inclusion in the Constitution may be perceived as a fundamental infringement of constitutional rights and safeguards.

Question 7

The current economic crisis and the necessity to comply with the obligations arising from the international assistance agreements for Greece revealed a number of questions as to the democratic legitimacy of measures imposed by the Parliament and/or the Executive as well the techniques of their implementation. These include:

(a) The legitimacy of measures imposed through the Government by extensive use of the legislative delegation of powers to the executive. In particular, Article 43 par. 2 section b of the Constitution enumerates specific criteria for delegation: '*Delegation for the purpose of issuing regulatory acts by other (than the President of the Republic) administrative organs shall be permitted in cases concerning the regulation of more specific matters or matters of local interest or of a technical and detailed nature*'. In many cases it is doubtful whether implementing measures comply with the above provision of the Constitution.
(b) An extensive application of Article 44 par. 1 of the Constitution has been made, in order to precipitate the adoption of urgent measures. The above article provides for the Government the possibility to adopt 'Acts of Legislative Content', i.e. emergency legislation issued by the executive without statutory delegation, 'under extraordinary circumstances of an urgent and unforeseeable need'. Such measures have to be ratified later by the Parliament. The excessive use of such provision, taking into consideration the long duration of the economic crisis, deprived in reality from the Parliament the possibility to really discuss and analyse such measures, which have been quasi imposed to it.
(c) Finally, the Courts argued on the necessity of measures adopted by the Parliament having an impact on rights guaranteed by the Constitution by evoking the extreme financial problems of the State. Additionally, the national Courts did not enter in a control of procedural aspects of enact-

ment of new legislation, with the explanation that such aspects are considered to constitute 'interna corporis' of the Parliament.

The legislative methods described above could not continue in the long term. Proposals to overcome similar deviations from the democratic principle may include:

(a) Rationalization and review of Article 43 paragraph 2 of the Constitution so as to provide a clear framework on the predefined conditions that shall apply with regard to legislative delegation to the Executive branch, including stable mechanisms that shall permit effective monitoring by the Parliament.
(b) Full compliance with the provisions of Law No 4048/2012 on Regulatory Governance – Principles, Procedures, and Means of Good Legislation.
(c) Establishment of control criteria that may be applied by the Courts to limit the immunity of procedures for new legislation.

Question 8

The Fiscal Compact was ratified by Law No 4036/2012. Therefore, according to the provisions of Article 28 of the Constitution the Fiscal Compact is an integral part of the Greek legal order and its provisions prevail over any contrary provisions of existing or future Statutes and secondary legislation issued by the Executive on the basis of a legislative delegation. Detailed provisions as regards the application of the obligations set out in the Fiscal Compact have not yet been enacted.

Question 9

I. Historical background

The Eurozone sovereign debt crisis, which immediately followed the global financial meltdown, began in Greece. Between 2009 and 2012 the country faced the most severe economic crisis of its recent history. With a large budget deficit and markets for new financing effectively closed, the state was faced with a disorderly default: unable to serve its sovereign debt, due and payable in June 2010.

To avoid a default – and related systemic risk in the Eurozone – Greece resorted to a combined European and international financial support mechanism, established *ad hoc* (2-9 May, 2010), following lengthy consultations

with European and international authorities. The Eurozone countries and the IMF, in consultation with national authorities, put together an urgent bail-out and adjustment programme and made available €110 billion of funds to help the country meet its obligations, fix the flaws in its economic policy, and re-enter the markets as quickly as possible. The strategic orientation of the programme focused mainly on the imposition of harsh austerity measures, designed to curb excessive demand and bring about internal depreciation, and parallel structural reforms to enhance competitiveness and boost productivity.

External and internal factors derailed this first economic adjustment programme. The policy mix proved inadequate: implementation was asymmetric (harsh austerity measures were fully enforced, while structural reforms lagged significantly behind) and generic faults in the policy design underestimated the fiscal results of a prolonged recession. In this sense the programme backfired.[7] Efforts to consolidate public finances and reduce the deficit led to a harsh recession and as a result fiscal revenue fell even further while public debt as a percentage of GDP increased.

In two consecutive Summits (11 and 25 March 2011) and by the *ad hoc* decision taken in the Summits of 21 July and 26 October 2011 regarding Greece, the Eurozone invited private investors to contribute to a solution for resolving the debt viability of Greece through the so called 'Private Sector Involvement', 'PSI' programme. At the same time, the financially robust States of the Eurozone were called to contribute further to the financing of the Greek economy. This principle of tripartite financing for the restructuring of Greek debt was adopted in the Summit on 26 October 2011.

Greek sovereign debt restructuring included (a) the bail-in leg, realized through the Greek Government Bonds' (GGBs) haircut (PSI), starting in February and completed in March 2012, and (b) the financing of Greece through the official sector of the EU and IMF. To this end, a company, the EFSF (now replaced by the ESM), owned by the Eurozone members, was established in Luxembourg.

The GGBs haircut has been realized via a voluntary GGBs exchange, by adoption and activation of Collective Action Clauses (CACs). The exchange was made by an exchange offer for GGBs and bonds guaranteed by the Hellenic Republic.

7. Structural reforms in labor and product markets, privatization, and measures to combat tax evasion were either not implemented or were implemented with delay and, at the same time, fiscal policy over-relied on tax increases instead of expenditure cuts, while the fiscal multiplier was underestimated.

The exchange of bonds was determined by Law No 4050/2012 (the 'Greek Bondholder Act') of 23 February 2012. This stipulated (a) the Invitation by the Hellenic Republic to bondholders for the exchange (swap) of their bonds against new securities, (b) the conditions under which the modification of the terms of the eligible bonds could be adopted by bondholders, including the introduction of CACs, and (c) the terms under which the bonds' exchange against new securities could be determined and effected. Bonds governed by Greek Law totalled approximately 177 billion Euros and bonds governed by foreign law some 28 billion Euros.

The Hellenic Republic's Invitation Memorandum promulgated under Law No 4050/2012 invited bondholders of the designated bonds to tender any and all of them in exchange for New, GDP-linked Bonds, GGBs and PSI Payment Notes, in accordance with the terms and subject to the conditions set out in the Memorandum. Simultaneously, other invitations were launched covering, together, GGBs and titles guaranteed by the Hellenic Republic, but governed by foreign law.

For GGBs governed by Greek Law (the 'Eligible Titles'), and subject to the modification / swap process, bondholders were called upon to decide collectively, within the deadline specified by the Invitation Memorandum, on the proposed modification of the Eligible Titles, i.e. on *the change or the addition of terms to one or more eligible titles or the exchange of one or more eligible titles with one or more new titles*. Addressees of the Invitation were the bondholders acting through the participants registered with the System for Monitoring Transactions in Securities in book-entry form operated by the Bank of Greece (account providers).

The Greek Bondholder Act also provided an optional collective action clause (CAC), for activation with bondholders' consent, to restrain the free rider / holdout problem in the restructuring effort. CACs could be activated by a quorum of at least ½ of the aggregate outstanding principal of all Eligible Titles specified in the *Invitation* (the 'Participating Principal') and a supermajority of at least (2/3) of the Participating Principal. The Act did not impose new terms on the bondholders and an exchange of bonds was not compulsory. Modification was voluntary: the decision for modification and/or exchange rested solely with the bondholders. But the Act provided for the bond loans' terms to be amended by qualified majority and specified quorum: the previous requirement of bondholder unanimity was abandoned.

Bondholders of approximately €172 billion principal issued or guaranteed by the Hellenic Republic tendered their bonds for exchange or consented to the proposed amendments in response to the invitations and consent solicitations announced on 24 February 2012. Of the approximately €177 billion of

bonds governed by Greek law and subject to the invitation, the Hellenic Republic received tenders for exchange and consents from holders of approximately €152 billion face value 85.8 % of the outstanding face value. Bondholders of 5.3 % of the outstanding face value participated in the consent solicitation and opposed the proposed amendments. The Hellenic Republic notified its official sector creditors that, upon confirmation and certification by the Bank of Greece as process manager, it intended to accept the consents received and to amend the terms of all of its Greek law governed bonds, including those not tendered for exchange pursuant to the invitations, in accordance with the terms of the Greek Bondholder Act (article 1 par. 9 of Law 4050/2012).

In view of the above, the Hellenic Republic announced that it had completed the exchange of approximately €177 billion outstanding principal amount of bonds governed by Greek law pursuant to its invitations of 24 February 2012. All holders of such bonds became bound by the proposed amendments pursuant to the Greek Bondholder Act upon the respective Council of Minister's Act on Friday, March 9, 2012, for the acceptance of the consents received by the Hellenic Republic by 9.00 pm CET on March 8, 2012. By delivering the consideration described in the invitations, the Hellenic Republic discharged in full its obligations to the holders of the amended Greek-law governed bonds.

We refer below to three significant cases related to the challenging of the above measures before the (Greek) Supreme Administrative Court ('Council of State'), one of which (the second in the series) was also debated before the European Court of Human Rights (ECHR).

II. The decision of the Council of State on the Memorandum (Plenary Session, Decision No 668/2012)

The Council of State decided on constitutional issues of Law 3845/2010, by which the Greek Parliament enacted the 'Memorandum of Understanding' as well as the three partial Memoranda,[8] concluded between the Hellenic Republic, on the one hand, and the Member States of the Eurozone, the ECB, and the International Monetary Fund (the so called 'troika') on the other hand.

8. i.e. a) the 'Memorandum of Economic and Financial Policies', b) the 'Memorandum of Understanding on Specific Economic Policy Conditionality', and c) the 'Technical Memorandum of Understanding'.

The Council of State rejected the application for annulment of legislative provisions that provide for wage and benefit cuts to public sector employees, in addition to pension cuts. The decision of the Council of State regarding the Memorandum comprised two parts. The first related to the issue of its ratification by the Greek Parliament and the second to the constitutionality of the substantive measures envisaged.

First, the Council of State held that the Memorandum does not constitute an international agreement, concluded between the Hellenic Republic, on the one hand, and the 'troika' on the other hand, falling within the scope of Article 28 (2) of the Constitution, since under the terms of the above law there is no transfer of powers, for which, under the Constitution, the Greek State (the government, the legislature, and the executive) is the only competent authority for granting powers to institutions of international organizations. Consequently the law should not have been voted by a three-fifths majority of the Parliament: a simple majority was adequate.

In the second essential part of the decision, the Court assessed the constitutionality of the measures enacted by laws 3833/2010 and 3845/2010, under the consideration that the adopted wage and benefit cuts of public sector employees in addition to pension cuts form part of a wider programme of fiscal adjustment and structural reform of the Greek economy. This entire programme, in the Court's view, is intended to address the country's economic emergency as well as its future fiscal and financial position.

The Court held that the imposition of the measures was justified because the aim was not merely to remedy the immediate acute budgetary problem, but also to strengthen the country's financial stability long term. The Council of State also referred to case law regarding reductions in salaries and pensions in several States against the same general backdrop of economic crisis. In addition, it observed that the applicants had not thoroughly claimed that their situation had deteriorated to such an extent that their very subsistence was at risk.

The Court in essence held that the measures were of pre-eminent public interest: in particular, it held that they serve, in principle, both substantial national public interest and, at the same time, the common interests of the Member States of the Eurozone, (given the obligations under EU law to maintain fiscal discipline and safeguard the euro area's stability as a whole). Such measures, by their very nature, have effect on levels of Member States' public expenditure. Given the prevailing circumstances at the time the measures were adopted, such measures could not be considered inappropriate for purpose or unnecessary, not least given that they would only be subject to marginal judicial review.

The Council of State held that the provisions at issue were not contrary to Article 1 of the First Additional Protocol nor to the principle of proportionality enshrined in Article 25 par. 1 section d of the Constitution. More specifically, the Council of State held that the non-temporary nature of wage and pension cuts was justified, since the aim of the legislature was not only to cope with the immediate severe financial crisis, but also to establish a sustainable basis for the entire financial apparatus of the State. It was also held that no breach of the property right protected by Article 17 of the Constitution, nor of the protected principle of trust, arose, provided the right to a given level of wages and pensions was not regulated by any constitutional or other provision, and the potential for differentiation in the level of wages and pensions according to circumstances was not ruled out.

As regards the alleged breach of the principle of equality in respect of the public burdens, the Court held that, in the circumstances prevailing at the time of publication of law 3845/2010, the imposition of measures cutting the pensions and wages of active employees did not breach the principle of equality enshrined in Article 4 par. 5 of the Constitution, as for the introduction of the settlement of outstanding tax affairs by law 3888/2010.

The Council of State was further invited to rule on decisions of European Union bodies relating to the 'bailout package' of Greece, as well as on the creation of a European stability mechanism to preserve financial stability in Europe. In its decision the Council of State cites substantial sections of the text constituting the so-called Greek 'bailout package', but makes no reference to the European Financial Stability Facility and expresses no concern as to whether a *de facto* amendment of the Treaty has occurred as a consequence of the Greek measures and related establishment of the Fund.[9]

III. The Decision of the European Court of Human Rights in the case Koufaki and Adedy v Greece (57665/12 and 57657/12) / Decision 7.5.2013 [Section I]

The European Court of Human Rights addressed the issue of a possible breach of Article 1 par. 1 of Additional Protocol No. 1 of the European Convention on Human Rights relating to the peaceful enjoyment of possessions as a result of the reduction in remuneration, benefits, bonuses, and retirement pensions of public servants. Two applicants challenged before the ECHR the

9. Theodora Antoniou, *The decision of the Plenary Council of State for the Memorandum of Understanding – A European affair without European approach,* 'To Syntagma' issue 1 of 2012.

above (earlier on I) austerity measures enacted by laws 3845/2010 and 3888/2010 to reduce public spending and react to the country's economic and financial crisis[10] including reductions in the remuneration, benefits, bonuses, and retirement pensions of public servants. The first applicant, Ioanna Koufaki, applied to the Court to annul her pay-slip from EUR 2,435.83 to EUR 1,885.79; the second applicant – the Public Service Trade Union Confederation – sought judicial review because of the detrimental effect of the measures on the financial situation of its members.

The European Court of Human Rights considered that the reduction of the first applicant's salary was not such that it would cause difficulties of subsistence as envisaged under the provisions of Article 1 of Additional Protocol No. 1. With regard to the above and to the particular climate of economic hardship in which it occurred, the interference at issue could not be considered to have placed an excessive burden on the applicant. As regards the second applicant, the removal of the thirteenth and fourteenth months' pensions had been offset by a one-off bonus. Substitute grounds alone did not make the disputed legislation unjustified. So long as the legislature did not overstep the limits of its margin of appreciation, it was not for the Court to say whether they had chosen the best means of addressing the problem or whether they could have used their power differently. Therefore, the European Court of Human Rights rejected the petition as inadmissible (manifestly ill-founded).

IV. Legal proceedings regarding the Greek PSI programme before the Greek Council of State

On 22 March 2013, the Council of State in plenary session discussed 28 petitions of minority bondholders for the annulment of the decision of the Council of Ministers for the enactment of the Private Sector Involvement (PSI) programme, i.e. the Council of Ministers' decision for the approval of the Greek Government Bonds' (GGBs) swap, implementing also the application of CACs and the Bank of Greece Act confirming the results of the GGBs' holders voting process.

The 28 petitioners were natural persons (Greek and Foreign bondholders), public legal persons and Social Security Funds, private companies, suppliers of the Greek State (notably pharmaceutical companies) as well as former em-

10. Previously judged before the Greek Council of State by the above mentioned Decision No 668/2012, which rejected several arguments based on the alleged breach of the principle of proportionality by the disputed measures, considering that the salary and pension reductions were not purely provisional measures.

ployees of Olympic Airways who received GGBs as a 'compensation' within the meaning of labour law, after their labour contracts were terminated within the framework of the privatisation of the national carrier.

The exchange of bonds governed by Greek Law was affected through Law No 4050/2012 (the 'Greek Bondholder Act'), enacted on 23 February 2012. This Law stipulated (a) the Invitation by the Hellenic Republic to the bondholders for the exchange (swap) of their bonds against new securities, (b) the conditions under which the modification of the terms of the eligible bonds could be adopted by the bondholders, including the introduction of CACs, and (c) the terms under which the bonds' exchange against new securities could be decided and implemented. With the invitation launched by the Hellenic Republic, bondholders of the designated bonds were invited to tender any and all of them in exchange for New, GDP-linked Bonds, GGBs and PSI Payment Notes in accordance with the terms and subject to the conditions set out in the Invitation Memorandum. Simultaneously, other invitations were launched covering, together, GGBs and titles guaranteed by the Hellenic Republic, but governed by foreign law.

Concerning GGBs governed by Greek Law (the 'Eligible Titles'), being subject to the modification / swap process, the Bondholders were called to decide collectively, within the deadline specified by the Invitation, on the proposed modification of the Eligible Titles, i.e. on *the change or the addition of terms to one or more eligible titles or the exchange of one or more eligible titles with one or more new titles*. Addressees of the Invitation were the bondholders acting through the participants registered with the System for Monitoring Transactions in Securities in book-entry form operated by the Bank of Greece (account providers).

The Greek Bondholder Act provided for the possibility to introduce, with the Bondholders' consent, a collective action clause, in order to restrain the free rider / holdout problem from appearing in the sovereign debt restructuring attempt. CACs could be activated if a quorum of at least ½ of the aggregate outstanding principal of all Eligible Titles specified in the *Invitation* was achieved (the 'Participating Principal') and a supermajority of at least (2/3) of the Participating Principal voted in favour of the modification. The Greek Bondholder Act did not impose new terms on the bondholders and an exchange of bonds was not compulsory. Modification was voluntary: the decision for modification and/or exchange rested solely with the bondholders. But the Act provided for the bond loans' terms to be amended by qualified majority and specified quorum: the previous requirement of bondholder unanimity, was abandoned.

The main legal ground put forth for the annulment was breach, as a result of the Greek Bondholders Law 4050/2012 introducing the Collective Action Clauses (CACs), of: (1) individual rights under the Greek Constitution and, explicitly, infringement of the right to property, the principle of equality, the justified reliance in on a fair public sector, the proportionality principle, and the freedom of contract; (2) individual rights arising from the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights (EUCFR); (3) bad use of discretionary power (in conjunction with breach of the principle of equality). The Court decision is still pending.

With respect to the jurisdictional grounds of rebuttal presented to the Court, the first issue raised was the disputed competence of the Council of State. The basic arguments were the private – and not administrative – law nature of the challenged acts, the fact that the Hellenic Republic as GGB issuer was no different from any other corporate issuer in distress, and was not in the exercise of its public power, and the role of Bank of Greece, which acted in the whole PSI process as 'fiscus' (as any other private sector CSD) and not as an authority exercising public power (BoG received orders of participation to the PSI program, calculated and affirmed participation percentages, erased the initial bonds from the accounts of its System and registered the New Bonds).

As to the petitioners' argument on breach of freedom of contract and economic freedom, the issue raised, in this regard, is whether the CACs activation should be considered as a measure of state intervention or as recovery measure in the framework of restructuring procedures.

The bondholders' arguments were the illegal intervention by the legislator, by means of the retroactive insertion of CACs in pre-existing contracts (bonds) without the consent of the bondholders and the CACs changing the terms of pre-existing contracts retrospectively.

The counter arguments were the non-retroactive imposition of CACs and their voluntary nature. The exchange of old bonds to new bonds was not compulsory since the holders of Eligible Titles were invited to tender any and all Eligible Titles in exchange for New Titles. The bondholders voted for the modification of the bonds' terms through the insertion of CACs: they decided to accept the majority rule and exchange the old bonds with new bonds in accordance with the majority principle. CACs were necessary and, from this point of view, in conformity with the proportionality (stricto sensu) principle, in order to cope with the free rider/holdout and the moral hazard issues. The CACs updated old-fashioned loan schemes and delimited possible speculative actions. In that sense, it has been argued that without CACs the bondholders would have had to pay a higher price.

As to the petitioners' argument on *deprivation of property* against a) the principles of the Constitution, demanding full compensation upon Court Decision, and b) the Human Rights Convention, the counter arguments were the following:

a) No deprivation by means of public act occurred, rather than a change of GGB's terms through contractual means upon the Bondholders' qualified majority decision to change the contractual relationship' structure of the bondholders with the issuer and the bonds' terms.
b) The fact that the haircut was not harmful to the bondholders' interests, given the rather unlikely perspectives of the issuer fulfilling its obligations without such restructuring and also the fact that if restructuring failed, the bondholders would probably lose more (if not all) of the value of their bonds, especially in the likely case of a Greek 'bankruptcy' or exit from the Eurozone.
c) New Bonds delivered to the bondholders constituted adequate, prompt, and effective compensation because the property of the bondholders had not been reduced or unfairly reduced: new bonds had, in essence, at least the same market value as the old ones on the day when the exchange took place, as well as a better rating.
d) The valuation method and procedure was reasonable, since the respective decision was taken by the supermajority of bondholders and, thus, had to be considered fair, given the circumstances.
e) Bondholder's interest was protected, considering the consequences of a possible disorderly insolvency on the value of the old bonds.

Therefore, the counter arguments were that PSI and CACs procedure was fully balanced and justified taking into account the pre-eminent public interest involved, prevailing over individual rights to property.

A further petitioner's argument was the *breach of the principle of equality*, since the Greek Government excluded from the PSI the Treasury Bills and, indirectly, provided different treatment for GGBs held by the Eurosystem: the invitation addressed to bondholders for the exchange of bonds did not include bonds held by the ECB and the National Central Banks, since those bonds were previously substituted by other bond series. The Greek State and the Bank of Greece argued as follows on these points:

a) The exclusion of Treasury bills of six and three months duration was essential, since these titles constitute money market instruments and are intended to cover short-term cash needs of the issuer. They differ in qualitative

terms, as to their maturity, from the other titles with a maturity of over one year which are identified as capital market instruments. This differentiation is reflected in secondary EU law, in relation to the risk weight of titles depending on their duration. Moreover, the exclusion of treasury bills from the exchange programme was necessary for practical reasons: their inclusion in the exchange program would have meant that nobody would acquire treasury bills of three or six months duration in the last six months prior to the restructuring of the public debt, announced as an option in July 2012. As a result, the public would have been unable to cover short-term needs. It is, moreover, international practice for short-term money market instruments, such as treasury bills, to be excluded from restructuring programs.

b) Further, it was argued that the different treatment of GGBs held by Eurosystem NCBs was justified by the purpose for which such GGBs were acquired by the Eurosystem. Such purpose was identified as the serving of the public interest and the objectives of the European Union, in the context of the monetary policy of the Eurozone. By contrast, the investments of other bondholders were profit driven. Thus there was an essential difference between the reasons behind the Eurosystem GGBs purchases in the secondary market and those of the other bondholders, which justified different treatment.

Question 10

As Greece is a Member State of the Eurozone, the question is not applicable.

Monetary policy

Questions 11, 12, and 13

Following the introduction presented under the Answer to Question 2, Section 1 reviews the architecture of the overhaul of EMU by the EC. Section 2 scrutinises the policies pursued as to whether they lead to real convergence or divergence. Sections 3 and 4 analyse the role of demand management in reducing the amplitude of business cycles and enhancing real convergence. In particular, Section 3 analyses the role of fiscal policy for a Member State and Section 4 suggests how the statutory objectives of the ECB should be redefined. Section 5 summarises and concludes.

I. The architecture of the overhaul of EMU

The peripheral sovereign debt crisis is a core banking crisis in disguise. The single currency brought about significant divergence in competitiveness and growth between the core and the periphery. This was manifested in growing current account deficits in the periphery, the mirror image of which was current account surpluses in the core. Core banks recycled these surpluses in the form of loans to the periphery. The borrowing appetite of the periphery was huge as they made a one-off adjustment from the high real interest rates of the pre-monetary union era to the low interest rates of the single currency era.

This borrowing appetite financed housing bubbles in Spain and Ireland and a state bubble in Greece, an unprecedented event. Portugal did not go on a credit spree, but nonetheless was condemned to a permanent erosion of living standards in the first ten years of EMU as productivity fell behind the core.

The periphery sovereign debt crisis was an accident waiting to happen with increasing probability through time, a transformation of the previous international debt crisis of 2007-08. Governments bailed out their financial system and pursued easy fiscal policy to fight the recessionary impact of the 2007-08 crisis, thereby giving rise to the sovereign debt crisis by exposing themselves to the threat of insolvency.

The overhaul of EMU attempts a full economic, banking, fiscal, and political union through budgetary surveillance, economic policy surveillance, financial regulation and supervision, and crisis resolution mechanisms. Budgetary surveillance seeks strict control of the Stability and Growth Pact (SGP) to ensure sustainable public finances. The SGP has been reinforced by introducing a spending rule anchoring public expenditure to potential output; and by the launch of the Excessive Deficit Procedure (EDP) to prevent unfavourable trends in public debt and budget deficits. The approach differs from the past tradition of peer pressure and recommendations: it envisages punitive sanctions for divergence from the guidelines. The economic policy surveillance is armed with a new Macroeconomic Imbalances Procedure (MIP) and a new Excessive Imbalance Procedure (EIP) to prevent real divergence escalating to a crisis.

The budgetary and economic surveillance programmes would effectively deny a Member State the use of fiscal policy to counter even cyclical divergence in real magnitudes arising from adverse asymmetric shocks or from common external shocks that hit each country differently. Austerity measures aiming to enhance competitiveness by cutting wages and prices (internal devaluation) would be imposed on an economy that develops economic imbal-

ances or attempts to ameliorate the economic and social effects of a cyclical weakness by expanding the productive capacity of the economy through fiscal policy or improving infrastructure and strengthening sectors with competitive advantage.

The overhaul by the EC will make poor countries even poorer (widening the income inequality between Member States) by sacrificing their existing productive capacity (a reduction of potential output) on the altar of futile economic efficiency. To escape lower living standards the able part of the labour force will emigrate, further undermining the capacity of the country to recover. Higher unemployment and lower wages for the remaining labour force will widen income inequality within a country. The envisaged overhaul is an unsustainable path to remaining in EMU and will be exploited by nationalist political parties favouring isolation over EU economic, social, and political union.

Financial regulation and supervision aim to make financial markets and institutions more stable, more competitive and more resilient to shocks, by increasing the required capital base of banks and improving the quality of assets that comprise the capital base (CRD4/CRR). Micro-prudential and macro-prudential regulation and common resolution rules would ensure that bubbles would not be created in the future.

Yet, the downside is also evident. In the upswing of the cycle (the first ten years of EMU) financial integration meant under-pricing of risk and easier monetary conditions for Member States with booming economies and high inflation. In the current downswing there is overpricing of risk in the periphery with tight monetary conditions that exacerbate the austerity programmes. The financial fragmentation that has emerged will consequently persevere in the future, with core countries facing easy monetary conditions and periphery countries tight monetary conditions. As monetary policy is conducted on the basis of average market conditions, the rising inflation in the core would necessitate tight monetary conditions that would further restrict the ability of the periphery to recover.

The overall conclusion is that the suggested overhaul would not simply deter bubbles in the periphery in the future, but would also exacerbate the vicious circle of tight monetary and fiscal policy in the periphery leading ultimately to the disintegration of the euro.

II. Policies for real convergence

The intellectual basis of EMU rests on the pillars of the Efficient Market Hypothesis (EMH) and the New Consensus Macroeconomics (NCM) or Neo-

Wicksellian models. According to EMH all unfettered markets clear continuously thereby making it highly unlikely that disequilibria, such as bubbles, would ever arise. Markets, so goes the hypothesis, are self-regulating, efficient, and self-correcting and therefore trusted to impose discipline on the extravagance of periphery governments. In NCM models Say's law is not valid in the short run, but holds true in the long run: demand ultimately adjusts to supply (or potential output). The latter is determined by factors exogenous to the system, such as multi-factor productivity and the growth rates of the labour force and capital. None of these supply factors are affected by monetary and fiscal policy (policy neutrality).

This view of the world has downgraded the importance of fiscal policy in demand management and has given legitimacy to SGP and the architecture and governance of the new EMU. In this framework, the role of fiscal policy is to balance the budget and reduce the share of public debt in GDP to enable markets to work more efficiently. The existence of temporary nominal rigidities in the form of sticky wages, prices, and information, or some combination of these frictions, permits monetary policy to have an effect on inflation both in the short and the long run, but not on output and unemployment in the long run.

The experience at least in the 21st century casts doubt on this view of the world. 'In the age-old discussion of the relative roles of markets and the state, the pendulum has swung – at least a bit – toward the state' (Blanchard, 2011, p1). Stiglitz (2011) commenting on the need to reform the NCM, argues along similar lines: 'They failed to predict the crisis; standard models even said bubbles couldn't exist – markets were efficient. Even after the bubble broke, they said the effects would be contained. Even after it was clear that the effects were not 'contained', they provided limited guidance on how the economy should respond. Maintaining low and stable inflation did not ensure real economic stability. The crisis was 'man-made'. While in standard models, shocks were exogenous, here, they were endogenous'. (p. 1).

The crisis has revealed the deficiencies in the original design of EMU. In particular, three negative loops have emerged that threaten the euro with disintegration. The negative loop between sovereigns and banks, where insolvent banks make the sovereign insolvent; and vice versa. The negative loop between deposits and banks, where the risk of redenomination induces flight of deposits from the periphery to the core exacerbating the financial fragmentation. The negative loop between austerity and debt sustainability, where the deeper the austerity programme, the more unsustainable the debt.

The importance of breaking the first two negative loops has been recognised, but not of the third – at least not to the level that it has elicited a call for

immediate action. The consensus now accepts the old criticism that a monetary union cannot survive without a fiscal union. The second negative loop requires a banking union. The debate is now raging as to whether or not Europe should proceed first with a banking or a fiscal union with the second union delayed until convergence on budget deficits and debts and political union have been achieved. This is a futile debate stemming from mistrust between the core and the periphery. The core fears that the periphery would indulge in a spending spree, passing the bill to the core, and aims to redesign EMU to prevent this from happening again in the future. The periphery fears that austerity is used by the core to exploit the periphery. But where there is a will there is a way. A compromise can be reached where the fears of both parties can be assuaged.

The hitherto experience of EMU has shown that the Efficient Market Hypothesis is discredited. Financial markets far from being efficient, have contributed to the crisis by lending to governments and the private sector of the periphery at an increasing pace until the crisis. As risk was underpriced in the first ten years of EMU, risk is now overpriced condemning the periphery to destitution, thereby increasing the likelihood of a euro disintegration. This calls for more not less mutual state support.

It is to the credit of European leaders that they have stood up to this challenge, although more work needs to be done. The new architecture for the EMU is backward looking. It attempts to close the loops of periphery governments' and banks' extravagance in an effort to avoid another crisis. But the risk has now shifted from one of inflation and excessive spending to one of deflation. It is deflation that now threatens to break up the euro. The new architecture should be at least balanced, if not biased, to address the forward risk of deflation.

The validity of the NCM models, which formed the intellectual basis for the conduct of monetary and fiscal policy in the first ten years of monetary union, has been questioned by the crisis itself. The reformulated NCM model can address both the inflationary and deflationary risk (see Arestis and Karakitsos, 2013, Karakitsos, 2008, 2009).

The revised NCM model can be of use in guiding policies that would ensure real convergence in the long run. The core-periphery divide is most of the time said to be structural in nature. For example, high unemployment in Spain is thought to be structural. This premise has its roots in the notion embedded in the original NCM models that demand adjusts to an exogenous supply (Say's law holds true in the long run). Yet, this is not true. A deep and protracted recession destroys the productive capacity of an economy by the closure of companies; it does not simply result in a change of ownership.

Therefore, though supply adjusts to demand, it is not exogenous as assumed in the NCM models. The destruction of productive capacity would make the resulting unemployment look structural, when in reality it is the result of low demand. This was also the case in the 1980s when high unemployment in Europe was attributed to euro-sclerosis (high minimum wages, inflexible labour markets, and a welfare state). But when German fiscal policy was eased to tackle the unification issue, unemployment in the whole of Europe fell. The problem of high unemployment was not euro-sclerosis, but deficient aggregate demand.

Supply responds to demand not only in the downswing, but also in the upswing. The prospect of profits would expand the productive capacity and this depends on demand. If the demand outlook is poor, companies will not invest and supply will not expand. Thus, in both cases supply adjusts to demand and not the other way round. Say's law is invalid, not only in the short run, as assumed in the NCM models, but also in the long run. Hence, real convergence requires policies that promote growth as demand drives supply.

It is further argued that growth depends on competitiveness, which, in turn hinges exclusively on wages and prices. This is a very narrow interpretation of competitiveness. It would be a mistake to assume, for example, that Greece would become competitive if wages and salaries were lowered to China's levels. For good or bad, Greece bypassed the industrialisation phase of development and its highly educated labour force is used predominantly in services. Forcing lower wages to make Greece more competitive would simply lead its more able skilled labour force to leave the country, a trend that is already in progress. This would lead to further real divergence, not convergence, and ultimately condemn Greece to poverty.

The overall conclusion is that growth should be the number one policy priority to promote real convergence within the monetary union.

III. Fiscal policy in demand management

The theoretical ineffectiveness of fiscal policy on demand rests on the Ricardian Equivalence Hypothesis (REH). In the REH the impact on real GDP of a higher budget deficit, triggered by an increase in public spending or lower taxes, is fully offset by a corresponding increase in private savings even in the short run. According to the REH, households view the increase in budget deficit today as an increase in taxes in the future to balance the budget and adjust their behaviour to neutralise the impact of fiscal policy. There are two extreme assumptions in the REH. First, that households are infinitely

lived and assign equal priority to the present and the future. Second, the REH ignores the self-financed element of an increase in budget deficit.

With the exception of a tiny minority, the economics profession at large accepts that fiscal policy is an effective tool of demand management. Fiscal policy aims to influence the level of demand in the economy so that it can reduce the amplitude of business cycles. In particular, fiscal policy should be tight when the economy grows faster than potential (i.e. when GDP growth exceeds the rate of growth of potential output) and easy when the economy is in recession or operates with spare capacity (GDP growth less than potential). In the short run, the fiscal multiplier is slightly greater than unity for most economies, implying that a one percent change in the budget deficit affects output (real GDP) in the same direction by a little bit more than one percent. The balanced budget multiplier (an increase in spending matched by a corresponding increase in taxes so that the budget deficit remains unchanged) is positive and not zero as implied by the REH.

There are five remarks regarding the use of fiscal policy in demand management. First, policymakers should never attempt to balance the budget (through austerity measures) when the economy is in recession or with spare capacity because they thereby negate their own efforts to stimulate the economy. Unfortunately, this is exactly how Europe has responded to the credit crisis. Second, the fact that easy fiscal policy would increase the budget deficit and public debt is not prima facie evidence against using fiscal policy when the economy is in recession. It simply becomes imperative to tighten fiscal policy when the economy is booming, as otherwise public debt would be increasing in successive business cycles. At some point in time, when public debt is high capital markets would refuse to provide any additional borrowing to the government making it insolvent, such as occurred with Greece and the other periphery countries in Europe. Third, even if the government does not become insolvent for a long time, like Italy, the economy is operating less and less efficiently the higher the share of government in GDP. Therefore, it is imperative that fiscal deficits created in the downswing are corrected in the upswing of the cycle. Otherwise, the debt will continue to soar, thereby making insolvency unavoidable in the long run. Fourth, an inefficient economy will result even if the government always uses a balanced budget stimulus, because on each stimulus the share of the public sector in GDP increases. Fifth, there is a trade off between the short to medium term impact and the long-term effects of fiscal policy. Easy fiscal policy boosts output in the short to medium term, but has a negative impact in the long run by cutting the rate of growth of potential output.

The negative impact of fiscal policy in the long run stems from its influence on potential output. The latter depends on the size and quality of the labour force, on the stock of productive capital (such as factories, vehicles, and computers), and on the efficiency with which labour and capital are used to produce goods and services – otherwise called multi-factor productivity, which is the joint productivity of labour and capital. Fiscal policy affects potential output by influencing the amount of national saving and hence the supply of capital in the long run. A budget deficit represents negative public saving, but it can also influence private saving. Larger deficits would imply less public saving, but that would induce a small increase in private saving, as a result of higher interest rates and increases in disposable income, which can boost both spending and saving. This positive increase in private saving is not sufficient to offset the reduction in public savings and therefore national saving declines. The consensus estimates of the negative impact on GDP through lower potential output are between -0.5 % and -1 %. Therefore, unless policy is reversed in the course of the business cycle, the overall effect is zero to negative. This gives legitimacy and credence to the SGP in the long run, but no excuse for applying it in the downswing of the business cycle or demanding immediate adjustment in countries with high budget deficits and public debt.

The use of fiscal policy in demand management at the federal level requires a fiscal union with a strong fiscal budget. The small EU budget is a testament of the inability to use fiscal policy at the federal level. It is utopian to believe that countries should first converge in deficits and debts before a federal fiscal authority can operate and debt mutualisation occur. The risk is high that EMU would not see the day of convergence. It would simply collapse under the burden of current hardships and the high probability of another financial crisis within the next five years.

A pragmatic approach is for Member States to be allowed to use their own fiscal policy. The finance can come from a balanced budget multiplier or by drawing from an insurance fund,[11] or finally from financial transfers from the

11. The concept of an insurance fund was introduced by Notre Europe, a think tank under the guidance of Jacques Delors, and Gaynor and Karakitsos (1997) to alleviate the effects of endogenous asymmetries or macroeconomic imbalances (see also Completing the Euro: Report of the Tommaso Padoa-Schioppa Group, June 2012). The insurance fund would operate outside the EU budget and it would be financed by Euro Area Member States. Countries would have to pay a standard amount in good business cycles and proportionately more when they are overheated. The insurance fund is not an

core for a short period of time, subject to strict conditionality for long term convergence of budget deficits and public debts.

IV. Monetary policy in EMU

In NCM models inflation is a monetary phenomenon and therefore price stability can be achieved by central banks changing nominal short term interest rates. These models combine intertemporally optimising agents from the real-business-cycle school with imperfect competition and nominal rigidities from traditional Keynesian models, thereby achieving maximum consensus within the economics profession; hence the acronym. Woodford (2003) has described these models as Neo-Wicksellian, because changes in *nominal* interest rates affect *real* interest rates due to nominal rigidities. These changes in real rates affect output (real GDP) and hence inflation. As the NCM models are derived from intertemporal optimisation, the emphasis is on the interdependency between current economic variables and expectations about their future realisations. Thus, current output and inflation depend upon the entire path of expected future interest rates. This feature has had a significant impact on the theory and practice of monetary policy, as it assigns a major role to the management of private sector expectations and, consequently, to the credibility of the central bank as an important element in anchoring inflation expectations (see, for example, King, 2005; Weber et al, 2008).

Neo-Wicksellian models adopt all the principles of the original Wicksellian theory. Money is neutral in the long run, not because money is a 'veil', but because inflation is influenced by the interest rate gap, and not by the forces of demand for and supply of money. Say's Law does not hold in the short run; it does, though, hold in the long run. Consequently, disequilibrium in one market (money or goods) is transmitted to the other in the short run; but not in the long run. In Neo-Wicksellian models the central bank controls the rate of inflation through changes in the rate of interest, which affects the output gap – the discrepancy between an endogenous demand for goods and an exogenous supply – with the latter affecting prices and price expectations in the short run. The assumption of an exogenous supply of goods and the requirement that in the long run the output gap should be zero implies that demand is always adjusting to supply (Say's law) and ensures the neutrality of monetary policy. Monetary policy can influence the rate of inflation, but not output (or

instrument for permanent transfers, but for alleviating cyclical macroeconomic imbalances.

the growth rate of the economy) and unemployment in the long run, i.e. the Philips curve is vertical. The rate of growth is determined in the long run by supply considerations, such as multi-factor productivity, the rate of growth of the labour force, market flexibility, especially labour market etc., all of which are beyond the control of the monetary and fiscal authorities. With output converging to its exogenously given supply, unemployment will, so the model urges, always converge to its exogenously given NAIRU.[12]

The supposed validity of the NCM models gives legitimacy and credibility to ECB inflation targeting. Control of inflation will ensure that growth in the economy converges in the long run to the rate of growth of potential output; and unemployment to its exogenously given NAIRU. The ECB does not need any other statutory targets, such as output (growth) or unemployment. The validity of the NCM models also gives legitimacy and credibility to the view of an immediate fiscal adjustment programme through austerity, as in the long run it makes no difference at which phase of the business cycle the adjustment begins.

The NCM models are valid in demand- or supply-led business cycles, which were the norm throughout the post World-War II era until the late 1990s. The NCM models are not valid, though, in asset-led business cycles, which are driven by excessive liquidity.

Asset-led business cycles, like the recent one, Japan in the 1990s and the US in the 1930s, produce a larger variability in output than inflation. In the upswing of the cycle output growth surpasses historical norms giving the impression that potential output growth has increased, thus creating a general feeling of euphoria and prosperity, as it did in the second half of the 1990s in the US. But in the downswing the recession is deeper than normal, and even more important, it lasts for a long time with many false dawns, as in the case of Japan in the 1990s and the 2000s and in the US recovery after the 2007-09 recession. As asset prices fall the past accumulation of debt becomes unsustainable as households, banks, and businesses engage in a debt reduction process by retrenching – asset and debt deflation. This depresses demand putting a new downward pressure on asset prices thus creating a vicious circle – a balance-sheet recession. The policy implication is that in asset-led business cycles guiding monetary policy by developments in inflation alone will not

12. NAIRU is the non-accelerating inflation rate of unemployment, a steady rate of inflation associated with equilibrium in the labour market, which nonetheless implies a natural rate of unemployment. This level of unemployment, though, is purely voluntary. The hardship of unemployment in the real world is therefore self-inflicted.

prevent the bubble from becoming bigger than otherwise. Monetary policy should be formulated with at least two targets: inflation and the output gap.

Excessive liquidity has financed a series of bubbles in the first ten years of the new millennium – internet, housing, commodities, and even a state bubble in the case of Greece – and minor ones in terms of their macroeconomic impact – private equity and shipping. This excessive liquidity was created gradually following the deregulation and financial liberalization in the US and the UK in the 1970s and 1980s, a process that spread to the rest of world. This laid the foundations for financial engineering, which went into an overdrive with the repeal of the Glass-Steagall Act in 1999. In this environment, as King (2009) suggests 'inflation targeting does not guarantee stability of the economy as a whole' and 'inflation targeting is a necessary, but not sufficient condition for stability of the economy as a whole' (p. 5; see also Bean et al, 2010). Therefore, the conclusion is that financial stability and monetary policy should be the responsibilities of the central bank – a feature that is recognised in the Blueprint of the EC. Such an additional target, though, requires that the ECB augment its statutory targets to include, in addition to price stability, the output gap and probably asset inflation. The justification of these additional targets follows from a reformulation of the NCM models to account for their deficiencies. Arestis and Karakitsos (2013) allow for an endogenous potential output by an explicit consideration of the capital accumulation process; an endogenous natural rate of interest as the real profit rate reinstating the original insight of Wicksell; the introduction of wealth effects in consumption to account for the impact of excessive liquidity on the spending and saving decisions of households; and an explanation of housing and financial wealth.

In the reformulated NCM model a central bank that targets inflation and the output gap succeeds in achieving financial stability. However, such a response leads to instability in a highly leveraged economy, as has been the case in the 21st century (see Karakitsos, 2009). In a leveraged economy the response of net wealth to interest rates and profitability is elevated; in fact, the more leveraged the economy, the higher these sensitivities. A high response of net wealth to interest rates and profitability would prolong the credit crisis, as the central bank is forced to move interest rates up and down the target rate. An ever increasing response of net wealth to interest rates and profitability makes the system unstable and the economy never converges to its initial steady-state, following a temporary credit crisis. The oscillatory central bank behaviour, which ultimately causes instability, is due to the cyclical pattern of profitability. Given the differential speed of the economy to a change in interest rates and profitability, with the former impacting slowly

while the latter rapidly, central bank action would delay, if not cause instability, leading to a credit crisis. This differential speed of adjustment is not just a feature of the reformulated NCM model, but a stylised fact of the real world and especially of EMU. Given that the real profit rate plays an important role in stabilising the economy, as it moves faster than interest rates, and given the influence of the interest rate on the real profit rate, which is responding to economic developments, it is not unreasonable that the central bank may destabilise a highly leveraged economy. Arestis and Karakitsos (2011) and Karakitsos (2008) show that this instability can be avoided if the central bank has a mild target for net wealth, in addition to the traditional targets of inflation and output gap. A mild net wealth target is equivalent to an asset inflation target in a way that does not impede the functioning of free markets and does not prevent 'good' financial innovation. It is also better than the overregulation envisaged by the Blueprint of the EC. Since securitization implies the transfer of assets and the risk to the personal sector, the ideal target variable for a central bank is the net wealth of the personal sector as a percent of disposable income, which is a stationary variable and for which a target range can be set. A net wealth target implies that the central bank would tighten monetary policy via hiking interest rates when net wealth exceeds a particular threshold and loosen monetary policy when net wealth falls below the target level. In this way the central bank will monitor the implications of financial innovations as they impact net wealth, even if it is ignorant of these innovations as in the case of Structured Investment Vehicles (SIV), which were responsible for the creation of excessive liquidity leading to the credit crisis. With a wealth-target the central bank will act pre-emptively to curb an asset upswing cycle from becoming a bubble.

Although the introduction of additional targets would take care of the conduct of monetary policy at the federal level, it leaves open the question of how the ECB should tackle the existing fragmentation of the financial system, where monetary conditions are not uniform. In the periphery they are tight with the cost of money being hundreds of basis points above the ECB target rate; in the core monetary conditions are easy.

The ECB has introduced a number of measures, such as the LTROs and OMT and has provided justification for its special measures by invoking the need to:

- safeguard the monetary policy transmission mechanism in all countries of the euro area;
- preserve the singleness of ECB’s monetary policy;

– ensure the proper transmission of ECB's policy stance to the real economy throughout the area;
– address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro. If not addressed, these conditions would have severe consequences for the maintenance of price stability.

But legal doubts remain and the Bundesbank has opposed OMT as it runs against the prohibition of monetary financing for Eurosystem central banks. Art. 123 of the EU Treaty prohibits the Eurosystem from making 'direct purchases of public debt instruments'. Moreover, an implementing Council Regulation prohibits the circumvention of such prohibition in cases of secondary market purchases. This calls for a revision of the legal framework within which such special measures would be undertaken.

V. Conclusions

The first fifteen years of the monetary union have been very turbulent. In the first ten years the divergence in real magnitudes between periphery and core favoured the periphery, as core banks recycled the current account surpluses into loans to the periphery. This liquidity financed bubbles in the periphery, which masked the real divergence and created a chimera of euphoria based on utopia. Since the eruption of the sovereign debt crisis the real divergence has continued, as liquidity has dried up and austerity has been imposed in the periphery, while the euphoria has evaporated.

The aim of EMU is to provide a framework in which the peoples of the EU Member States can prosper. This aim can only be served if the central objective of policy is to promote growth and employment within price stability for all Member States. Mistrust between the core and the periphery has resulted in a divergence from this objective. The new architecture and its governance are focusing on a system that would identify and monitor real divergence between Member States and take measures to prevent the divergence from growing to levels that would trigger another crisis. The measures are punitive in nature as they imply austerity through corrective action on fiscal and monetary policy as applied to periphery Member States.

Mistrust leads to a Nash equilibrium, as Member States adopt the worst strategy for themselves in ignorance as to what the others would do – the prisoner's dilemma. The Nash equilibrium implies the break up of the euro. This can be avoided by coordination and collaboration that would result in a Pareto equilibrium. This requires compromise between the two parties.

Basic models can provide the principles of this compromise and be a guide for the architecture of the overhaul of EMU. These basic models reject the EMH and the basic tenets of the NCM models, which served as a framework of the old deficient structure and the basis of policy.

The vision of an economic, monetary, banking, fiscal, and political union need not be accomplished in small steps or at once. Real convergence between Member States would make sure that the electorate would endorse this vision when it comes to decide. But at the moment we are building on growing real divergence.

Fiscal policy should be allowed to operate as a tool of demand management either by an individual state or in small steps at the federal level. The small EU fiscal budget is a testament to the inability at the federal level to exercise fiscal policy. It is of secondary importance whether the fiscal stimuli in the periphery should be financed with a balanced budget or by financial transfers from the core to the periphery or a mixture of both. The issue of debt mutualisation and of a fiscal union is again blurring the central issue that the periphery must return to growth. These issues are putting the cart before the horse by ignoring that the central issue is real convergence.

The imposed austerity on the periphery violates the principles of a wise use of fiscal policy in demand management. Budget deficits should be cut and public debt should be trimmed to sustainable levels when the economy is in recovery or booming. Imposition of austerity when the economy is in recession creates a deflationary spiral that imposes unnecessary hardship and impoverishes a nation. This has destroyed the mutual support system, without which no union can survive. The fiscal adjustment of the periphery should be spread between business cycles rather than imposed immediately irrespective of the state of the economy in the business cycle. The compromise of the periphery is to adopt conditionality for the privilege of being allowed to use its fiscal policy in demand management. The core can set the conditions that would satisfy them, but it is the responsibility of its leaders to sell it to their people.

The statutory objectives of the ECB should be enlarged to include at least the output gap and maybe an asset inflation target in the form of a mild net wealth target as a proportion of the disposable income of households, on top of price stability. The financial fragmentation should be dealt with by giving legitimacy to the special programmes of the ECB.

Question 14

The European Treaties adopt general terms with a view to establishing policies and fundamental principles. Such indefinite legal terms produce non-resolvable indeterminacy by the interpretative task and inevitably create the need for values' and interests' weighing between, on the one hand, the fundamental principles inherent to those terms and, on the other hand, their practical impact. The fact that the EU Treaty establishing the common currency did not provide for tools and means for managing potential pathology and for tackling euro crisis phenomena, gives rise to the need for creative interpretations by the Court of Justice of the European Union, in order to fill the gaps of the Treaty, not only by rendering monetary and economic policy principles consistent with each other but also with the multitude of the fundamental European principles, and safeguard thus the cohesion of the European Union and of the Eurozone. Such creative flexibility has been shown in the Pringle judgment and it is very likely that it will be manifested again in the future in cases relating to monetary and economic policy issues.

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Márton Szili and Béla Pataki[1]

Economic policy

EU legal order

Question 1

The European Commission's Communication on the common principles on national fiscal correction mechanisms from June 2012 states that the requirements of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)[2] *are part of a broader move, already initiated with the recent reform of the Stability and Growth Pact increasing the national ownership of the Union surveillance framework.*[3] This broader move, however, contains many different elements as regards legal nature and procedure posing several questions on legality and constitutionality from an EU law perspective. This contribution tries to highlight some of these questions and points out the possible weaknesses and strengths of the measures adopted.

Although the Commission in its Communication regards the instruments on economic coordination as a consistent system, the questions on the interaction between the policy instruments outside the scope of the EU Treaties and the Treaties themselves remain.

One crucial answer to several of these questions came from the Court of Justice of the European Union (ECJ) itself when it, in the *Pringle case* (Case

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2. http://www.european-council.europa.eu/media/579087/treaty.pdf
3. Communication from the Commission, Common principles on national fiscal correction mechanisms (COM/2012/0342 final) See: Point 1. Legal status of the rules on the correction mechanisms and relation to the EU framework.

C-370/12)[4] decided that the EU Member States have the competence to conclude the Treaty establishing the European Stability Mechanism (ESM Treaty),[5] and that Article 125 of the Treaty on the Functioning of the European Union (TFEU) allows *the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy* (para. 137). The latter argument is based on the underlying principle that the ESM will not act as guarantor of the debts of the recipient Member State, but the latter will remain responsible to its creditors for its financial commitments.

The declared compatibility of the 'no bailout clause' in Article 125 with the ESM Treaty together with the Court concludes that the establishment of the ESM falls, within, the scope of economic rather than monetary policy (para. 60) and therefore the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of TFEU is untouched. This shows that according to the Court *the EU's monetary constitution, originally designed to focus solely on crisis prevention, also allows the establishment of a crisis management framework.*[6]

The underlying problem of TSCG is the many provisions otherwise regulated by primary EU law (in effect deeper integration within a certain group of Member States), but using the intergovernmental method and not the regulated processes foreseen by EU law like the enhanced cooperation (Article 20 TEU and Article 326-334 TFEU).Whether these are measures that could threaten the Union's objectives of sincere cooperation as defined in Article 4(3) of the Treaty on European Union (TEU) is a highly sensitive question especially for those Member States outside the Eurozone. One thing is clear: *the generally stipulated conditions of compatibility with EU law do not change the fact that the Treaty has a significant indirect influence on primary EU law.*[7]

4. Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland, The Attorney General,* Judgement of the Court of Justice (Full Court) of 27 November 2012, [2012] I-000.
5. Treaty Establishing the European Stability Mechanism, (www.european-council.europa.eu/ media/582311/05-tesm2.en12.pdf (03.03.2012)).
6. Pieter-Augustijn Van Malleghem, Pringle: A Paradigm Shift in the European Union's Monetary Constitution; German Law Journal Vol. 14 No. 01,p. 167.
7. Martin Kusák, Lenka Pítrová, Legal aspects of the treaty on stability, coordination and governance in the Economic and Monetary union, The Lawyer Quarterly Vol 3, No 2 (2013), p. 104.(http://www.ilaw.cas.cz/tlq/index.php/tlq/article/view/71).

Question 2

The influence and overlap of the new instruments of economic governance on, and with primary EU law and the institutional settings of the European Monetary Union are difficult to deny. If we look at the introduction of the informal 'Euro Summit'[8] meetings by the TSCG, we see the broadening institutional distinction for Member States outside the Eurozone and those inside. Although the President of the Euro Summit is required to keep the contracting parties whose currency is not the euro and the other Member States closely informed, the institutionalization of the division will influence EU decisions regarding economic coordination. And this is not only a question of 'ins' and 'outs', but the 'Euro Summit' makes *the legal distinction between measures taken within and those that are properly outside the scope of the EU Treaties far more complex*,[9] or even mistakable. This institutional setting is outside the scope of the EU Treaties (as a binding intergovernmental agreement) but it inevitably shifts the competences from EU institutions and changes the governance mode for economic policy within the EU as laid down in EU law. An obvious example is the 'reversed qualified majority voting' rule in Article 7 TSCG.

On the other hand, the Euro Plus Pact stipulates a number of policy measures such as wage setting arrangements, employment, pension and retirement measures which go far beyond the original mind setting of economic governance. The aim – together with the ESM – is to prevent a future financial crisis and make the Eurozone more competitive. The result may be the fostering of the internal market, but for the price of a Europe of different speeds.

Question 3

The financial crisis which started in 2008 gave an impetus to deepening further economic policy coordination of the EU. Since then, several amendments have taken place both in primary and secondary legislation. In 2012, a new wave of legislation was launched by the Four Presidents Report and the blueprint of the European Commission.

8. Article 12 TSCG.
9. Rose M. D'Sa, The Legal and Constitutional Nature of the New International Treaties on Economic and Monetary Union, European Current Law Issue 5, 2012, p. XV. (http://www.fide2012.eu/index.php?doc_id=97).

It is preferable that the new coordination mechanisms transform into EU legislation. The TFEU already includes several provisions on economic policy coordination, which creates a legal basis for secondary legislation. It is good for the legal stability that many provisions are enshrined in primary law, but it also means limitations.

The regulatory framework for the euro area and non-euro area is different, and this gap will widen further. Thanks to Article 136 TFEU there is more room for maneuver to adopt new secondary legislation in the field of economic policy coordination for the euro area than for the non-euro area. This opportunity has already been used many times, for example by the application of sanctions in the *Six-Pack* and the adoption of the *Two-Pack* regulations. Yet, even before introducing the new Article 136 in the Treaty, tighter rules were applied in the euro area in the economic policy (sanctions of the excessive deficit procedure are only applicable for euro area). Given that the further tightening of the coordination mechanisms proposed by the Commission and the Four Presidents mainly concern the euro area, the regulatory gap will widen further between the non-euro area and euro area Member States. Tighter coordination will result in more transparency and predictability – both potentially leading to improved credibility and competitiveness. The question is how non-euro area Member States could join this new regulatory framework without joining the euro area. Is there any legal instrument in the EU legal system for this?

For non-euro area Member States there are options to apply the rules which are only for the euro area. First, they can adopt unilateral declaration[10] saying that they will participate in the tighter coordination mechanism of the euro area. Another option is simply to decide to apply the tighter rules without making declaration. However, none of the above mentioned options would lead to the same level of credibility that euro area Member States enjoy. The simple decision or unilateral declaration can be withdrawn anytime, which weakens the binding nature of the rules. Such a withdrawal can hurt the credibility. This creates an unequal position between euro area and non-euro area Member States.

The tighter coordination proposed in the blueprint and the Four Presidents Report need some modification in the secondary or primary legislation, or in some cases, they can be implemented without changing the legislation. Member States can commit themselves in a contract to carry out structural

10. For example Denmark and Romania made a unilateral declaration under Article 14 of the TSCG to be bound by the provisions of the Fiscal Compact.

reforms motivated by some financial support without adopting regulation or directive. In this case, however, some procedural rules can still be enshrined in secondary legislation. The ex-ante coordination of major structural reforms is already regulated in the TSCG. On the basis of Article 121 TFEU ex-ante coordination could be regulated in a secondary legislation for all Member States, although, the main tendency is now to create closer integration only in the euro area. The main issue here is if coordination includes policy fields, which are supposed to remain under national competence. For example deeper coordination in specific economic policy fields, such as taxation or employment is more difficult. Legislative process is very slow in taxation (unanimous vote requirement, full interpretation in council working groups), which will not change in the near future. Many Member States use tax policy to support social policy and level playing field in competitiveness, and they are not keen on any fundamental changes in tax legislation. In order to progress in common taxation, the Treaty should be changed.

Question 4

As mentioned earlier in Question 2, the new institutional settings of economic governance represents a factual (or arguably a legal) shift in the position and responsibilities of EU institutions.

Many of the reforms proposed within the last years to conquer the financial crisis include new roles for the Commission, especially in the overview of national budgetary decisions and its special position when financial assistance for a Member State is negotiated (see the Greek example). Some argue that this – partly based only on intergovernmental agreements – could be contrary to Article 17 TEU because in such cases the Commission does not represent *the EU as a whole, but principally the Eurozone Member States*.[11] Without going into details about the issues concerning the legal possibility to allocate new tasks to the Commission, and the European Central Bank (ECB) by the ESM Treaty and the TSCG,[12] it is evident that additional rules have been introduced by these instruments (e.g. proposals on convergence time frames and common principles for correction mechanism) which have a di-

11. Roberto Cisotta, What Role for the European Commission in the New Governance of the Economic and Monetary Union?, IAI WORKING PAPERS 13 | 24 – July 2013, p. 4. (http://www.iai.it/pdf/DocIAI/iaiwp1324.pdf).
12. About the admissibility to confer new powers to the Commission and the ECB see Case C-370/12 (Pringle) op.cit., paras 155 et seq.

rect influence on the practical implementation of the *Stability and Growth Pact* and the *Six-Pack*.[13]

The experience shows that the solutions for the banking and financial crisis focused on efficient economic solutions while lacking considerations on the political side (i.e. legitimacy and accountability). The *democratic deficit,* however, cannot be confined to the lack of involvement of the European Parliament or national parliaments because governance in the EU is strongly characterised by non-majoritarian independent institutions like the Commission and the ECB,[14] and the decision-making process in the EU is very different from those in the Member States.[15]

The democratic legitimacy of economic governance in the EMU does not necessarily depend on the political involvement of the parliaments, but is linked to the underlying and still unresolved deficiencies in the EU's competence to harmonise national economies. This was one of the core elements of the financial crisis itself.[16]

From the above point of view the objective of bringing the provisions of the intergovernmental agreements within the scope of the EU treaties (as provided for example in Article 16 TSCG) is to save the internal market, which would also give some of the answers regarding legitimacy and accountability.

Question 5

The main weakness of the financial system of the EU is the fragmentation and lack of single regulatory framework and supervision. Banks in Europe operate at a higher cost than their counterparts in the US because of the weaker transparency caused by the different regulatory frameworks that prevailing across Europe. Against this background there is certainly a need for single regulatory framework and supervision in the EU.

The current Treaty is not designed to set up a single financial regulatory and supervisory framework which is needed for Europe. Nevertheless, many of its building blocks can be launched, even if the legal basis is not well-

13. For the relevant legal texts see: http://ec.europa.eu/economy_finance/economic_governance/sgp/legal_texts/index_en.htm.
14. Stephan Bredt, Prospects and Limits of Democratic Governance in the EU, European Law Journal, Vol. 17, No. 1, January 2011, p 40.
15. In theory these institutions rely on the so called *output legitimacy*, different to the input legitimacy of national parliaments.
16. Jurgen Habermas, Die Krise der Europäischen Union im Lichte einer Konstitutionalisierung des Völkerrechts – Ein Essay zur Verfassung Europas, ZaöRV 2012, 1, p. 2.

founded. The Single Supervisory Authority can be set up under Article 127(6) TFEU, but as Nicolas Véron stated in his study,[17] it has limitations. Article 127(6) TFEU does not allow for all the range of tasks in supervision, just 'specific' tasks. It explicitly excludes insurance undertaking from the scope of ECB supervision. ECB is set up for the euro area and it is difficult to find the link on how ECB can have direct supervisory tasks on non-euro area members. Further progress beyond the Single Supervisory Mechanism adopted in October 2013 in the banking union will necessitate Treaty changes.

There is less room for differentiation between euro area and non-euro area Members in banking union than in economic policy coordination. In economic policy coordination we are talking about tighter coordination among governments, and they can interpret it as less power in national economic policy. Tighter interconnectedness in the euro area needs tighter budgetary control. As regards banking union, we are talking about common rules for banks, private actors, and the single market, which should be implemented in the EU and not only in the euro area.

Some of the elements of the banking union have already been adopted (SSM), or will be adopted (BRRD) by the end of 2013. The non-euro area Member States could only join the banking union if rights and obligations are balanced. Host supervisory institution, for example, should have ample right to apply different steps if it disagrees with the board decision which favors home country. This additional right of host institutions is even more important if the decision includes fiscal burden sharing. In the current phase of negotiation an appropriate compromise has been reached in the question of home-host institutions in the BRRD.

Legal orders of the Member States

Question 6

The requirements under the Stability and Growth Pact changed over time from the 'simple' *balanced budget rule* to the introduction of the *medium term objective* (MTO) and the *government expenditure rule*.[18] These measures are partly regulated within and partly outside the EU legal framework.

17. Nicolas Véron, Realistic Bridge towards European Banking union, Bruegel Policy contribution, 2013/09 2013June.
18. See for an overview: http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm.

The Directive on the requirements for budgetary frameworks of the Member States made several changes necessary regarding budgetary accounting and statistical reporting, preparation of forecasts for budgetary planning, country-specific numerical fiscal rules, and medium-term budgetary frameworks.[19] These requirements are, however, already reflected in the guidelines for national budgetary planning.[20]

The border which is difficult to cross for Member States in the antechamber to the euro area is not necessarily linked with the tightening of existing rules as agreed at EU level (like the Six-Pack), but the one by joining the Eurozone somewhere in the future. If we take into consideration that all Eurozone member states will become members of the ESM, and that any granting of financial assistance under the ESM will be conditional on ratification of the TSCG (not to mention the link with the Euro Plus Pact), it is a high burden for all Members States 'with a derogation' that the original set of *convergence criteria* was complemented by non-EU instruments laying down new binding requirements.

Question 7

The Hungarian Parliament ratified the TSCG at the end of March 2013.[21] In his expose to the parliamentary debate the Hungarian Foreign Minister recognised that the TSCG is necessary to overcome the serious difficulties which the Eurozone is facing.[22] At the same time, he expressed Hungary's original desire that these changes should have been done by the amendment of the founding Treaties as planned in the case of the ESM and Article 136 TFEU. The possibility to join the TSCG, but applying its core provisions only after the adoption of the euro in Hungary was essential for Hungary because in this way it will be part of the process which will shape the future of the

19. Directive 2011/85/UE of the Council of 8 November 2011 on the requirements for budgetary frameworks of the Member States, OJ L 306 of 23.11.2011.
20. Information note – on the mandatory conditions and requirements necessary for the compilation of the 2014 budget bill. /Tájékoztató – a 2014. évi költségvetési törvényjavaslat összeállításához szükséges feltételekről és az érvényesítendő követelményekről./ (http://www.kormany.hu/download/3/85/f0000/2014_tervtaj.pdf).
21. Act No. XXXII of 2013 on the enactment of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.
22. János Martonyi's expose inj support of Hungary's signing of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. 24. January 2013. (http://www.kormany.hu/hu/kulugyminiszterium/hirek/a-kulugyminisz terium-kozlemenye-az-unios-fiskalis-szerzodes-ratifikaciojarol).

EMU. From a democratic point of view the decisions taken at EU (in this case Eurozone) level must be somehow legitimized by the possible participation of all Member States. For Hungary this means a greater insight and possible influence on rules which could have a major impact on the conditions for joining the euro area in the future. Although the TSCG is outside the legal framework of the EU and in theory no transfer of powers from the Member States to the EU would occur, the reality is a considerable transformation of power-arrangements in EU economic governance. Recognising these contradictions, the Hungarian Government submitted before the ratification by the Parliament the proposal for constitutional scrutiny to the Constitutional Court of Hungary (about the details of the Court's decision see answers to Question 9 below).

The TSCG tries to give an answer to the legitimacy and accountability of decisions to be taken with the involvement of national parliaments in the governance of economic and monetary union (Article 13 TSCG). Although details on participation are not clearly specified, it will inevitably change national parliamentary processes not to mention the political responsibility for 'EU decisions' on a national level. As the approval of government revenues and expenditures is usually a prerogative of the national parliaments, the European Parliament's role in this process is a rather difficult one.

Question 8

Once a country ratifies the Treaty on Stability, Co-ordination, and Governance, it is binding for the Member States (except Titles III and IV which only apply for euro area Member States). Nevertheless, the provisions explicitly ask for changes in the national legal system and the EU legislation. Some of the provisions of the fiscal compact (Article 3(1) TSCG) should be introduced '*... in national law ... through provisions of binding force and permanent character preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes*' as stated in Article 3 (2) TSCG. It means that main provisions should be enshrined in the national legislation, preferably in the constitution. It should be noted that only the main provisions (balance budget rule, the minimum level of the structural balance) should be introduced in the national legislation. The detailed interpretation of the rules (how to calculate the structural balance) can be communicated elsewhere in form of a ministerial degree or simply on the web page of the ministry of finance. The second part of the citation suggests that the implementation of the Treaty can be considered adequate without any legal changes, if the country can present well-established budgetary

practices with long tradition and reliable track records. This shows that the Treaty prefers pragmatism instead of legal form.

Provisions under Article 3(1) TSCG should be introduced in the national legal system, while provisions under Article 4, 5, and 6 TSCG should be enshrined in EU secondary legislation. The latter provisions were already laid down in the Two-Pack regulation.

According to Article 14 TSCG, non-Euro area Member States can '... declare their intention to be bound by all, or part of, the provisions in Title II and IV of this Treaty'. In case of Article 3 TSCG, which is on stricter budgetary rules, this rule can easily be applicable since non-Euro area Member States can also introduce new rules into its national legislation. There are more problems with those Articles of TSCG which are implemented in the Tw-Ppack regulation. The right legal instrument should be found on how to apply an only Euro area regulation to a non-euro area Member State.

Independently from the TSCG, Hungary enshrined a debt break in the Fundamental Law, which is even tighter than the 60 % debt break stipulated by the TSCG. According to the Hungarian rule, a debt ratio cannot exceed 50 % of the GDP, and as long as it is higher than 50 %, the debt ratio has to decline each year.

Non-euro area Member States which ratified the Treaty can design their fiscal rules in line with the provisions of the Treaty right now, but it only becomes effective at the time they join the Euro area. This approach has some advantages, but also drawbacks. The early adoption of the rules could improve the predictability of the legal system, but it can have drawbacks when too long time passes until the anticipated provisions enter into force. During this period, the original Treaty might change and there is a risk that the never-applied rules become outdated.

Question 9

The difficult legal nature of the international agreements adopted to address the financial crisis in Europe was also debated in Hungary. Before the ratification by the Parliament, the Hungarian Government submitted the TSCG for constitutional scrutiny to the Constitutional Court of Hungary.

Several of the questions apparent in the discussions and legal literature on EU level were also raised before the Constitutional Court, for example the legal nature of such an intergovernmental agreement, the transfer of powers from Member States, and the new tasks mandated on EU institutions.

The Court decision[23] states (in reference to its earlier decision on EU matters)[24] that according to Article E) paras (2) and (4) of the Fundamental Law of Hungary, *the votes of two thirds of the Members of the Parliament is required for the consent to be bound by an international treaty aimed at modifying or amending the rights and obligations originating from the founding treaties, provided that the treaty is aimed at jointly exercising further competences originating from the Fundamental Law. An international treaty can be, in particular, regarded as such, if Hungary is a party to it as the Member State of the European Union, together with other Member States, and the treaty regulates subjects contained in the founding treaties, or it is aimed at implementing or supervising the founding treaties.*

The decision clearly expresses the underlying idea that the TSCG widens the scope of application of certain articles of TFEU and secondary EU law, and it *creates new scope of competence for the European Parliament, the president of the European Parliament, the Council of the European Union, the European Commission and its president and the Court*.[25]

The Court further states that treaties outside the scope of the founding treaties can also influence the joint exercising of competences by way of the institutions of the European Union, which may consequently require the transfer of competences originating from the Fundamental Law of Hungary. The Constitutional Court leaves it relatively open what treaties are to be considered as falling under this category. In its view this should be established case by case on the basis of the object and the subjects of the treaty as well as the rights and obligations deriving from the treaty.

In the case of the TSCG, the Court decision is based on the provisions according to which the TSCG provides for a new obligation for the states' parties regarding their budgets, and contains a system of regulations aimed at facilitating budgetary discipline by way of a budgetary pact. The Court even declares that the TSCG treaty serves the purpose of economic integration within the EU and widens the scope of application of certain articles of the TEU and TFEU.[26] Therefore – according to the provisions of the Fundamen-

23. Decision 22/2012 (V. 11.) of the Constitutional Court on the interpretation of paras (2) and (4) of Article E) of the Fundamental Law. /22/2012. (V. 11.) AB határozat az Alaptörvény E) cikk (2) és (4) bekezdése értelmezéséről, ABK 2012. június, 94./; For the English version see: http://www.mkab.hu/letoltesek/en_0022_2012.pdf.
24. Decision 143/2010 (VII. 14.) of the Constitutional Court.
25. 22/2012. (V. 11.) AB, para. 56.
26. 22/2012. (V. 11.) AB, para. 55-56.

tal Law of Hungary – the former authorisation for expressing consent to such a treaty as well as its conclusion and ratification will require the votes of two-thirds of all members of the Hungarian Parliament.

Question 10

In the field of economic policy coordination different rules applicable to euro area and non-euro area Menbers have become widespread during the last couple of years and it creates new challenges. In this new setup, non-euro area Member States have a minor degree of influence on the preparation of strictly euro area legislation. It became a practice that non-euro area members can participate in council working groups where the euro area regulations are discussed, and can have a say, but evidently, based on the Treaty they cannot vote. As a contrast in the European Parliament non-euro area, representatives can vote on euro area legislation. The participation of the non-euro area Member States in the implementation of euro area legislation is even more restricted. Non-euro area Member States cannot participate in the euro area Council meetings (Eurogroup), and therefore, they do not have an overview of the implementation, though they are informed at the ECOFIN through the regular debriefing on the outcome of the Eurogroup discussions.

There can be a pressure for non-euro area Member States to apply the stricter rules which are legally binding only for the euro area. Tighter rules will result in more transparency and predictability, which both lead to improved credibility and competitiveness. If a non-euro area Member State would like to enjoy the benefit from the enhanced coordination and transparency, they have to apply them even before they introduce the euro.

Hungary already applies some of the rules enshrined in the Two-Pack regulations and in the Fiscal Compact, which are only binding to the euro area. These rules require setting up a fiscal council and debt limit rule on a constitutional level. Hungary in the new Fundamental Law entered into force on 1 January 2012, set a debt limit, and included provision to set up a fiscal council. The Hungarian debt limit is tighter than that of the EU, since it says that the budget cannot be adopted if it implies a debt above 50 % of the GDP, and as long as it is higher than 50 %, the budget should imply a decline in the debt ratio. The Hungarian Fiscal Council has very strong power over the budget, because the Budget can only be adopted if the Fiscal Council gives its consent.

The new economic governance regime certainly has implications on the road to the euro. In order to lift the derogation, the Member State still has to fulfil the Maastricht criteria, which has not changed. The new economic procedures will create more clarity about how to assess the durability of the ful-

filled Maastricht criteria. For example, there is uncertainty about the durability of the economic preparedness of a country, which is subject to an excessive imbalance procedure. Even if it fulfils the necessary indicators for the euro introduction, there is a risk that they will not be sustainable. The ESM Treaty creates a new legal criterion to the introduction of the euro. The (5) recital of the ESM Treaty says that all euro area Member States will become ESM Members. They have to apply for the membership after the abrogation of the derogation, and the Board of Governors approves the application for membership. It means that before the decision on abrogation, the Council has to know about the intention of the Member State and whether it wants to apply for the ESM or not.

Monetary policy

Question 11

The ECB had an important role in easing the financial and debt crisis in the euro area. Many steps of the ECB contributed to the fact that financial markets regained normal functioning. At first sight the question whether all these measures were in line with its mandate can be justified.

The mandate of the ECB is laid down in the 127 TFEU and in the Statute of the ECB. The primary objective of the ECB is to maintain price stability. Without prejudice to the objective of price stability, it is supposed to support the general economic policy of the Union, and it should act in accordance with the principles of an open market economy with free competition, favouring an efficient allocation of resources. The ECB implements the monetary policy mainly through financial market operations, therefore it is vital for the ECB that the financial market functions properly; otherwise it cannot fulfil its task defined by the Treaty.

A recent study[27] of the Bruegel institute found that the *action of the ECB was clearly within its mandate of ensuring the proper conduct of monetary policy*. The main argument of the study is that action by the ECB was effective, and this is what matters. The unconventional actions, like OMT and LTRO might have fiscal consequences, and can redistribute the fiscal posi-

27. Guntram B. Wolff, The ECB's OMT Programme and German Constitutional Concerns, Bruegel, Think tank 20: The G-20 and Central Banks in the New World of Unconventional Monetary Policy, August 2013.

tion of its members, but this can also be true for the standard tools of the ECB. At the time of dysfunction of the financial market, the regular tools could more likely lead to fiscal consequences than in normal times. The new unconventional action of the ECB itself might create a potential higher risk to fiscal positions, but at the same time it eased the fragmentation and therefore mitigated the overall fiscal risks in the euro area. In this context it is difficult to say that the ECB exceeded its mandate.

During the last couple of years, ECB widely used sovereign bond purchase on secondary market under its program called Securities Market Program (SMP) launched in 2010 and terminated in 2012. The Treaty prohibits buying sovereign bonds on primary markets, but it allows acquiring them on secondary ones. This purchase should not be used to circumvent the prohibition of monetary financing. It is not clearly defined in which case a secondary market operation can be considered a circumvention of the direct purchase on the primary market. From a legal and practical point of view one can say that if the secondary market operation has the same effect as the primary market operation, prohibition of monetary financing would be considered. Again it is difficult to judge. The 2010 and 2011 annual monitoring report of the ECB and a recent study[28] concluded that SMP and OMT were not in conflict with the prohibition of monetary financing.

Question 12

Article 127(1) TFEU defines that the primary objective of the ECB is to maintain price stability. In Article 127(5) TFEU, the ECB is tasked to contribute to prudential supervision and stability of the financial system. According to the Treaty, the ECB has no direct responsibility for micro-prudential supervision of the banking system. However, the ECB can only perform its primary objective if the banking sector in the euro area is efficient and functions well. Primary legislation does not give a clear answer as to whether the ECB or other institutions are responsible for ensuring a well-functioning banking system. At the same time it is not prohibited for the ECB to contribute more to the prudential supervision.

The link between the efficient monetary policy and prudential supervision can easily be found. In the single monetary policy, all euro area Member States face the same interest rate, although there are differences in terms of

28. Philippine Cour-Thimann and Bernhard Winkler, The ECB's non-standard monetary policy measures the role of institutional factors and financial structure, ECB Working Paper Serie 1528 / April 2013.

real economy and risks, which would explain different interest rates. The single prudential supervision can play an important role in the differentiation of the interest rate. Financial regulation and supervision can require more prudence and reserve if the risks of the specific bank or banks of a specific country make it necessary. In this setup, risky banks will have to apply higher interest rates, and therefore, different interest rates will work in the single interest rate area. Against this background, the ECB involvement in the supervision could help implement its monetary policy, thus its primary objective.

In case of non-euro area Member States, the above mentioned link between monetary policy and banking supervision is not straightforward. Based on Article 127(6) TFEU, the ECB can be tasked by a supervisory role although it has some limitations as explored by a recent study.[29] Given that ECB already has rights over the non-euro area national central bank and the banking system, the expansion of these roles do not seem to be against the Treaty and the current practice. From a legal point of view there is no obstacle of the supervisory function of the ECB over the non-euro area banking system. Challenging problems need to be solved. For example, ECB will monitor the bank recapitalization program of the ESM which is only for euro area Members. Countries outside the euro area cannot use this tool unless they find an alternative fund that could substitute the ESM. This can be the balance of payment facility laid down in Article 143 TFEU. This shows that even if non-euro area Member States can participate in the banking union and thus the single supervision, they will not be equal in terms of surety and opportunity.

Question 13

The adequacy of the objective of the ECB is frequently questioned, in particular in times of crisis. The primary objective of the ECB is to maintain price stability, and without prejudice to this objective, support broader economic policy goals. In contrast, the objective of the Fed, which is defined in Article 2a[30] of the Federal Reserve Act, is more complex. It also includes stable prices as an objective, but this is only one objective among many others. More-

29. Nicolas Véron, Realistic Bridgetowards European Banking union, Bruegel Policy contribution, 2013/09 2013June.
30. Article 2a Federal Reserve Act: The Fed '... shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.'

over stable prices are not mentioned in the first place among monetary policy goals. What does this mean? Why is price stability so important in Europe and less in the US? The answer to this question can be found in their different approaches to the economy.

From a legal point of view the objective of the ECB is more clear-cut and ambitious, while the Fed pays more attention to the real status of the economy. The price stability ensures the stability and predictability of an economy which enables long term investments and employment creation. The single objective of price stability is enough if the other part of the economy is resilient, and thus able to address economic shocks by using its flexibility. In other words, the economy conducts sound public finances while structural policies are efficient. In the US, the Fed follows a more pragmatic approach recognizing that the economy is not perfectly flexible and public finances can also be a source of shock. Taking these circumstances into consideration, Fed can intervene to mitigate economic shocks and dysfunctions, even though they come from inappropriate economic policy decisions or lack of flexibility of structural policies. The ECB is stricter in that sense. It assumes that problems should be solved where they arise. It is reluctant to address structural weaknesses by monetary policy and it expects structural problems to with solved with structural policies.

Extending the mandate of the ECB beyond price stability would mean a slight redistribution of the responsibility from Member States to the ECB. In this case ECB would have the right to counterbalance or repair budgetary and structural policy mistakes as part of its multiple objectives.

Question 14

Under the Treaties the ECJ has the task of ensuring that the interpretation and application of the Treaties' law is observed, and it must also be able to maintain the institutional balance[31] which principles should also apply in the case of monetary policy.

The *Pringle case* is a good example that the ECJ will probably have a larger role in its capacity as the *European constitutional court*[32] and also have a crucial role in the process of deeper integration. As there is a lack of clear

31. Case C-70/88 *European Parliament v Council of the European Communities*, Judgment of the Court of 22 May 1990. I-0204., para. 23.
32. António Vitorino, What future for the EU and its Court of Justice, Notre Europe – Jacques Delors Institute, 7 December 2012. p. 3. (http://www.notre-europe.eu/media/eucourtofjustice-vitorino-ne-jdi-dec12.pdf?pdf=ok).

legal convergence between the different legal instruments on fiscal and monetary policy, it is to a large degree depending on the ECJ (and also on national constitutional courts) to find the right balance.

On the other hand, it is important to distinguish between the above mentioned 'constitutional' role of the ECJ and its role within the economic governance procedure such as acquired under the TSCG. According to the TSCG, the ECJ is an important link in the enforcement of the *fiscal compact.* If a Member State fails to take the steps required by the TSCG, the Commission is required to take them before the ECJ, who at the end of the day can decide on a fine up of to 0.1 per cent of GDP.[33]

A procedure before the ECJ regarding economic policy is not new as a breach of the requirements in Article 120 TFEU could theoretically be brought before the Court. However, it is not the same when it concerns the budgetary situation and the excessive deficit procedure of a Member State because Article 126 (10) TFEU contains the exclusion of an infringement procedure that is missing in Article 121 TFEU.[34]

Having in mind the famous decision of 13 July 2004[35] and the subsequent amendment of Council Regulation (EC) No 1467/97 of 7 July 1997 to include the criteria of *unexpected adverse economic events with major unfavorable consequences for government finances against the economic forecasts* (Articles 3 (5) and 5 (2)), it remains to be seen whether the involvement of the ECJ in the political arena of economic policy entails the desired consistency.

33. Article 8 (2) TSCG.
34. Calliess/Ruffert, EUV/AEUV Kommentar, 4. Auflage 2011, Art. 121 (ex-Art. 99 EGV) [Koordinierung der Wirtschaftspolitik],Rn. 17-18.
35. Case C-27/04 *Commission of the European Communities v Council of the European Union,* Judgment of the Court of 13 July 2004, I-6679.

ITALY

Roberto Baratta[1]

Economic policy

EU legal order

Question 1

In the field of economic policy the Union enjoys basically a competence of coordination and surveillance of Menber State budgetary strategy, as well as of setting out economic policy guidelines (Article 2(3) TEU). Certainly, that coordination can be enhanced since special primary law provisions apply to the members whose currency is the euro (Articles 5(1) TEU and 136 TFEU). However, by and large, even after the Treaty of Lisbon, Member States retained the power to govern economic policy and national budget subject to oversight and coordination from the EU which has the ultimate possibility of sanctions. This original picture has been revised in depth since then: the space left to national parliaments to deviate from objectives provided for in the relevant excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if there at all (see *infra*).

As to non-euro area countries, the legal framework is quite different. United Kingdom and Denmark do not participate in the third stage of the economic and monetary union and thus enjoy several exemptions (respectively Protocols No. 15 and 16). Further, there are Member States *with a derogation*, having not fulfilled the necessary conditions for the adoption of the euro. They enjoy a transitional status pursuant to Article 139 TFEU which in principle should lead those states to accede to the euro area. That explains why they submit convergence programmes to the European institutions (Article 140 TFEU). Basically, the preservation of national power for fiscal authority is balanced by EU oversight and coordination.

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The strengthening of fiscal surveillance on euro zone states, through mainly the approval of *Six-Pack* and *Two-Pack* (see *infra*), has contributed to divide the euro and non-euro countries, making the original division set out by the treaties more asymmetric.

If euro zone states are allowed to strengthen the coordination and surveillance of their budgetary discipline, even in terms of ministerial meetings, *i.e*. the Euro Group (Article 137 TFEU and Protocol No. 14), it remains to be seen whether they retain the power of *drawing up international agreements among themselves outside the EU legal framework*. The treaty of Lisbon deleted Article 293 of the European Community Treaty (which concerned agreements between Member States in some fields). On the contrary, Article 273 TFUE – which allows Member States to submit disputes to the ECJ related 'to the subject matter of the Treaties ... under a special agreement between the parties' – does not stop some Member States from stipulating agreements as to fields covered by the European integration process. In short, it seems as if the compliance of the mandatory condition concerns the fact that the agreement must respect the Treaties, the institutional framework of the EU, and its *acquis*.[2] However, arguing from *Defrenne*,[3] Member States, while respecting primary law, are prevented from resorting to a revision procedure different from the ones provided for in Article 48 TEU. Prohibition to recourse to other international law procedures to modify the treaties is the obvious consequence of respecting primary law and it fits in the broad logic of the EU legal order and its *specificity*. Unsurprisingly, Opinion 1/09 stopped Member States (and institutions) from concluding an international (mixed) agreement because it infringed the founding structural principles of the EU judicial system.[4]

The practice of Members States confirms that conclusion. For instance, the Unified Patent Court Agreement, signed by 25 EU Member States on February 2013, entails some amendments to the so-called Brussels I regime (Regulation No. 1215/2012). That explains the reason as to why the entry of

2. Rulings 31 January 2006, C-503/03, Commission v Spain, ECJ Report 2006, I-1122, para. 34 concerning the compatibility of Schengen Acquis with Community law; and tellingly 27 November 2012, C-370/12, Pringle, nyr, paras 68-69, 72.
3. In *Defrenne* the ECJ made it clear that 'apart from any specific provision, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 (now 48 TEU)', 8 April 1976, 43/75, ECJ Report, 1976, 455, para. 58.
4. Baratta, National Courts as 'Guardians' and 'Ordinary Courts' of EU Law': Opinion 1/09 of the ECJ, 38 Legal Issues of Economic Integration (2011), 297.

the UPC Agreement is subject to the previous entry into force of the amendments to that Regulation (Article 89(1) UPC Agreement): contracting Member States are aware that they cannot disregard secondary law provisions. Further, the issues concerning the *Fiscal compact*'s coherence with primary law are addressed in the preamble and in the many references to the EU rules embedded in the Treaty (see in particular Articles 3, 7 and 10, as well as several *subordination calls* included in the preamble). Namely, Article 2, in line with ECJ case law,[5] sets out the principle of conformity with EU law in applying and interpreting the *Fiscal compact*, and implicitly recognizes the primacy of EU law over the treaty itself. In the same vein, the commitment to bring the *Fiscal compact* treaty in the wake of the European legal framework 'within five years, at most' (Article 16), should be considered. Finally, the grant of financial assistance through the ESM is worth mentioning: the new paragraph 3 of Article 136 TFEU aims to ensure that that mechanism operates in compliance with the EU law, namely with regard to measures adopted by the Union when coordinating the Member States' economic policies.[6]

That being said, the conclusion of an international agreement, instead of a treaty revision, is sometimes due to the impossibility to achieve unanimity among Member States. The history of the *Fiscal compact* makes it quite clear. Unlike the Unified Patent Court Agreement, which has been construed as an international instrument though a EU way out was available, the history of the *Fiscal compact* is different. Indeed, the adoption of an instrument of pure international law concluded by a limited number of states, outside the architecture of the EU legal order, was the only solution available. It is worth considering that at the outset it was conceived as a EU revision treaty. At the European Council of 29th October 2011, a 'limited' revision of primary law was envisaged as a key action since further strengthening of economic convergence within the euro area was needed. Although the main concern of this debate was related to specific problems of the euro zone states, it was plain that any revision of primary law had to be done without affecting the position of the non-euro states, whose consent had to be acquired pursuant to the revision procedures laid down in Article 48 TEU. That requirement, however, soon proved hard to achieve. In the first half of December 2011 it became definitively clear that the United Kingdom would have prevented any resort to Article 48 TEU.

5. Matteucci case (27 September 1988, case C-235/87, ECJ Report 1988, 5589, para. 19).
6. For a critical approach: S. Josso, 'Réflections sur la première révision du TFUE. Un nouvel accroc à la légitimité démocratique de l'Union', RUE, 2012, 584.

In that context, some issues were raised as to whether it was possible to pursue other paths, such as secondary law instruments, while considering the limits imposed by EU legal order. Of course other paths were conceivable, such as measures adopted under Article 136 TFEU, and revisions of Protocol No. 12 (as suggested by the President of the European Council in his *Interim Report* of 6th December 2011) or through enhanced cooperation acts. However, it was debatable whether a balanced budget rule, implying at that very moment amendments to national constitutions, as informally agreed during the Summit of October 26th 2011, could have been adopted through secondary law acts. Even considering the peculiarities of Article 136 TFEU, this legal basis may not be used as a tool to modify Protocol No. 12: in that respect, pursuant to Article 136(1), it is necessary to apply Article 126(14), second subpara. Therefore, one may ask whether such a competence includes an obligation implemented at a constitutional level touching upon the autonomy of executive powers and national parliaments to define domestic budgets. In addition, a balanced budget rule may affect a constitutional value of some Member States as long as it poses relevant constraints in terms of determining public revenue and expenditure. After all, the Union is deemed to respect the constitutional identity of its Members States (Article 4, para. 2 TEU). Although the concept of 'national identity' as embedded in domestic Constitutions is rather vague, at that very moment one could not avoid recalling two lengthy rulings of the German Constitutional Court that shaped the limits of European integration rather narrowly under that national constitution. In particular, the *LissabonUrteil* held that revenue and expenditure including external financing included in the domestic jurisdiction of Germany (paras 248 et seq., 252, 256). These limits are likely to be respected by the EU as a part of its national identity, for they belong to identified core areas of national competence. In the end, it can reasonably be advocated that a balance budget rule entailed a strong interference in the constitutional identity of some Member States. In that respect, the direct involvement of national parliaments through their constitutional processes of ratification is a far better solution, instead of using secondary law tools.

That being said, a '17 plus' *inter se* agreement immediately raised several legal questions since it was supposed to touch upon a subject matter covered by EU Treaties, as well as secondary legislation, entailing the risk of inconsistencies. Indeed, in late 2011 the envisaged plan of a fiscal rule in order to attain a domestic balanced budget, coupled with stronger institutions' surveillance of national budgets, additional powers conferred to the Commission and the Court of Justice, as well as new provisions on economic policy coordination and governance, posed a serious challenge in terms of legality. Ad-

mittedly, a customary rule of the law of treaties (Article 41 of the Vienna Convention on the law of treaties) lays down a technique for modifying a multilateral treaty by only two or more parties to it. A modification limited to some parties *inter se* posed several legal constraints, one of which being that the envisaged revision ought not to be prohibited by the EU law.

Further, a *17 plus* treaty could not encroach upon the institutions' attributions since, evidently, Articles 5(2) and 13(2) TEU imply that the institutions act within the limit of the powers conferred to them and pursue only the objectives laid down by the treaties. As long as those powers and objectives are neither altered nor undermined, these rules do not prevent a vast majority of Member States from providing additional tasks with respect to some institutions. It is worth recalling that in the *Bangladesh* case, the ECJ, as well as the Advocate General Jacobs, stated that Member States may confer tasks to the Commission aimed at coordinating their activities outside the treaties.[7]

Undoubtedly, in that context the room for action appeared tiny from an EU law standpoint. For, according to Article 41 of the Vienna convention, a *17 plus* treaty could affect neither the enjoyment of the rights of the non-euro zone countries under EU law, nor the performance of their obligations, and could not amount to affect the effective execution of the object and purpose of EU law as a whole. However, one could argue that should a *17 plus* instrument enhance the existing EU mechanisms of national budget surveillance, that outcome would be consistent with the object and purpose of the EU treaties and, ultimately, be consistent with the condition laid down in Article 41(1) ii of the Vienna Convention.

Even considering the approval of a soft-law instrument, the 'Euro Plus Pact',[8] as well as the so-called *Six-Pack*, all these measures hardly amounted to re-establishing international market confidence in the euro zone. In essence, this is why the *Fiscal compact* has been concluded. Further strength-

7. 30 June 1993, joined cases C-181/91 and C-248/91, European Parliament v Council and Commission, ECJ Report 1993, I-3713 et seq. Likewise, in the *EDF* case the ECJ accepted without objections the fact that the administration of the European Development Fund established by Member States outside the Community budget, had been entrusted to Community institutions (2 March 1994, C-316/91, European Parliament v Council, ECJ Report 1994, I-625).

8. 'The Euro Plus Pact. Stronger Economic Policy Coordination for Competitiveness and Convergence' is a political agreement concluded by the euro area heads of state or government (and joined by Bulgaria, Denmark, Latvia, Lithuania, Poland, and Romania) on 24-25 March 2011. It is annexed to the European Council Conclusions adopted on the same days (see T*he European Council in 2011,* Publications Office of the EU, Luxembourg, 2012, 40 et seq).

ening of economic convergence within the euro area was needed, much in the way suggested by Mr. Delors when the EMU was conceived. The main political purpose was to tackle risks of spill-over effects of the crisis from some euro zone states to other states of the same area, their mutual destinies being thus interwoven. A set of comprehensive rules, ensuring sustainability of national fiscal policies in the long run, was considered one of the levers in order to rebuild market confidence on both the euro currency and the related economies.

Use of Union institutions outside Union framework. As argued above, under certain conditions additional tasks may be attributed to EU institutions outside Union framework.[9] Particularly in the case of *Fiscal compact*, that approach was in principle considered viable, provided that the future treaty would have avoided inconsistencies with the law and related principles of the EU (*contra legem* provisions).[10] Further, we have elsewhere argued that, if needed, the provisions aimed at supplementing EU legislation (*praeter legem* provisions) could be enacted through the usual legislative procedures based on a Commission initiative, while respecting its autonomous power of initiative. Basically, it has been advocated that attributing some additional tasks to both the Commission and the ECJ could not affect the rights of the states not participating in the *17 plus* Treaty, since the institutions would have continued to work in the general interest in accordance with the EU treaties. After all, the history of the EU had experienced some precedents of *pragmatic flexibility*, such as the Schengen Agreement and the Prüm Treaty, albeit regarding subject-matters relatively addressed by EU law and having a less important impact. Moreover, in *Parfums Christian Dior,* even the ECJ held that three Member States could establish, through an international agreement, a common judge able to refer preliminary rulings in the field of trademark covered by the *acquis.*[11]

As to the *Fiscal compact*, an *inter se* international agreement was perceived as the ultimate resort. It is a matter of course that the proper role of the

9. 27 November 2012, C-370/12, Pringle, nyr, para. 74.
10. The ECJ jurisprudence is clearly oriented in the sense that the effects of a multilateral mixed agreement on the bilateral relations between Member States cannot affect primary law, as well as the allocation of responsibilities defined in the treaties (see, in that regard, ruling 30 May 2006, C-459/06, MOX Plant, ECJ Report 2006, I-4635, para. 123; Opinion 1/91, ECJ Report, 1991, I-6079, para. 35, and Opinion 1/00, ECJ Report 2002, I-3493, paras 11 and 12).
11. 4 November 1997, C-337/95, *Parfums Christian Dior*, ECJ Report 1997, I-6013, para. 21.

EU institutions outside the EU legal framework was and remain debatable. For instance, the ESM treaty showed that such a use was possible with the consent of all Member States, whilst the draft agreement on the unified patent litigation system is quite a counterexample. The argument according to which Article 13(2) precludes allocation of new tasks to the institutions outside the EU legal framework unless a unanimous will to the contrary, goes too far. A treaty rule may not actually be derogated with the blessing of the 27 governments. So it is not clear that a unanimous will is required in order to attribute additional tasks to the institutions, provided that their role and nature has not altered.[12] In any case, the implied assumption was that the non-participating States, having recognized the need for the euro zone to have a proper fiscal discipline and taking part in the negotiations as observers, could ultimately acquiesce or reduce their objections to the use of the institutions on the basis of a pure international instrument, provided that the EU treaties would be respected and the functioning of the single market would not be undermined. The Prime Minister of the United Kingdom has clearly indicated that his Government will not raise objections to the recourse to EU institutions under the *Fiscal compact*, provided that the interests of the United Kingdom are not threatened.[13] Thus, it can *ex post* be argued that the UK Government acquiesced to the use of institutions outside the EU legal framework.[14]

Finally, the use of an international instrument, concluded among a limited number of Member States, raises a *repatriation problem*. As the *sunset clause* in Article 16 of the *Fiscal compact* recognizes, the great majority of Member

12. Opinion 1/92 ECJ Report 1992, I-2821, paras 32 and 41; and Opinion 1/00, ECJ Report 2002, I-3493, para. 20; see also Opinion 1/09, not yet reported, paras 74-76.
13. 'Cameron U-turn over policing of tough new euro zone rules', *The Guardian,* 28 January 2012.
14. On 31st January the Prime Minister explained to the House of Commons that 'The new intergovernmental agreement is absolutely explicit and clear, that it cannot encroach on the competencies of the European Union and that measures must not be taken that in any way undermine the EU single market. Nevertheless, I made it clear that we will watch this matter closely and that, if necessary, we will take action, including legal action, if our national interests are threatened by the misuse of the institutions' (House of Lords, *The euro area crisis*, HL paper 260, 30, point 89). The Deputy Prime Minister took the view that the Government had agreed to co-operate with the EU by allowing euro zone countries to use the EU institutions to enforce the fiscal agreement (House of Commons, *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union: Political Issues*, 23). That being said, after the signature of the *Fiscal compact*, UK could, but did not actually challenge, its compatibility with the 'unanimity rule' being violated. It could have indeed lodged an application against the 25 member states pursuant to Article 259 TFEU.

States already considered the need to bring back to the EU system at least that exceptional instrument which was conceived in the middle of the crisis. Therefore, the juxtaposition of the EU legal framework and an international instrument ratified by a limited number of member states is only accepted on a temporary basis. To say the least, that mixture may reinforce the fragmentation and uncertainty of the legal framework and also the division between the euro area and non-euro area States.

Question 2

As indicated above, the competence of the Union in the area of economic governance (Articles 120 to 126 TFEU) is basically a competence of coordination and surveillance of the budgetary strategy, as well as of setting out economic policy guidelines.[15]

However, Regulations 1466/97 and 1467/97 have been thoroughly revised and strengthened by the so-called *Six-Pack* and *Two-Pack*. In short, the *Six-Pack* reform focuses on national debts and macroeconomic imbalances, impacting on states with *earlier* sanctions, whilst the *Two-Pack* includes, on the one hand, a Regulation enhancing the surveillance *for euro area states* benefiting from financial assistance or threatened by serious financial instability. On the other hand it also includes a Regulation which creates a reinforced European Semester for euro area countries with a revised timetable for the submission of national documents in order to ensure the correction of excessive deficit: they are obliged to submit national draft budgets by 15 October every year. In some cases even before they are submitted to national authorities.

Integrity of the internal market regime that applies to all EU Member States. See answer to questions No. 1 and 3.

Question 3

Re-shaping the process of the EU integration. The current (financial) crisis surrounding the process of European integration has revealed the need of reforms. In the foreseeable future one may reasonably expect that the Member States would find some way out of the crisis, enacting both a revision for the treaties and of secondary law in order to achieve a workable and stable legal

15. 27 November 2012, C-370/12, Pringle, nyr, point 64.

framework for the centralized monetary policy.[16] In that perspective, the *Six-Pack* and the *Two-Pack*, as well as the ESM treaty and the *Fiscal compact* were conceived just as provisional (though necessary) measures. Therefore, new powers and responsibilities for the EU in economic and fiscal policies appear indispensable objectives to pursue, assuming that the existing structures are not capable of achieving a sound economic governance in the EU. A centralized banking supervision is being established. Arguably that could turn out to be a first step towards a Fiscal Union that almost inevitably implies more Economic Union and ultimately more Political Union.[17] So far there is no clear path to pursue.

Reforms could point towards more differentiated integration in relation to measures not supported by unanimity. For instance, it has been suggested to inject *at primary law level* some forms of enhanced cooperation or partial exit-clauses in order to achieve more flexibility. That is debatable. On the one hand, that approach could add more complexity to the functioning of the Union and its institutions. It is no coincidence that the enhanced cooperation has been used *cum grano salis* in the history of the EU. The European patent and the FTT (see *infra*) examples show not only the political conflict that may accompany the use of the instrument of enhanced cooperation, but also the extreme level of legal complexity that it may entail. All in all, it would be quite interesting to explore how the forms of enhanced cooperation already adopted by the institutions (the law applicable to divorce, European patent with its mixture of international treaties as well as EU sources of law) are deemed to work in order to evaluate their impact on the functioning of the internal market and namely on *real economy*. On the other hand, and perhaps mostly, more forms of differentiated integration implies some risks in terms of legitimacy and transparency. The legal complexity of the economic governance system is remarkable, though somehow unavoidable. The different forms of integration (provided for by *inter se* agreements, rules of primary law, en-

16. Indeed, the President of the European Commission, José Manuel Barroso, said in his speech on the State of the Union on 12 September in the European Parliament: 'We must complete the economic and monetary union.' On the same vain, the German Chancellor stated that 'we now need to find the right way forward to stabilize the economic and monetary union in the long term by rectifying the design flaws. We need to be ambitious here and must not shy away from changing the treaty basis of economic and monetary union if this should prove necessary. This process of deepening the European Union is indispensable'.
17. Louis, 'Institutional Dilemmas of the Economic and Monetary Union', Challenges of multi-tier governance in the EU. Effectiveness, efficiency and legitimacy, Brussels, 2013, 51.

hanced cooperation etc.) add more complexity. That system is hardly manageable and sometimes lacks transparency. In the near future it may be difficult to simplify the functioning of the current system of multi-tier governance. At the same time, to inject new forms of differentiated integration through treaties' revision could ultimately affect the legitimacy of the EU. For that path could lead to more complexity and less transparency in the decision making, widening the sceptical attitude of the citizens towards the European Union. In addition, the participation in the Union has historically produced a set of advantages and disadvantages for each Member State in a game that, in political and economical terms, is most likely a positive sum game. Is it fair to pick and choose, exacerbating the concept of differentiated integration? A feeling of uncertainty is not misplaced.

The ESM treaty and the *Fiscal compact* may already be considered exceptional forms of differentiated integration. Since international treaties require national proces of ratification, they enjoy quite an evident standard of democratic legitimacy. Admittedly, however, a revision process under Article 48 TEU entails a greater level of democracy and transparency, since it also involves the European Parliament.

Besides, the conclusion of the above mentioned treaties dramatically shows that the EU legal order lacks the capacity of a swift self-amendment. The legal and political implications concerning a treaty revision without unanimity (similarly to the UN Treaty) deserve to be explored. The *Fiscal compact* experience shows that an international instrument inevitably poses some issues of inconsistencies with the law and principles of the EU, which usually need, to say the least, interpretative solutions. In the future it seems preferable to avoid other forms of international instruments which, sooner or later, require measures of *repatriation* in order to terminate possible incoherencies. International agreements may be tolerable in time of crisis, but cannot, on their own, be a lasting solution and, *a fortiori* cannot be a new form of EU law (see answer question No. 1).[18]

To sum up, three ways forward may be envisaged for reshaping the EU integration process. First of all, a renewed economic and monetary union needs greater fiscal policy integration. The progress towards strengthening budgetary discipline already achieved by adopting the *Fiscal compact* may be further enhanced, for example, by granting the European level real rights to intervene in national budgets when the agreed ceilings of the Stability and

18. Contra Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' EuConst 9 (2013) 37-72.

Growth Pact have not been observed. Moreover, a renewed economic and monetary union needs greater financial market policy integration. In that perspective, the creation of an effective European supervisory mechanism for European banks is essentially better averting systemic risks to the EU economic order.

Second, a renewed economic and monetary union needs greater economic policy integration. Experience dramatically demonstrated that the current economic coordination did not suffice. The importance of the two pillars of economic and monetary union is a truism: a monetary union without a sufficient degree of convergence of economic policies is not likely to last. The risk of spill-over effect if one country's loss of competitiveness is a problem of democracy as well. The issue is that greater economic policy coordination will perhaps also affect some core spheres of national sovereignty, such as labor market or tax policy. National constitutional constraints need to be addressed, with the aim to find out a sensible balance between necessary new intervention rights at European level and the scope for action of Member States and their parliaments, which in principle should be preserved.

Third and most important, the normative instruments adopted to tackle the financial crisis, as well as the related constraints, do not flow from a mature democratic political process. Though confirming the paradigm of the supranational model of the Union, these measures show structural shortcomings if one considers the limited role reserved to the European Parliament in the economic governance of the EU. In this scenario, more democratic legitimacy has to be injected. Initially, it could be done by means of the national systems. In the long run, a real political union would be desirable. Conferring a normative role to the Commission would hardly be a proper solution, unless its nature is deeply changed. Likewise, increasing the role of the Council would not help too much in terms of democracy. Democratic legitimacy of the EU could be enhanced by injecting more accountability of the decision-making towards the EP (see answer to question No. 6). In other words, the multilevel democratic nature of the EU system needs to be somehow reinforced focusing more on its own direct source of democratic accountability, the EP. Searching for a more mature governance of the euro zone that enhances its democratic accountability will be the challenge for the future steps of economic integration.

Question 4

In the complex scenario of the new economic governance partially stepping outside the EU framework, national budgetary autonomy is going to be af-

fected all the more in terms of both a duty to reduce government debt and to enact programs of structural reforms to ensure an effective correction of excessive deficits. These obligations affect the national autonomy to determine the level and distribution of public spending, as well as its funding. Although the adoption of national budgets pertains to national parliaments, the Commission and the Council have the competence to review the obligations of the pays sous programme and to monitor their correct implementation. As a matter of fact, the space left to national parliaments to deviate from objectives provided for in the relevant excessive deficit procedure, even in terms of debt criterion, is extremely tiny, if any. To say the least, governments of indebted states will be prevented from exercising expansionary fiscal policies. This is a problem both of democratic legitimacy and national sovereignty.

As to the former, it is worth noting that these constraints show structural shortcomings in terms of democratic legitimacy. This seems all the more so if one considers the limited role reserved to the European Parliament in the economic governance of the EU.

It has been argued that the *Fiscal compact* also seems to widen the democratic deficit of the EU economic governance. On the one hand, in concrete terms, the margin of manoeuvre for national authorities facing budgetary problems is quite reduced. Also, the Commission proposal aimed at reforming the CSF Funds (Common Strategic Framework) provides for 'macroeconomic conditionalities'. In other words, all these economic, social, and territorial cohesion instruments will be closely linked to the respect of fiscal discipline.[19] As a result, if a Member State fails to comply with its own macroeconomic obligations, the Commission would have the right to suspend all, or part of the commitments undertaken under the functioning of the CFS Funds.

On the other hand, the Commission's role is enhanced, conferring to that institution a normative role and facilitating the adoption of the measures proposed by it, making it *semiautomatic* under the functioning of the new economic governance through the means of the reverse qualified majority rule in the decision making process.[20] One may wonder if the Commission enjoys a full-fledged democratic mandate to play such a prominent role, considering still a semi-technocratic institution.

19. See COM(2012) 496 final, recital 19 and Article 21.
20. R. Baratta, 'Legal Issues of the 'Fiscal Compact': Searching for a mature democratic governance of the euro', *The Euro Crisis and the State of European Democracy*, European University Institute, RSCAS, EUDO, Florence, Italy, 2012, 31, 51; W., van Aken, L. Artige, 'Reverse Majority Voting in Comparative Perspective: Implications for Fiscal Governance in the EU', ivi, 129.

A democracy issue also arises from the fact that, first, the EP has no substantial saying in the formulation of policy decisions according to Articles 121(2)TFEU (the EP is informed about the recommendations adopted by the Council), 121(5)TFEU (the EP has the right to invite the President of the Council to appear before the relevant Committee), 148TFEU (which requires a consultation of the EP), and 126 TFEU (the Council informs the EP of the decisions taken as to fiscal surveillance). The same is true regarding the Economic dialogue approved with the *Six-Pack*: the Macroeconomic Imbalance Regulation (No. 1176/2011, and No. 1174/2011), as well as the fiscal Regulations (No. 1175/2011, 1177/2011, and 1173/2011), aim to foster the economic dialogue between the institutions. Ultimately, the involvement of the EP does not fully provide parliamentary legitimacy to the decision taken at EU level.

Moreover, as to the *Fiscal compact*, the EP is hardly involved in the Euro Summits since its President may be invited to be heard, whilst the institution representing the European citizens receives *ex post* a report by the President of the Euro Summit. This is not to say that the governments are deprived of democratic legitimacy, but that their legitimacy depends upon effective accountability to their national parliaments. In the meantime the EP, representing the European citizens directly, does not emerge as a net beneficiary both in the current EU law framework (primary and secondary law, as revised by the *Six-Pack* and *Two-Pack*) and in the *Fiscal compact*, whereas the decision-making power of governments is reinforced. The EP is not involved in the shaping of the decision concerning the duty to reduce public debt pursuant to Article 4 of the *Fiscal compact* and the relevant decision of the corrective arm (the excessive deficit procedure) of the Stability and Growth Pact under Regulation No. 1177/2011. Even assuming that the Commission constantly pursues the general interests of the euro zone populations, that is not enough. In addition, the full implementation of the rule regarding the *joint discussion* between the national and European Parliaments (through a 'Conference') of budgetary policies and other issues covered by the *Fiscal compact*, would not be the panacea for recovering democratic accountability if one adopts the idea of deliberative democracy through deliberation of citizens' elected representatives.

In this scenario, more democratic legitimacy has to be injected by means of the national systems, as the *Bundeverfassungsgericht* rightly demanded with regard to the rescue funds' instruments recently adopted by the euro zone states. However, this is only true if national parliaments have the strength to effectively scrutinize the respective governments. The advantage of this perspective is that it does not entail far-reaching treaty changes, and

would not raise major national constitutional limits with regard to the transferral of other portions of sovereignty to the EU.

Another path, which is more consistent with the ideals of founding a European federation, might be pursued. Assuming that legitimacy is a concept with variable intensity *per se*, it may be enhanced by injecting more accountability of the decision-making towards the EP, though this perspective implies treaty changes and faces some national constitutional limits. Legal instruments to address the euro zone financial crisis have shaped new opportunities for the European integration process. Some deficiencies still deserve to be corrected. As long as the decisions on national budgets are more and more affected by European institutions, the democratic legitimacy and accountability of the EU seem, to be perceived as an issue to be tackled in the future development of the EU legal order.[21] The multilevel democratic nature of the EU system needs to be reinforced so that it will rely less on national legitimacy input and more on its own direct source of democratic accountability. A genuine European political democracy is needed in order to pursue a sense of collective identity when the citizens evaluate the output side of the measures adopted under the economic policy-making.

Question 5

See answer to Question 12.

Legal orders of the Member States

Question 6

The degree of legal challenges for euro area Member States and other countries stemming from the primary and secondary law, as well as the *Fiscal compact* and ESM treaty, vary according to their respective participation in the economic and monetary union. Its fragmentation and the limited space of this paper prevent dwelling on them. Besides, some points have already been addressed in previous answers. Therefore, the balanced budget rule has been chosen as an illustrative and significant legal challenge, at least for Italy.

21. See *Towards a Genuine Economic and Monetary Union*, Report by the President of the European Council, Herman Van Rompuy, Brussels, 26 June 2012 EUCO 120/12, at 6-7.

The failure to achieve a balanced budget may be presented as a problem of democracy which plays a role larger than is currently acknowledged.[22] A balanced budget obligation tackles Member States which adopt irresponsible fiscal policies, while their systems lack economic competitiveness. It is also important for other Member States which may be affected by contagious effects, given the interdependence of respective economies, notably within the euro zone and to certain extent within the EU. Indeed the balanced budget obligation prevents the elites governing a country, and their policy autonomy, from adopting unethical debt-creating policies which will be paid by future generations. Limits on national budget deficits may, as a consequence, protect democracies from inter-generational conflicts. Hence, the benefit of a democratic society since a fiscal discipline is one of the basic elements of a social pact among generations. After the *Six-Pack*, the *Fiscal compact* is to be considered another clear signal that the euro zone states are giving up the laxity of the Maastricht Treaty and its related practice.

The balanced (or in surplus) budget constraints may be viewed as one of the major legal challenges euro zone Member States have faced since the beginning of the economic crisis. Introduced by the *Fiscal compact* (see answer No. 8), it plays a key role in its architecture by posing constraints on its implementation at national level, as well as by attributing to the ECJ the power to adjudicate over the proper implementation pursuant to Article 8. Some Member States started a process of introducing a balanced budget rule even before the *Fiscal compact* treaty was negotiated. In 2011, the Italian Parliament approved a first round of a constitutional reform incorporating a balanced budget obligation into Article 81 of the Italian Charter. The Constitutional reform of Article 81 was finalized on 17 April 2012, when the Senate approved it with a majority superior to two thirds of the Parliament, thus prevented the holding of a referendum (provided for by the Italian Constitution in cases where reforms are adopted under a simple majority). The new Article 81, which takes effect from 2014, obliges the State as a whole to ensure the balance between budget revenue and expenditure, taking into account situations of adversity and favorable phases of the economic cycle.[23] Moreover, the borrowing is permitted for the purpose of considering the effects of the economic cycle only and with the approval of both Houses by absolute ma-

22. Baratta, 'Legal Issues of the 'Fiscal Compact', cit., 60.
23. Lo Stato assiaves 'L'equilibrio tra le entrate e le spese del proprio bilancio, tenendo conto delle fasi avverse e delle fasi favorevoli del ciclo economico'.

jority if exceptional events occur.[24] Finally, the reform gives the ordinary law the task to define the exceptional events that allow the state to exceed the balanced budget rule. In these cases, the Government should present a readjustment plan so that a deficit spending must be redressed or recovered in the subsequent year, without turning out a new public debt. An ordinary law adopted by the absolute majority of the Parliament, will set up the basic rules and criteria to ensure that the balanced budget rule is implemented, as well as the sustainability of the public debt. The Italian constitutional reform has been considered as a 'further major improvement in fiscal governance' and 'another sign of Italy's commitment to sound public finances'.[25]

It seems worth recalling that the *Fiscal compact* requires implementation of the budget rule via binding provisions of permanent character, 'preferably constitutional'. Article 81 of the Italian Charter goes beyond that requirement.

Question 7

In 2012, Italy approved a new Bill No. 234/2012 setting out comprehensive provisions on the participation of national authorities to the creation and implementation of the EU's political and normative institutions.[26] One of the most innovative parts of Law 24 December 2012 No. 234 is indeed Part II which provides a thorough involvement of the Italian Parliament in the legislative process of the EU. The new Bill provides obligations to consult and inform the Parliament (Article 4), including the international agreements concluded among Member States in financial, economic and monetary areas (Article 5). The objective is to effectively involve the Italian Parliament in the decision making process of secondary law before the Government adopts a position within the EU institutions (Article 6). In the same vein, the Italian Chambers may adopt formal instructions addressed to the Government, as well as parliamentary scrutiny reservations (Article 10). Shortly, any political

24. 'Il ricorso all'indebitamento è consentito solo al fine di considerare gli effetti del ciclo economico e, previa autorizzazione delle Camere adottata a maggioranza assoluta, al verificarsi di eventi eccezionali'.
25. Commission staff working document. Assessment of the 2012 national reform programme and stability programme for Italy, SWD(2012) 318 final, Brussels 30.5.2012, 4.
26. C. Favilli, 'Ancora una riforma delle norme sulla partecipazione dell'Italia alla formazione all'attuazione delle politiche dell'Unione europea', Rivista di diritto internazionale, 2013, 701.

and normative activity of the EU, namely in the economic governance area, is currently subject to serious scrutiny control by the Italian Parliament. Implicitly the new Bill is also meant to inject in the EU system's more democratic legitimacy through the Italian national system. However, this will be true only if the Italian Parliament has the strength to effectively scrutinize the government. The Bill goes exactly in that direction providing all the necessary normative tools.

Question 8

The core of the *Fiscal compact* is laid down in Articles 3 and 4 of the treaty, as they respectively establish the 'balanced budget rule' and the obligation to reduce a 'public debt' at the ratio of 60 % – *i.e.* the same level provided for since the Maastricht Treaty.[27] The parties facing an excessive deficit procedure are expected to set up a budgetary and economic partnership plan (including a detailed description of structural reforms) in order to ensure an effective and durable correction of their excessive deficit (Article 5). As indicated in point 8 of the preamble, the Commission is meant to present further legislative proposals for the euro zone in order to implement Articles 5 and 6 within the EU legal order. Secondary law acts are meant to solve any issue of potential friction between those provisions and the EU normative framework.

As to the core of the fiscal discipline, Article 4 states that if the ratio of the general government debt to GDP exceeds 60 %, the difference between the actual ratio and 60 % should be reduced by an average of one-twentieth per year. The final provision reflects what is already laid down in secondary law, despite some attempts to enhance the obligation to reduce public debt pending negotiation. For it contains a mere *renvoi* to Article 2 of Council Regulation (EC) No. 1467/97, as amended by Council Regulation (EU) No. 1177/2011. This legislative measure reformed the corrective arm of the Stability and Growth Pact, which is applicable to all Member States (except the United Kingdom and Denmark), aside from financial sanction addressed to euro zone states only. It was assumed that the former corrective arm of the Stability and Growth Pact, while referring mainly to the excessive deficit procedure being triggered if a Member State deficit went above 3 % GDP

27. Unsurprisingly, given the political atmosphere, the Fiscal compact rules do not contain any reference either to the issue regarding the pooling of national debt, or to any form of euro-bonds or project-bonds. In that respect, it merely engages the parties to improve the reporting of their national debt issuance both to the Council and the Commission in order to coordinate their respective plans (Article 6).

threshold, did not focus enough on the excessive debt criterion, therefore allowing a Member State to run up debts of well above 60 % without being sanctioned.[28] On the contrary, Regulation No. 1177 deters both *excessive deficit* and *excessive debt* and, if they occur, provides for prompt correction. In short, as to the ratio of government debt to GDP, Article 2 of the Regulation states that the Council and the Commission take into account all the relevant factors and the economic and budgetary situation of the Member State concerned, whilst considering the level and evolution of the debt and its overall sustainability, as well as the business cycle. Broadly speaking, this evaluation of the ratio of the government debt requires that the latter is sufficiently diminishing and approaching the reference value at a satisfactory pace, while also providing a transitional period of three years. Article 4 of the *Fiscal compact* endorses these normative elements of secondary law.

The other key provision of the *Fiscal compact* is the *balanced (or in surplus) budget rule*, set out in Article 3(1)(a), which is essentially based on the model of *debt brake* laid down in the German Constitution. Pending the negotiation of the *Fiscal compact*, the requirement to implement that rule at national level has been downgraded to a 'preferably' constitutional level (from 'constitutional or equivalent level'). It refers directly to the general government budget, but it is clear that the practice of accumulating debt outside the general government account undermines the attainment of the Union's objectives in the framework of the EMU and amounts to a violation of the treaty rules, and in particular of Article 4(3) TFEU. The balanced budget rule indicates a common will of the parties to embrace serious constraints on their sovereign rights when adopting the annual budgetary laws by limiting public indebtedness at an early stage. Despite the fact that this rule is a clear 'addition' to the existing rules of EU law not addressed by the Six-Pack, it pursues and enhances the fulfillment of the general goals of the Union. Clearly, that rule entails no inconsistency with the 3 % GDP threshold laid down in Protocol No. 12. The latter is a *ceiling* which does not prevent states from committing themselves in a stricter way. In other words, they are not conflicting provisions, the compliance with the former implying no violation of primary law and vice versa. As a result, there is no need to apply the coordination clause provided for in Article 2(2) of the *Fiscal compact*.

Being somewhat different from the *Golden Rule*, the balanced budget rule also seems to provide for four elements of flexibility. First, it is worth consid-

28. However, it seems worth remembering that the excessive deficit procedure set out in Article 126(11) TFUE provided for sanctions, which have never been enforced.

ering the presumption according to which the obligation is deemed to be respected if the annual structural balance has a deficit of 0,5 %. This figure is raised to 1 % for states having a public debt significantly below 60 %. However, this provision is defined in terms of the rapid convergence towards the medium-term objective (MTO), pursuant to Regulation No. 1466/97 as amended by Regulation No. 1175/2011. The convergence process entails the consideration of the country-specific sustainability risks, while the relevant progress towards the MTO is subject to evaluation in line with the Stability and Growth Pact.

Second, the time-frame for such convergence, as proposed by the Commission, takes into account the relevant 'sustainability risks' for each party. The time for convergence (and the 'progress' towards the MTO) is evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures.

Third, in exceptional circumstances states may temporarily deviate from their respective medium-term objective or the adjustment path towards it. Exceptional circumstances include an 'unusual event outside the control of the Contracting Party concerned, which has a major impact on the financial position of the general government', as well as 'periods of severe economic downturn', causing a temporary deviation in the budget that 'does not endanger fiscal sustainability in the medium term'. As a result, the treaty does not seem to prevent a party hit by a natural disaster, or a severe economic blow to adopt some measures of fiscal stimulus.

Fourth, the rule provides for a sort of a *de minimis* principle since only *significant* deviations – that is to say, having an appreciable effect on the commitment undertaken by the relevant state – from the virtuous budgetary conducts entail the automatic triggering of a correction mechanism aimed at implementing measures to correct the deviations over a period of time. It is worth noting that the correction mechanism will be put in place by states at national level in accordance with the principles established by the Commission. As a consequence, this institution acquires a relevant normative power to guide national legislation in terms of common principles regarding 'in particular' (the list is thus not exhaustive) the nature, the size, and time-frame of the correct action to be automatically undertaken, also in cases of exceptional circumstances, and the role and independence of the national institution to monitor the compliance with the balanced budget rule. This normative power is institutionally quite delicate and should be carefully evaluated when transposing the *Fiscal compact* into the EU legal framework.

Question 9

The answer is negative.

Question 10

First, there is a risk of a legal and political fragmentation of the EU framework. Tellingly, for instance, the *Fiscal compact* tries to build a bridge between euro zone Member States and those outside the euro area. So it comes as no surprise that, under certain conditions, even the non-euro zone states may accept being bound by it. In particular, as long as they enjoy either a derogation or an exemption from participation in the single currency, they would be bound only by the selected provisions of titles III (which represents the core provisions of the treaty) and IV (economic policy coordination and convergence) to which they declare their adhesion at the moment of depositing their instrument of ratification. As a consequence, for them only the accession to the treaty can be selective (à la carte). Eight non-euro countries (Bulgaria, Denmark, Hungary, Latvia, Lithuania, Poland, Romania and Sweden) showed their interest to be aligned to the fiscal compact by signing it. In the same vein, the *repatriation provision*[29] (see also *supra* answer to Question No. 2), as well as the Euro Summit regulation,[30] should be considered.

Second and more generally, the new economic governance regime entails not only relevant implications namely for Member States with derogation seeking to meet the convergence criteria pursuant to Article 141(1) TFEU, but also that the euro zone states could move towards a more integrated process, leaving the others to the periphery of the Union. A sort of Two-Speed

29. That is to say the commitment to bring the Fiscal compact treaty in the wake of the European legal framework 'within five years, at most' (Article 16).
30. In short, according to Article 12, all heads of state or governments of the euro zone – having no regard to their ratification of the *Fiscal compact* – 'meet informally' together with the Commission and the President of the ECB. The participation in discussion is also open to the Contracting states not being part of the euro zone, if the agenda touches upon some defined items, *i.e*. the competitiveness, the modification of the global architecture of the euro area, and the related fundamental rules, as well as 'when appropriate and at least once a year' some 'issues of implementation' of the *Fiscal compact.* This wording clearly shows the need to reach a compromise between, on the one side, the euro zone states pursuing the establishment of a new body tailored for the objectives for which they only bear responsibility, and on the other side, the non-euro zone states which feared being put on the outside when discussing the core of the future economic governance.

Europe may take shape, and that for several reasons. Let's take for instance the first experience of enhanced cooperation limited to euro area states in the field of taxation (the so-called Tobin tax). The UK Government challenged the legality of the decision authorizing eleven Member States to enhanced cooperation in the area of FTT, before the ECJ (case C-209/13), pleading that a specific part of it (the *counterparty principle* encapsulated in Article 4(1), point f) of the Commission's proposal) infringes inter alia customary international law since it has extraterritorial effects and, as a result, Article 327 TFEU as regards the obligation to respect the competences of non-participating Member States. Those pleas in law are unconvincing.[31] Yet, it is

31. Under international law one may reasonably advocate a *protective principle approach* when dealing with the extra-territorial use of national legislation. In this perspective, an international law subject *may assert* its authority over matters which produce a deleterious effect on another entity irrespective of where the acts take place or by whom they are committed, notably in respect of situations that take place wholly outside its territory, provided that it has an objective *domestic interest deserving protection*. It may be worth noting that such a head of jurisdiction does not entail the exercise of *universal* jurisdiction – though, as is known, States sometimes legitimately adopt grounds of jurisdiction which operate universally (Belgium did it for war crimes and so forth) – since the protective approach presupposes the existence of a subject-matter or a situation which is directly harmful to the State exercising jurisdiction. Stemming from several cases of States' practice the protective principle can be regarded as an accepted ground of jurisdiction under customary international law. This approach could amount to being a useful guide to solve the problem of international fiscal jurisdiction. In addition, the ECJ endorsed that approach when applying EU anti-trust law to conduct restricting competition adopted by companies located outside the territory of the Union, but indeed having repercussions within the EU since their activities were directed to affect the EU market (see *Wood pulp case*, joined cases 89/85 and others, *Ahlstrom*, judgment of 27 September 1988). It is here submitted that the aim to protect the internal market from conducts affecting it, is one of the most convincing rationale of that ruling. It is hardly necessary to add that financial transactions targeted by Article 4(1) point f) of the Directive as proposed by the Commission, caused harm to the euro zone and its market, so that a *proportionate legislative reaction* even having some limited extra-territorial effects, can be reasonably advocated and justified by the participating Member States. It is worth remembering that the piece of draft legislation squarely addresses the *fundamental need* to protect one of the major achievements of the European integration and the significant integration results achieved through the EMU since the Maastricht Treaty. Indeed, the Commission's initiative falls precisely within the financial crisis of *the common currency* that involved no less than five states. As the Commission clearly stated in its proposal, there is a strong need to protect that major achievement: '*The recent global economic and financial crisis had a serious impact on our economies and the public finances. The financial sector has played a major role in causing the economic crisis*

true that the more euro zone states endorse new forms of integration, the more contentious this process may become unless there is no clear acceptance of the principle of solidarity which permeates the Treaty on the European Union. In an ideal world, the FTT proposal would fit better into a solidarity scheme should its revenue benefit the process of European integration as a whole, becoming a new own resource of the EU.[32] In practice, however, that is just wishful thinking given the current legal basis (Article 311 TFEU): unanimity requirement is not being met, so far at least.

Monetary policy

Question 11

This question refers to the bond buying programmes of the ECB and their consistency with Article 123 TFEU.[33] At the time of writing (September 2013) both the ECJ and national courts did not touch upon it, though cases against the Outright Monetary Transactions (OMT) are pending before the General Court, as well as the German *Bundesverfassungsgericht.*[34] In *obiter dictum* of the ruling not to grant interim relief against the ratification of the ESM and *Fiscal compact*, the German Constitutional Court has already cast doubts over the OMT's consistency with the treaties.[35] In that respect, there are some points relatively clear in law that can be summarized as follows:

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whilst governments and European citizens at large have borne the cost. There is a strong consensus within Europe and internationally that the financial sector should contribute more fairly given the costs of dealing with the crisis and the current undertaxation of the sector'.

32. Poiares Maduro, 'A new Governance for the EU and the Euro: Democracy and Justice', Challenges of multitier governance in the EU. Effectiveness, efficiency and legitimacy, Brussels, 2013, 27, 41-42.
33. See ECB Decision 2010/281 of 14 May 2010 establishing a securities markets programme (2010) OJ L 124/8 whihc terminated in September 2012.
34. See T-492/12 *Von Storch and others v ECB*. The German Constitutional Court announced that it would rule on the compatibility of OMT with the German Constitution (BVerfG, 2 BvR 1390/12, 12 Sept. 2012, para. 202).
35. Ruling of the German Constitutional Court (12 September 2012, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12, paras 276-278).

1. Under Articles 123 TFUE and 18(1) Statute ESCB and ECB, the prohibition of monetary financing concerns only the purchase of bonds directly from Member States, while the ECB still enjoys the power to intervene on the secondary market, the latter being a necessary monetary policy instrument for any central banker.
2. Bond buying programmes establish no direct link with Member States.
3. ECB interventions pursue the objectives set out by the treaties, and namely the price stability throughout the entire euro zone. While protecting one of the most important achievement of the European integration, i.e. the common currency, ECB ensures the stability of the euro and, albeit indirectly, the functioning of the internal market. For nobody knows what kind of possible disruptive consequences (in terms of contagious and spill-over effects) may have the failure to establish an economic and monetary Union whose currency is the euro (Article 3(4) TEU). The opposite opinion would imply that the ECB should not intervene at all even if the collapse of the common currency is at stake.
4. Under the OMT, interventions are strictly conditioned to a request for a stability support by the relevant Member State which meanwhile must commit itself to an adjustment program (strict conditionality).
5. OMT interventions cover only one to three years' bonds. Thus, the risk for the ECB is quite reduced.
6. Should the beneficiary Member State fail to meet the program's objectives, ECB would terminate the intervention (for conditionality may be impossible to enforce). That would prove the ECB's sovereignty and independence, as set out by primary law.
7. All that being considered, ECB programmes and notably the OMT neither overstep its authority, nor are means to fund Member States. So in principle they do not circumvent the objective to prohibit monetary financing of euro zone states (in the sense stated by 7th recital of Council Regulation No. 3693/93: 'purchases made on the secondary market must not be used to circumvent the objective' of Article 123 TFEU).[36]
8. As a matter of fact, OMT has not been used so far since no country has applied for an OMT program. Arguably, there is no effective risk for the ECB to print money, risking hyperinflation.
9. Finally, a serious issue arises which concerns the relationship between a national supreme court and the ECJ: to avoid any risk of conflicting deci-

36. Contra, P. Craig, The Lisbon Treaty. Law, Politics, and Treaty Reforms, OUP, Oxford, 2013, 472.

sions the Bundesverfassungsgericht should consider to refer the case to the ECJ.

Question 12

Started in 2008, the financial crisis has shown several inadequacies of the system founded in the seventies on the mere harmonization of banking supervision under the principle of *home country control*. At the time of negotiating the Maastricht Treaty, Member States were not eager to lose control over their own banks. A sort of *competition in laxity*, aimed at attracting banking businesses where the applicable rules were softer or weaker, has occurred. As the euro area Summit held on 29 June 2012, the 'vicious circle between banks and sovereign' that is weakening the finances of euro zone needs to be cut. This necessarily implies additional financial market regulations, but not necessarily, at least in principle, further differentiation between the euro area and other Member States as long as the latter accept the new financial instruments and, as a consequence, an additional loss of sovereignty.

The treaties provided for a partial remedy: Article 127(6) TFEU is a legal basis having the very precise objective to center on the European level 'specific tasks' relating to the prudential supervisions of other financial credit institutions. As known, the European institutions have definitively opted for this way out with a view of creating a real *Banking Union*. Although the system is still under discussion, it would ultimately lead to an architecture based on two concentric circles: the larger one (including namely, the *SEFIV* rules and *CRV IV package*) is applicable to all Member States, the smaller (*i.e.* SSM, SRM and the *Single Bank Resolution Fund*) concerns the *special* regime applicable to the euro zone states aimed at creating an integrated system of European *supervision*. The mere coordination of national banking control, though enhanced it may be, is not enough for euro zone states, as the crisis of the financial sector clearly proved since 2008. On 12 September 2013, the EP endorsed a political agreement on draft legislation to introduce a single bank supervision system in the euro zone under the aegis of the European Central Bank. It will also change the way that the European Banking Authority (EBA) functions.

At the time of writing, two key elements compose the new banking union: the *centralization of banking supervision* and a *single resolution system*. The former is based on the assumption that fragmentation on banking control should be over in order to ensure that the financial markets have full confidence in the quality and independence of the banking supervision. Based on two Commission proposals, the Single Supervisory Mechanism (SSM) and

the amendments to the 2010 Regulation establishing the European Banking Authority (EBA) are being finalized by the institutions.

In essence, under the framework proposed by the Commission, the SSM is based on the ECB which will be responsible for supervising banks within the banking union, while relying on the specific know-how of national authorities. In close cooperation with them, the SSM will be responsible for the supervision of around 6,000 credit institutions in the euro area. The SSM would in particularly involve banks with assets of more than €30 billion, representing total assets (share of GDP) of the host country of more than 20 % (except where below €5 billion), along with national banks in the euro zone. Thus, in principle ECB would directly supervise the 130 biggest banks in the euro zone, while the other credit institutions would be under the control of a mixed system (EU and national supervision). Although the SSM is based on Article 127(6) TFEU, it is open to non-euro states that have established a close cooperation in accordance with Article 7 of the SSM proposal.

The Single Resolution System – the second key complement of the Banking Union – has been discussed since the Commission proposal presented on 10 July 2013 (Com(2013) 520 final, alongside with the harmonization of national bank resolution rules (the BRRD Directive). It is essentially founded on two pillars. First, a SRM (Single Resolution Mechanism) which is charged to apply uniform rules. Powers of resolution are conferred upon the Commission and the Board (a new EU body with full legal personality). National authorities are expected to execute resolution actions adopted by both the Commission and the Board. Second, a *Single Resolution Fund* is provided for. The Fund would be fed by contributions to be paid by the entities covered by the proposal. It should be noted that the proposal would apply only to defined entities established in the euro area MS, and those that have established a close cooperation arrangement with the SSM. Two of the main legal issues concern whether the Commission proposal may be correctly based on Article 114 TFEU and whether the delegation of powers to the Board is compatible with the Treaties and the *Meroni Doctrine*. It remains to be seen whether the SRM, being based on Article 114 TFEU, may be applied to entities established in certain Member States only. Given the limited space of this report, these issues cannot be dealt with here.

Question 13

In principle, the ECB is expected to fulfil multiple objectives pursuant to the treaties (price stability is, so to say, the *primus inter pares* goal, alongside with the support for the general economic policies in the Union). The core

task of maintaining price stability in the euro area will be complemented by supervision tasks on credit institutions. The role conferred to the EBC should involve the power to carry out some prudential supervision tasks of the EU banking system. (i) Restoring confidence in the banking system is functional to the euro's purchasing power, and (ii) Article 127(6) would be otherwise deprived of any *effet utile*. That being said, if, as it is likely, a SSM is going to be established, it will be *inter alia* necessary to separate monetary policy under the treaties and banking supervisory tasks in order to prevent potential conflict of interests and ensure autonomous decision-making for the performance of these tasks.

Nevertheless, the current treaties do not allow the ECB to act as a lender of last resort for Member States (clearly the so-called bond buying programmes of the ECB are quite different). It is not within the ECB's mandate. In addition, the 'no bail-out clause' in Article 125 TFEU, and the prohibition of direct financial facilities in Article 123 TFEU, require revision and, as a result, new tasks for the ECB. Overall, the monetary union was construed in the way to subject Member States to the logic of the market when they enter public debt. They only remain responsible for commitments to their international creditors. In the logic of the current economic and monetary union, the obligation to pursue a sound fiscal discipline is necessary to maintain the financial stability of the common currency as a whole.

Question 14

Shortly, the independence of the ECB does not necessarily imply that its activity is outside the judicial control of the ECJ. Under the well-established ECJ case-law, the EU is founded on the 'Rule of Law' so that effective legal protection in the fields covered by Union law is ensured.[37] However, it should be noted that it is also settled case-law that whenever an institution enjoys a certain or a fortiori wide degree of discretion, the judicial control is restricted to considering whether the exercise of that discretion contains a manifest error, constitute a misuse of power, or whether the institution clearly exceeded the bounds of its discretion. Arguably, *la justiciabilité* of both monetary policy decisions and open market operations could follow the same self-restraint approach.

37. Rulings 294/83 *Les Verts* and C-50/00 P, *Unión de Pequeños Agricultores*, para. 40; Opinion 1/09, para. 66; Article 19(1) TFEU.

Open question

Question 15

The EU has started focusing more on economic growth. That issue was addressed by the European Council of 28th/29th June 2012.[38] The ultimate objective is to enhance the social dimension of the EU in order to stimulate more popular support in a period of acute economic recession and which the related social crisis faced in several euro zone states.[39] It cannot be overlooked that, according to its founding principles,[40] the Union's aim is to promote the well-being of European people and that democracy is naturally related to the idea of economic development, social welfare, and ultimately to justice.[41]

38. See the *Compact for Growth and Jobs*, Annex to the European Council Conclusions of 28/29 June 2012.
39. For instance, more emphasis on growth seems necessary to tackle the risk of condemning the euro zone to austerity, as several MEPs argued (see the arguments raised by EMPs Sylvie Goulard, Daniel Cohn-Bendit, Guy Verhofstadt, and Pervenche Berès, as reported by Agence Europe No. 10565, 2 March 2012).
40. Articles 3(1) TEU and 9 TFEU (as to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health): B. de Witte, A.H. Trechsel et al., *Legislating After Lisbon. New Opportunities for the European Parliament*, EUDO Report 2010/1, 58 et seq.
41. A. Sen, *The Idea of Justice*, Allen Lane – Penguin Books, London, 2009, 345 et seq.

THE NETHERLANDS

Stefaan Van den Bogaert, Tom de Gans, and Johan van de Gronden[1]

Introduction

The national rapporteurs are very grateful for the contributions written by Thomas Beukers, Vestert Borger, Armin Cuyvers, Herman van Harten, Marlies Noort, and Thomas van Rijn.

Due to constraints on the size of this report, we have chosen not to answer the questions 10, 12, 13 and 15. As we are submitting a country specific report, the questions are interpreted as an invitation to provide an overview of the Dutch national political and academic debate.

Economic policy

EU legal order

Question 1

The prevailing view in the Netherlands is that primary Union law allows the adoption of the instruments that have been agreed upon in response to the euro area debt crisis.[2] One is aware of the fact that primary law has been stretched to (almost) its limits in issues such as voting procedures, sanctions, competences, and institutional balance. A treaty amendment is considered but is regarded as a big risk due to upcoming elections in Member States, referenda

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2. Some topics are dealt with below. For the Single Resolution Mechanism see Kamerstukken (documents Dutch Parliament), 33732, nr. 2, p. 7 and letter from the Minister of Finance to Parliament of 30 september 2013, FM/ 2013/1746 M; for the Six-Pack see Kamerstukken, 22112, nr. 1068.

and wishlists on diverse issues of Member States. Also, the strong notion exists that now is the time to solve the crisis in which we should not focus on a lengthy and time consuming treaty revision.[3] Dutch Parliament is divided on whether treaty amendment is necessary.

Non EU-instruments

ESM[4] and the revision of Article 136 TFEU

In the Pringle case the Court of Justice of the European Union (ECJ) ruled the ESM Treaty as such compatible with EU law.[5] In the explanatory memorandum[6] with the proposal of the Dutch act for approval of the ESM Treaty, the Dutch government states that the ESM Treaty has no provisions that aim to derogate the EU Treaties. Furthermore, the government states that the EU Treaties have supremacy over the ESM Treaty and also states that the aim of the ESM Treaty is to strengthen the European Union. During the parliamentary procedure for the act some questions were raised[7] about the compatibility of the ESM Treaty with the TFEU. Legal questions were asked about the no-bail out clause of Article 125 TFEU, the simplified revision procedure of Article 48 (6) EU in the context of the decision of the Council to revise Article 136 TFEU, and why the ESM was not incorporated in the EU Treaties.

The Advisory Division of the Dutch Council of State (hereinafter Council of State) has made some remarks on the ESM Treaty in its advice.[8] It noted that the wording of the Articles 3 and 14 deviates from the wording of Article 136 (3) TFEU as foreseen. Article 136 (3) TFEU reads 'the financial stability of the euro area as a whole' whereas Article 3 of the ESM Treaty reads 'the financial stability of the euro area as a whole *and of its Member States*'. Article 14 ESM Treaty opens the possibility for ESM to grant precautionary fi-

3. See also the annex to the letter of the Dutch government to national parliament of 15 February 2013 (on the state of the European Union), Kamerstukken 33551, nr. 1 and the debate following in the House of Representatives, Handelingen 2012-2013, nr. 59.
4. European Stability Mechanism.
5. See for comments by Dutch scholars: Vestert Borger, The ESM and the European Court's Predicament in Pringle, 14 German Law Journal 113-140 (2013); De Witte and Beukers, The Court of Justice approves the creation of the European Stability Mechanism: Pringle, 50 Common Market Law Review (2013) p. 805-848.
6. Kamerstukken, 33221, nr. 3.
7. Kamerstukken, 33221, nr. 6 and B. Handelingen 2011-2012 (report of the parliamentary debate in the House of Representatives) 22 and 23 May 2012.
8. Kamerstukken, 33221, nr. 4.

nancial assistance whereas Article 136 (3) TFEU allows financial assistance *if indispensable* to safeguard the financial stability. The Council of State also showed concern about the lack of the institutional checks and balances of the EU in the ESM. According to the Council of State, the democratic control by national parliaments of the functioning of national representatives in organs of the ESM, can only partially compensate for the lack of mechanisms for democratic control of the ESM. Furthermore, in Dutch legal doctrine it is put forward that Article 136 (3) TFEU is subject to different interpretations.[9]

There was some discussion in the Netherlands whether the ESM direct bank recapitalization instrument, which was not an issue in the Pringle case, could be based on Article 19 ESM Treaty.[10] The Dutch Parliament agreed with the position of the Dutch government that Article 19 ESM Treaty allows for this instrument and that the application of the emergency procedure should not be allowed for this instrument.[11]

Fiscal Compact

The Fiscal Compact gave rise to more legal discussions than the ESM Treaty in the Netherlands.

The first discussion was whether the same result could be reached within the framework of the EU. According to the Dutch government it is possible to reach the same result within the EU framework. Although the Dutch government did not give detailed information on how this could be done,[12] arguably it could be done in different instruments by using as a legal basis Article 136 (1) TFEU, and Article 352 TFEU if necessary in combination with enhanced cooperation.

The Council of State showed much criticism on the Fiscal Compact in its advice on the proposal of the act for approval of the Fiscal Compact.[13] Whereas according to the Council of State the ESM Treaty could be considered as a necessary external supplement to the institutional framework of the

9. See F. Amtenbrink, Naar een effectievere economische governance in de Europese Unie, SEW 2011, pp. 435 en 436.
10. FD.nl, 2 July 2012, http://fd.nl/economie-politiek/302221-1207/juristen-opnieuw-ratificatie-esm-nodig?visited=true and 12 July 2012, http://fd.nl/Print/krant/Pagina/Opinie/728020-1207/wijziging-van-het-esm-verdrag-is-onnodig_bron_fd_krant, both last visited on 30 July 2013.
11. Kamerstukken 21501-07, nr. 1008, p. 2. See also Kamerstukken 33551, nr. 1.
12. Kamerstukken, 33319, nr. 6.
13. Kamerstukken, 33319, nr. 4.

EU, the Fiscal Compact is not a complementary, but a parallel structure with legal obligations which for a large part overlap with the EU legal framework. The Council of State is concerned about this development because it could undermine the normative power of existing EU obligations.

A second question was whether the voting arrangement set out in Article 7 of the Fiscal Compact complies with Article 126 TFEU. The obligation of Article 7 compels Contracting Parties to behave in a certain way in advance of decision-making by the Council and serves the purpose of the Economic and Monetary Union. According to the Dutch government, Article 7 complies with Article 126 TFEU and the secondary legislation regarding the SGP.[14] According to the Council of State Article 7 seems to be an amendment of Article 126 TFEU. Since this is not possible because of the primacy of Union law, it wonders what happens if a Contracting Party were not to behave according to Article 7. The Council of State considers European Council conclusions more suitable for such political agreements. The Dutch government acknowledges that this obligation cannot be enforced before the ECJ. It notes, however, that a treaty obligation approved according to 25 national constitutional procedures is more effective than a political agreement in the European Council.[15]

In Dutch legal doctrine concerns are raised as to whether, for example, primary EU law would permit the use of EU institutions in international treaties.[16]

Question 2

In the Netherlands compliance with the EMU criteria is considered to be one of the top priorities of the Dutch budget plans.[17] In Dutch legal doctrine it is contended that budget policy is shaped to a large extent on the EU level and that only little room is left for the national legislature.[18]

The Dutch government is of the opinion that the supranational measures of the Six-Pack, Two-Pack etc. on the one hand, and the Fiscal Compact on the

14. Kamerstukken 33319, nr. 3 and 6.
15. Kamerstukken, 33319, nr. 4.
16. See V. Borger and A. Cuyvers, Het Verdrag inzake Stabiliteit, Coördinatie en Bestuurin de Economische en Monetaire Unie; de juridische en constitutionele complicaties van de eurocrisis, SEW 2012, p. 381-387.
17. See for example Kamerstukken 33319, nr. 3, p. 2 et seq.
18. See M. Diamant and M.L. Emmerik, Het Nederlands budgetrecht in Europees perspectief, Tijdschrift voor Constitutioneel recht 2013, p. 115.

other constitute one coherent package. Although in general debates on the future of the European integration process the Dutch government is of the view that the current division of powers between the EU and the Member States should be reconsidered, its strong feeling is that measures taken in the wake of the euro crisis are necessary in order to address the deficits of economic governance.[19] In its view, the added value of the Fiscal Compact is the political confirmation of the commitment of the Euro countries to sound fiscal policies and to the improvement of procedural mechanisms geared towards compliance with the EMU norms.[20] In this regard, a very important development is the obligation to lay down the balanced budget rule in national legislation. Furthermore, the Dutch government has expressed the wish to integrate the provisions and principles of the Fiscal Compact in the EU legal order in the long run.[21]

In Dutch legal doctrine it is argued that the adoption of measures such as the Six-Pack, the Two-Pack, and the Fiscal Compact has led to a shift of powers from the national level to the EU level.[22] In contrast with this point of view, the Dutch government has argued from a political perspective that sovereignty has already been transferred with the Stability and Growth Pact (SGP) (as set out in EU primary and secondary law). All developments that came after the entering into force of the SGP (Six-Pack, Two-Pack, Banking Union) are a logical consequence of the choices made in the SGP at the end of the nineties of the previous century.[23]

19. See the 'Staat van de Europese Unie 2013', Kamerstukken 33 551 nr. 1, p. 4.
20. See Kamerstukken 33319, nr. 3, p. 3.
21. See Kamerstukken 33319, nr. p. 5.
22. See e.g. M. Diamant and M.L. Emmerik, Het Nederlands budgetrecht in Europees perspectief, Tijdschrift voor Constitutioneel recht 2013, p. 122 et seq. and J.W. van de Gronden, Bestrijding eurocrisis en de EU-begrotingsregels: alleen handhaving van afspraken of ook soevereiniteitsoverdracht, SEW 2013, pp. 368 and 369.
23. For example Handelingen TK 2012-2013, 34-5-47.

Question 3

Contractual arrangements[24]

In December 2012 the European Council asked its president to explore 'the feasibility and modalities of mutually agreed contracts for competitiveness and growth: individual arrangements of a contractual nature with EU institutions could enhance ownership and effectiveness'. Where the European Council clearly mentions individual arrangements of a contractual nature *with EU institutions*, a French-German paper[25] at the end of May 2013 leaves the role of the European institutions aside. In the paper 'Member States and the European level enter into contractual arrangements', the concept 'European level' could also refer to the ESM because the arrangements are to be complemented by 'the creation of a specific fund for the Euro area' as part of a solidarity mechanism with financial and non-financial incentives.

Since the arrangements are to focus on the preventive phase of the SGP,[26] it is not likely that the concerned ESM Member is experiencing, or is threatened by, severe financing problems, and for which financial assistance is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.[27] This implies that the ESM Treaty is to be amended in such a case. Even more notable is, however, that this seems to be a development towards European (possibly EU) determination of general economic, social and tax policy measures. As a consequence, European teeth bite not only in exceptional situations such as excessive macro-economic imbalances, but also as a going concern. This raises more fundamental questions on the sovereignty of Member States.

In case the contractual arrangements are linked to the ESM, then just as in the ESM the European Commission could have an implementing role in

24. For a reaction of the Dutch government on the communication of the Commission Towards a Deep and Genuine Economic and Monetary Union. The Introduction of a Convergence and Competitiveness Instrument on this issue (COM 2013 (165)) see: Kamerstukken 21501-20, nr. 780.
25. France and Germany – Together for a stronger Europe of Stability and Growth, 30 May 2013 http://www.dublin.diplo.de/contentblob/3897436/Daten/3299763/France_and_Germany.pdf and http://www.ambafrance-dk.org/IMG/pdf/Together_for_a_stronger_Europe_of_Stability_and_Growth.pdf: both last visited on 23 September 2013.
26. The corrective phase of the SGP already consists of effective ways to force a Member State to act in a certain way.
27. See Articles 3 and 12 of the ESM Treaty.

which the Commission negotiates and the ESM Board of Governors decides. It is good to be aware of the different institutional set-up of the ESM as compared to the EU Treaties, with its different checks and balances, for instance no Commission act as guardian of the Treaty.

Question 4

The Dutch government contends that democratic involvement in the decision-making process in the EMU should be improved within the existing EU framework.[28] An interesting instrument that national parliaments can use in this regard the so-called 'yellow and orange card procedures' introduced by the Treaty of Lisbon.[29] The national parliaments should intensify their role, when mandating their government and exercising their checks and balance powers.[30] Furthermore, the Dutch government argues that the powers of the European Parliament should be reinforced.[31]

In this regard it should be noted that the issue of democratic legitimacy has been subject of a lively debate in the Netherlands.[32] The Senate has commissioned a report[33] from the Advisory Division of the Council of State on this subject. In a EMU the Council of State foresees far-reaching 'Europeanisation' of budgetary policy, structural economic policy, and banking supervision. In so far as the EU itself lacks sufficient own funds, the decision-making mechanisms should be designed in such a way as to reflect the need for national parliaments to be adequately involved where national public funds are being used. However, this must be done in such a way as to safeguard the effectiveness of the process of deciding on the use of the funds. Hybrid forms in which both national parliaments and the European Parliament are involved, and which do not amount to more than an exchange of information, merely make the situation unclear. An example of this is the conference referred to in Article 13 of the Fiscal Stability Treaty. A role for national parliaments at European level is therefore worthwhile only if it is ac-

28. Kamerstukken 33551 nr. 1, p. 8 and 9.
29. Kamerstukken 33551 nr. 1, p. 8.
30. Kamerstukken 33551 nr. 1, p. 9 and 10.
31. Kamerstukken 33551 nr. 1, p. 10.
32. See e.g. J.W. van de Gronden, Bestrijding eurocrisis en de EU-begrotingsregels: alleen handhaving van afspraken of ook soevereiniteitsoverdracht, SEW 2013, pp. 368 and 369. See also M. Diamant and M.L. Emmerik, Het Nederlands budgetrecht in Europees perspectief, Tijdschrift voor Constitutioneel recht 2013, pp. 123 and 124.
33. Full tekst in English can be found here: http://www.raadvanstate.nl/assets/adviesdocumenten/W.01.12.0457-I-english.pdf: last visited on 18 October 2013.

companied by specific powers within the European decision-making process, in particular in the euro area.

According to the Council of State the democratic safeguards that are necessary when sovereignty is transferred to the European Union will have to be sought initially in the powers of the European Parliament. Democratic involvement should, after all, take place as much as possible at the level at which the decision-making takes place. Where the decisions involve legislation, the European Parliament should have the right of codecision. Where they are in the nature of administrative decisions, there will be accountability to the European Parliament. Ultimately, this duty of accountability should be capable of resulting in the resignation of the European Commission or individual Commissioners.

A solution will have to be found here for cases in which either legislation or administrative decisions apply only to the euro area member states. From the perspective of democratic involvement it would be undesirable for members of the European Parliament representing non-euro area member states to decide on such matters. This problem could be solved by adjusting the decision-making rules in the European Parliament, but the establishment of a separate parliament for the euro area is also a possibility. This possibility would institutionalise a departure from the principle of the unity of the European Union and should, therefore, be considered only if divergence becomes unavoidable in view of the parliamentary powers that must be exercised. This would have advantages and disadvantages and would in any event necessitate a treaty amendment or a new treaty between the euro area member states.

In general, it is noted that developments such as the conclusion of the Fiscal Compact leads to the 'depoliticization' and 'constitutionalization' of financial-economic policy; although this may be necessary in order to make the euro sustainable, this development is controversial in the constitutional tradition of many European countries.[34]

Question 5

The EU faces many legal challenges with regard to financial market regulation and supervision. The main Dutch attention is paid to the following issues.

34. See J.H. Reestman, Constitutioneel minimalisme, Tijdschrift voor Constitutioneel recht 2013, p. 23.

On the basis of Article 114 TFEU the EU legislator is proceeding at a unification of the financial market law of the Union, while before 2010 the Union legislation was mainly harmonizing existing national laws through directives.[35] Although the case law of the ECJ has accepted that the term 'harmonisation' in Article 114 TFEU encompasses unification as the most intense way of harmonisation, the question arises whether this legal basis can still be used when it cannot be established that national legislation in the field exists, or is likely to exist. The preservation of the functioning of the internal market is not recognised in the Treaty as a common policy, but in reality it is, at least with regard to the internal financial market.

At the moment, a form of unitary supervision is organised through the European Supervisory Authorities.[36] The question can be raised whether Article 114 TFEU – on which basis the Authorities are established – cover the extent of the supervision powers of those Authorities. It is clear that coordination of the activities of the national supervisory authorities falls within the ambit of the legal basis as this is certainly 'approximation of provisions laid down by (...) administrative action'. A further question is whether Article 114 permits that, where coordination is insufficient or not successful, the Authority substitutes itself for the national supervisor ordering it a certain conduct or addressing a decision to an operator on the market prescribing certain behaviour.[37]

A different situation exists where it would be considered necessary that the unified legislation was supervised by a single Union supervisor with enforcing powers towards market participants. An example is given by Article 21 ff of Regulation (EU) No 1060/2009 concerning rating agencies[38] entrusting the European Securities and Markets Authority (ESMA) with extensive powers. This Regulation is based on Article 114 TFEU, but the question is whether the establishment of such a centralised supervision at European level is within the reach of this Article. Can such a system be considered as the ultimate form of the 'approximation of provisions laid down by (...) administra-

35. For example Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176/1.
36. See Regulation (EU) Nos 1093/2010, 1094/2010, and 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing respectively the European Banking Authority, the European Insurance, the Occupational Pensions Authority, and the European Securities and Markets Authority, OJ 2010 L 331/12, 48 and 84.
37. See Articles 9(5), 17, 18 and 19 of the Regulation referred to in the previous footnote.
38. OJ 2009 L 302/1 as modified by Regulation (EU) No 513/2011, OJ 2011 L 145/30.

tive action'?[39] The question is relevant as in the future the Union legislator may want to have recourse to more instances of centralised Union supervision, as is shown by the proposal of the Commission on the SRM.[40]

The SRM is subject to extensive political debate in the Netherlands. The question is raised whether it is legally possible to restrict Union legislation based on Article 114 to a certain group of Member States. In the SRM proposal the regulation would only apply to banks to which the Regulation conferring specific tasks to the ECB concerning policies relating to the prudential supervision of credit institutions applies. Those are the banks established in the Member States which have the Euro as their currency plus those Member States which adhere to the SSM. The Dutch government regards Article 114 TFEU as a valid legal basis for the SRM proposal.[41] The House of Representatives, however, has accepted a motion that this legal basis is not desirable and calls on the government to find another legal basis with other like-minded Member States.[42] This call seems to be very challenging for the government. Hence, the motion states that the use of Article 114 for an instrument in which 10 out of 28 Member States have an opt-in is in contradiction with the principles of the internal market. Alternatives mentioned are Article 352 TFEU and enhanced cooperation in combination with Article 114. However, if there would be a problem with the principles of the internal market, these problems would not cease to exist when those alternatives are applied. In favour of Article 114 it might be argued that there are objective circumstances which distinguish the participating Member States from Member States not participating in the SSM. A further question would be whether the conditions for enhanced cooperation (Articles 326-334 TFEU) are fulfilled when no qualified majority could be reached for a certain proposal. In other words, are the financial markets so integrated that any enhanced cooperation

39. See in this regard also Case C-270/12, United Kingdom v Council & EP in which AG Jääskinen gave an opinion on 12 September 2013. The AG proposes Article 28 of 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 (OJ 2012 L 86, p. 1) be annulled on the grounds that Article 114 TFUE is not a proper legal basis for its adoption.
40. Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism, a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, doc. COM(2013) 520 final.
41. Kamerstukken 21501-07 nr. 946 and 33 732 nr. 2.
42. Kamerstukken 21501-07 nr. 1089.

would 'undermine the internal market' or would 'constitute a barrier to, or discrimination in trade [in services] between Member States'?

It is also important to what extent delegation of power to European Supervisory Authorities is in conformity with the 'Meroni' case law,[43] according to which no large discretionary powers can be delegated to bodies other than the institutions. What does the notion of 'large discretionary powers' mean in the field of supervision of financial markets? It seems difficult to define supervisory powers so narrowly that the decision to be taken does not entail any discretion. The question is therefore how much room for appreciation can be left to the authorities or bodies which are entrusted with supervisory powers.[44] Or, is it under the actual Treaty necessary to entrust such powers to the Commission or another institution?

Legal orders of the Member States

Question 6

The relevant Dutch *constitutional legal framework* for this question consists mainly of Article 105 Dutch Constitution – which establishes that the budget is adopted by law (and thereby the budget power of government and Parliament), and that Parliament controls the execution of the budget – and of Article 68 Dutch Constitution – which obliges government to provide requested information to Parliament. As will be seen below, in the Netherlands the European measures pose relevant challenges with regard to their compatibility with the Dutch Constitution and with regard to the budgetary autonomy of Parliament.

The *ESM Treaty* is considered by Diamant and Van Emmerink to restrict the authorization right of Parliament, as it increases – in the form of an unconditional commitment to the amount of 40 billion Euros – the part of ex-

43. ECJ 13 June 1958 (Meroni c. High Authority, 9/56), [1957 and 1958] ECR 133. See also the pending Case C-270/12, United Kingdom v Council & EP.
44. Response Ministry of Finance from the Netherlands on the European Commission consultation on the Review of the European System of Financial Supervision: 'With the Meroni-doctrine in mind, we believe there should be no ambiguity about the scope of the intervention powers of the ESAs. (...) Examples are found in the provisions on 'emergency situations', 'European system of resolution and funding arrangements', 'coordination function', and the prohibition or restrictions of certain financial activities.'

penses that is based on existing legal obligations.[45] Parliamentary involvement in ESM decision-making about the use of this amount is – in case unanimity applies in the ESM Board of Governors – secured through the normal accountability mechanism providing responsibility of the Minister of Finance to Parliament. This involvement is confirmed in procedural agreements made between the Minister and Parliament, which provide for the prior provision of information, whenever possible, to Parliament.[46] When the emergency decision-making procedure of Article 4 ESM Treaty is applied, both the Dutch government and Parliament lose their influence over ESM decision-making, as the voting rights of the Netherlands in that case are not high enough to block a decision.

Different positions have been taken in Dutch academic debate about the compatibility of the *Fiscal Compact* with Article 105 Dutch Constitution. Van Rossem argues that Article 105 Dutch Constitution does not only prescribe the use of the formal instrument of 'law' for the adoption of the budget, but thereby also prescribes the material norm of 'democratic control'. Ratification of the Fiscal Compact violates this norm, he argues, since it removes the possibility to make fundamental choices on how to stimulate the Dutch economy.[47] The dominant position, however, seems to be that the Fiscal Compact is compatible with the Dutch Constitution,[48] based on the dominant, narrow reading of Article 105 Dutch Constitution. Nonetheless, tensions with the budgetary autonomy of Parliament are observed,[49] and the limit established by the German *Bundesverfassungsgericht* of hollowing out any 'meaningful influence' of Parliament's budgetary power is considered an important

45. Diamant en Van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', TvCR (2013) pp. 94-129 at 104.
46. Kamerstukken, 21501-07, nr. 942.
47. Van Rossem, 'Pleidooi voor een materiële soevereiniteitsopvatting', TvCR (2013) pp. 49-54 at 50-51.
48. See in this sense e.g. Diamant en Van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', TvCR (2013) pp. 94-129 at 110; Warmelink, 'Over afwijken en afwijkingen van de Grondwet', TvCR (2013) pp. 44-48 at 46; J.H. Reestman, 'Constitutioneel minimalisme. Het Stabiliteitsverdrag in de Nederlandse rechtsorde', TvCR (2013) pp. 6-27.
49. Diamant en Van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', TvCR (2013) pp. 94-129 at 110; Warmelink, 'Over afwijken en afwijkingen van de Grondwet', TvCR (2013) pp. 44-48.

tool to assess future EU measures, also for its impact on the Dutch Parliament.[50]

Diamant and Van Emmerik consider the rules of the *Six-Pack* and *Two-Pack* to be legally compatible with the budget powers of Parliament in Article 105 Dutch Constitution, but at the same time also as a *de facto* limitation of free economic policy choice.[51]

Question 7

The Constitution of the Kingdom of the Netherlands (Grondwet) lays down the budget right for the Dutch Parliament (consisting of the House of Representatives and the Senate).[52] The government holds the initiative to present budget plans. The budget Acts of Parliament (normally each of the ministries has its own Act) authorize the government to expend up to a specific maximum. For higher government expenditures during a budgetary year the government needs parliamentary authorisation.

The parliamentary budget control by the House of Representatives focuses in practise on governmental policy issues and choices, whereas the role of the Senate is more concentrated on authorisation of the budget. Parliament is supported by the Court of Audit in the parliamentary control over government revenues and expenditures. The Court of Audit focuses on legitimacy and efficiency of the government budget.[53] It has the role to approve or disapprove the balance sheet of the State's revenues and expenditures. Their opinion will be presented to Parliament, which maintains political control over the government budget.

During the budgetary year, the obligation of Ministers and State Secretaries to inform Members of Parliament is of vital importance for the legitimacy and accountability of the economic policy. On the basis of Article 68 Constitution 'Ministers and State Secretaries shall provide, orally or in writing, the Houses either separately or in joint session with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State.' Further detailed rules on the man-

50. Diamant en Van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', TvCR (2013) pp. 94-129 at 110-111.
51. Diamant en Van Emmerik, 'Het Nederlandse budgetrecht in Europees perspectief', TvCR (2013) pp. 94-129 at 117.
52. See Articles 104 and 105 of the Dutch Constitution, which require that budgetary decisions must be taken by Act of Parliament.
53. See: http://www.courtofaudit.nl/english/Organisation.

agement of the State's finances are laid down in the Comptabiliteitswet (Government Accounts Act).

In this regard, it should be noted that it is apparent from Dutch legal literature that parliamentary control is in practice rather limited. Approximately 90 % of the government budget is normally already engaged of a budgetary year due to several reasons (such as Acts of Parliament, previous decisions, contracts, international obligations).[54] It is submitted that the euro crisis measures taken in the context of economic governance of the EMU – most notably the golden rule of a balanced budget, the Six-Pack and Two-Pack – will further limit the room for manoeuvre for the Dutch parliament. At this moment a proposal is pending at the Dutch Parliament to enhance further budgetary discipline (Wet Houdbare Overheidsfinanciën/Act Sustainable Government Finances),[55] which will be discussed in the answer to question 8.

Furthermore, it should be noted that the Dutch Parliament has approved the ESM Treaty on 5 July 2012.[56] The adopted resolution of Harbers MP c.s. ensures parliamentary involvement if the ESM Board of Governors requests callable shares.[57] Raising the total ESM authorised capital stock would entail a change of the ESM Treaty which has to be approved by parliament.[58]

Moreover, it should be pointed out that in order to ensure the democratic legitimacy and accountability of EMU economic governance and the role played by the Dutch Minister of Finance as a Member of the ESM Board of Governors, procedural arrangements between the Minister of Finance and Parliament are established. These arrangements will be formalized in a protocol on the provision of information.[59] The precise legal status of this future information protocol is somewhat obscure, but the procedure agreements and future protocol generally aim at prior involvement of the Dutch Parliament to provide an opportunity to give feedback on the use of the ESM resources. If it is not possible to provide information beforehand, the Minister needs to make a parliamentary reservation for irrevocable decisions. This is not possible in the context of an emergency voting procedure (Article 4 (4) ESM Treaty). However, the Minister will still give his viewpoint to Parliament and, if pos-

54. See: Bovend'Eert and Kummeling, Het Nederlandse Parlement, 2010, p. 336. Diamant, Van Emmerik 2013, p. 97.
55. See: Kamerstukken, 33416, nr. 2.
56. See: Kamerstukken, 33221, nr. 2. Act of Parliament of 5 July 2012, Staatsblad 2012, 307.
57. See: Kamerstukken, 33221, nr. 11.
58. See: Kamerstukken, 21501-07, nr. 942, p. 3.
59. Kamerstukken, 21501-07, nr. 942. The legal nature of the protocol is still unknown.

sible, will debate with Parliament. More generally, the Minister of Finance will inform Parliament on a periodical basis of his activities in the context of the ESM, but will of course be limited by the inviolable character of ESM documents (Article 32 (5) ESM Treaty) and the ESM professional secrecy and immunity (Article 34 ESM Treaty; Article 35 (1) ESM Treaty). Sometimes the government provides Parliament with information on a confidential basis. Such information may not be part of public debate.

In the papers of the Dutch Parliament, a short report can be found of an informal interparliamentary conference held at the Danish Folketing in Denmark on 11 March 2013 with participation of Dutch MPs.[60] As becomes clear from the report, the (possible) ways to ensure democratic legitimacy and accountability of economic governance in the EMU are central themes of contemporary, continuous discussion between the Dutch and other national parliaments, aiming to stay proactive players in a context of strengthened parliamentary cooperation in the EU.

Question 8

Article 3 Fiscal Compact

The most important provision of the Treaty on Stability, Coordination and Governance (Fiscal Compact) is without doubt Article 3. Article 3(1)(a) requires the Contracting Parties to have a budget that is in balance or in surplus. As becomes apparent from Article 3(1)(b), this rule shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective (MTO), as defined in the revised Stability and Growth Pact (SGP) with a lower limit of a structural deficit of 0,5 % of GDP. In case of significant deviations from the MTO or the adjustment path thereto, Article 3(1)(e) requires that an automatic correction mechanism be triggered, aiming to correct the observed deviations over a defined period of time.

Article 3(2) Fiscal Compact requires Member States to comply with the balanced budget rule in Article 3(1) by implementing it in national law within one year after the entry into force of the Treaty. This implementation should take place through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. Moreover, Article 3(2)

60. See Kamerstukken, 33594, A, nr. 1.

Fiscal Compact states that the Contracting Parties shall put in place at national level, whilst fully respecting the prerogatives of national parliaments, the correction mechanism referred to in Article 3(1)(e) on the basis of common principles to be proposed by the European Commission. These principles are laid down in a communication published by the European Commission on 20 June 2012.[61]

Although the Fiscal Compact already entered into force on 1 January 2013, at the time of writing the Netherlands has not yet ratified it. A legislative proposal approving the Treaty is currently pending before Parliament.[62] Nevertheless, the government has already made clear how it wants to comply with the implementation duties set out in Article 3(2) of the Treaty. It has introduced a legislative proposal, entitled Wet houdbare overheidsfinanciën (Law on Sustainable Government Finances, 'Wet HOF'), which inter alia aims to incorporate the balanced budget rule and the automatic correction mechanism into national law.[63] The proposal has been approved by the House of Representatives on 23 April 2013 and is currently pending before the Senate.

The Dutch government aims to comply with the balanced budget rule of Article 3(1)(a) Fiscal Compact by requiring in Article 2(3) Wet HOF that the Minister of Finance, when conducting the cyclical budgetary policy, should take into account the relevant European budgetary norms, among which the country specific MTO prevailing at any moment. The correction mechanism is implemented through Article 2(4) Wet HOF. It states that the competent ministers will take adequate measures limiting expenses and/or raising revenues in case the Minister of Finance concludes that the budgetary policy is not in compliance with European budgetary rules and procedures. Article 2(5) Wet HOF subsequently specifies that the previous paragraph in any case applies when a Union institution concludes that the budgetary policy does not lead to respect of the MTO and issues a recommendation in this regard. In such a case the required correction measures need to be in conformity with said recommendation. As becomes clear from Article 2(6) Wet HOF, the Minister of Finance takes the required correction measures on the basis of a correction plan to be presented to Parliament.

61. Communication from the Commission, Common Principles on national fiscal correction mechanisms, 20-06-2012, COM(2012) 342 final.
62. Kamerstukken, 33319, nr. 2 ('Wetsvoorstel goedkeuring VSCB').
63. Kamerstukken, 33416, A ('Wet HOF').

The Dutch legal scholars Reestman, Van Emmerik and Diamant[64] raise the question whether the Dutch government fully complies with the implementation duties set out in Article 3(2) Fiscal Compact via the Wet HOF. They point out three main aspects.

First of all, the balanced budget rule of the Wet HOF does not indicate clearly which MTO it relates to. In the explanatory memorandum to the Wet HOF, it is stated that the balanced budget rule does not need to be quantified given that the MTO-requirement flows directly from the SGP. However, the MTO-requirement laid down in the Fiscal Compact is considerably stricter compared to the one laid down in the SGP.[65]

Secondly, it remains to be seen whether the Wet HOF, being an 'ordinary law', meets the requirement in Article 3(2) Fiscal Compact to implement the balanced budget rule through 'provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. According to unwritten principles of Dutch constitutional law, the legislature cannot bind itself towards the future, let alone its successor.

Thirdly, a similar question concerning the binding force and the permanent character of the Wet HOF can be raised as regards the automatic correction mechanism. The European Commission has made clear in its communication on the common principles governing the mechanism, that the legal status of the mechanism should be such that its provisions cannot be simply altered by an ordinary budgetary law.[66] Yet, it is doubtful whether the Wet HOF, as soon as austerity measures require a change in (budgetary) laws, will be capable of curbing the legislature's prerogatives.

64. J.H. Reestman, 'Constitutioneel minimalisme – Het Stabiliteitsverdrag in de Nederlandse rechtsorde' (2013) TvCR 1, pp. 17-23; M. Diamant & M. van Emmerik, 'Verplicht begrotingsevenwicht in Nederlandse (Grond)wet naar buitenlands voorbeeld?' (2012) *NJB* (internet version consulted).
65. It should be noted that the stricter MTO-requirement in the TSCG does not constitute a violation of Union law. Nothing, in principle, prevents Member States from imposing on themselves, in areas that do not belong to the exclusive competence of the Union, on the basis of a Treaty concluded inter se stricter requirements than those following from Union law. This approach is in conformity with the principle of supremacy of Union law, which is also specifically referred to in Article 2(2) TSCG.
66. Communication from the Commission, Common Principles on national fiscal correction mechanisms, 20-06-2012, COM(2012) 342 final, para. 1.

According to the Dutch government and the Advisory Division of the Council of State Article 3 (2) Fiscal Compact simply confirms already existing obligations under the Stability and Growth Pact.[67]

Articles 4, 5, and 6 Fiscal Compact

As becomes apparent from the explanatory memorandum to the legislative proposal approving the Fiscal Compact,[68] the Dutch government does not consider it necessary to accommodate the duties arising from the Articles 4, 5, and 6 Fiscal Compact into its national legal order.

As far as Article 4 is concerned, this provision simply reiterates the 'debt rule' laid down in Article 2(1a) of Regulation 1467/97, the corrective part of the SGP, and as such does not, one can even say should not be, implemented into national law. Concerning Articles 5 and 6 Fiscal Compact, dealing with economic partnership programmes and ex ante reporting obligations on debt issuance, Recital 8 to the Fiscal Compact makes clear that these initiatives will be incorporated in secondary Union legislation and not in national law.[69] In fact, this has already happened with the entry into force of the 'Two-Pack'. Articles 8 and 9 of Regulation 473/2013 deal with reporting on debt issuance and economic partnership programmes respectively.

Question 9

In the Netherlands only one challenge has been brought. This challenge concerned the ESM Treaty and was brought by Geert Wilders, a Dutch Member of Parliament, in summary proceedings. Wilders claimed that the ESM constituted an unlawful act (*onrechtmatige daad*) against him as a citizen.

On 1 June 2012, the President of the Court of First Instance in The Hague (*Rechtbank*) rejected his challenge.[70] Essentially the President confirmed that, under Article 81 of the Dutch Constitution, Dutch courts cannot intervene in the legislative process, and that it was up to the legislative organs to decide on the adoption of the ESM. Only where a law violates a directly applicable

67. Kamerstukken 33416, nr. 3, p. 6, nr. 4, pp. 8-9 and nr. 8, pp. 4 and 6.
68. Kamerstukken 33319, nr. 3, p. 10.
69. It should be noted, however, that it is rather unusual for a Treaty to contain duties that are to be realized by an entity that is not a Party to it. For this reason it is understandable that Recital 8 states that the Contracting Parties 'welcome' and 'take note' of the Commission's legislative proposals in this regard.
70. Rechtbank Den Haag 1 June 2012, case nr. 419556 / KG ZA 12-523. LJN: BW7242.

norm of public international law or a norm of EU law can a Dutch court intervene. The President therefore concluded that there had been no unlawful act, that there was no ground for the Court to intervene, and that the political judgment of the Dutch legislation was to be respected. Interesting in this regard is that Wilders had also argued that the ESM violated Article 125 TFEU, but that the President followed the opinion of the Dutch legislature that there was no such conflict.

In this context it is also important to add that the Netherlands does not have a constitutional court, and that Dutch courts are even expressly prohibited under Article 120 of the Dutch Constitution to test formal laws against the Dutch Constitution. This also means that future challenges to EMU related national instruments, or at least challenges with any prospect of success, are unlikely, in stark contrast to other Member States.

Lastly, and in relation to question 8, there is the theoretical option that future challenges might arise where the Wet HOF, or the Fiscal Compact itself, is not respected (this because of the possible direct effect of Treaties in the Dutch legal order). Here, it suffices to say that such actions seem highly unlikely to succeed, already because parties would have difficulties securing standing. Nevertheless, this might be an interesting point to compare more generally.

Monetary policy

Question 11

The relevant legal framework regarding ECB action consists of Articles 14 and 18 of the ESCB/ECB Statute, Article 123 TFEU, and the ECB General Documentation.[71]

Political debate

The Dutch member of the Governing Council, Klaas Knot, supports the OMT bond buying programme, although he is aware of the risk of politicization of

71. 'The Implementation of Monetary Policy in the Euro Area. General Documentation on Eurosystem Monetary Policy Instruments and Procedures', last amended by ECB Decision 2010/30.

the ECB as a consequence of sovereign bond buying.[72] The Dutch government, in light of the independent position of the ECB of which the Netherlands is traditionally an advocate, formally refrains from commenting on ECB action.[73] In fact, the then Minister of Finance de Jager (CDA) in his answer to a parliamentary question on 17 September 2012 refused to take a position on ECB government bond acquisition: 'I emphasise that the ECB is independent in conducting its monetary task and therefore I do not pronounce myself on the ECB policy concerning the acquisition of sovereign bonds'.[74] In May 2011 de Jager did express his concerns about the nationality balance in the ECB Executive Board when Italian Draghi was proposed as new President of the ECB.[75]

Several opposition parties in Parliament have made their position about ECB intervention known. In a parliamentary debate of 26 June 2012 the (opposition) Socialist Party argued that the ECB should more actively buy sovereign, and not only of stressed countries. No other parties spoke out in support of such an action, and the (at that time opposition) Labour Party accused the Socialist Party of 'advocating an unlimited opening up of the ECB money tap'.[76] Nonetheless, in its election-programme for the 2012 parliamentary elections, the Labour Party also argued for an active role by the ECB, including sovereign bond acquisition as a measure of last resort.[77] Also, the Labour

72. Banning and Kalse, 'Overheidsfinanciën draaien nu alleen om geloofwaardigheid', NRC Handelsblad, 23 September 2011.
73. Between October 2010 and April 2012 the Netherlands had a minority government consisting of the Liberal Party (VVD) and Christian-democratic People's Party (CDA), and supported in Parliament by the Freedom Party (PVV). Since November 2012 the Netherlands is governed by a coalition of the Liberal Party (VVD) and the Labour Party (PvdA).
74. Tweede Kamer, vergaderjaar 2011-2012, aanhangselnummer 3496 (ah-tk-20112012-3496, ISSN 0921-7398, 's-Gravenhage 2012), <https://zoek.officielebekendmakingen.nl/ah-tk-20112012-3496.html> (last visited 26 September 2013): 'Ik benadruk verder dat de ECB onafhankelijk is in de uitvoering van de monetaire taak en dienovereenkomstig spreek ik mij niet uit over het beleid van de ECB ten aanzien van de opkoop van staatsobligaties.'
75. 'De Jager: zorgen over bestuur ECB', De Volkskrant, 13 May 2011.
76. 'Roemer onder vuur in Europadebat', Nos, 27 June 2012, <http://nos.nl/artikel/388713-roemer-onder-vuur-in-europadebat.html> (last visited 26 September 2013).
77. Verkiezingsprogramma Partij van de Arbeid, Tweede Kamerverkiezingen 2012, p. 59.

Party was in favour of the massive liquidity support by the ECB (through the so-called LTRO) in December 2011.[78]

Academic debate

Economist Hoogduin (Former Director at the Dutch Central Bank) argues that the OMT programme falls within the ECB mandate, not only from a monetary policy perspective, but also to safeguard financial stability.[79] Together with economist Eijffinger, he does believe that the position in which the ECB is being forced in practice, namely that of sending letters to governments forcing them to adopt economic policy reform in return for bond buying, is undesirable and unpleasant for the ECB.[80]

Legal scholar Smits also argues that the ECB with its SMP bond buying programme is acting within its mandate, as concerns of monetary policy and the stability of the financial system justify it.[81]

Beukers argues that the ECB mandate offers important discretionary power in the conduct of monetary policy.[82] This includes the ECB's assessment of the functioning of the monetary policy transmission mechanism, of the appropriate mechanisms to restore the malfunctioning of this mechanism (bond buying and enhanced liquidity support), of the application of collateral rules (Article 18 ESCB/ECB Statute, ECB General Documentation[83] and e.g. the concept of prudence), and of solvency in the context of emergency lending assistance (Article 14(4) ESCB/ECB Statute). Although it is true that ECB operations carry a risk of losses, it is noted that this is a characteristic of all monetary policy operations.

78. Plasterk, 'De ECB moet ingrijpen en dat zal niet leiden tot inflatie', 2 December 2011, <http://www.pvda.nl/berichten/2011/12/Opinie-plasterk-nrc-ecb-inflatie> (last visited 26 September 2013).
79. 'Stap is acceptabel', Het Financieele Dagblad, 7 September 2012.
80. Eijffinger and Hoogduin, 'The European Central bank in (the) Crisis', 10 CESifo Journal for Institutional Comparisons (2012) pp. 32-38 at 35.
81. Smits, 'Correspondence', 49 CML Rev. (2012) pp. 827-832 at 829.
82. Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank intervention', 50 CML Rev. (2013) forthcoming.
83. 'The Implementation of Monetary Policy in the Euro Area. General Documentation on Eurosystem Monetary Policy Instruments and Procedures', last amended by ECB Decision 2010/30.

Question 14

The acts or omissions of the ECB are open to judicial review by the ECJ. Article 263 TFEU states that the ECJ shall review the legality of acts of the European Central Bank, other than recommendations and opinions. This means that the ECJ can review monetary policy decisions and open market operations (Article 132 TFEU, Article 18 (1), first indent, Statute of the ESCB and of the ECB).[84] Moreover, open market operations represent the monetary policy instruments of the Eurosystem. So open market operations and monetary policy decisions can be entangled together in practice. One example of an open market operation is an operation in the financial markets to buy and sell outright (spot and forward) or under repurchase agreement (Article 18 (1), first indent, Statute of the ESCB and of the ECB).

The contentious issue in general EU law regarding the legal remedies available to individuals (natural and legal persons) against EU measures, in this context the ECB measures, might also arise in this context (see pending case Von Storch v ECB).[85] The ECJ has adopted (and adhered to) in settled case-law a relatively strict understanding of the direct standing of natural and legal persons to institute proceedings on the basis of the notions of direct and individual concern (Article 263 TFEU, *UPA* case).[86]

When the access to the ECJ hurdle has been taken, the ECJ will only have limited possibilities/discretion for judicial review on these complex operations. The ECB has a broad discretion in a sphere which entails monetary and economic choices on its part, and in which it is called upon to undertake complex, technical assessments.

The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate in regard to the objective. Further, the ECJ might materially not be in a position to review, in extenso, the technical basis of the choices made by the ECB.

In Dutch legal doctrine, not much attention has yet been paid to these issues.

84. Case T-532/11 & C-102/12, Städter v ECB. Although, this case (and appeal) is declared inadmissible.
85. Case T-492/12, Von Storch v ECB.
86. Case C-50/00, P Unión de Pequeños Agricultores v Council.

POLAND

Dariusz Adamski[1]

Economic policy

EU legal order

Question 1

Both art. 121 and art. 126 TFEU have proved to be too tenuous legal bases for actions effectively pursuing the reforms necessary to sustainably improve national macroeconomic policies.

Similarly, art. 122 TFEU is not a reliable basis for establishing financial rescue schemes. In this context it could be argued that it was used for setting up the European Financial Stabilisation Mechanism only because no better legal anchorage existed when it turned out that some euro-area Member States had merged into a balance of payment crisis (this type of crisis had been considered as impossible in the monetary union,[2] and thus art. 143 TFEU – which deals with this issue – is limited in scope to non-euro-area Member States).

Conversely, art. 136 TFEU – even if restricted to euro-area countries only – allows for streamlining national economic and social policies (the so-called structural policies: from business environment to labour market policies, social security, education, healthcare, taxation, etc.) the ineffectiveness of which has been primarily responsible for the crisis. It could be argued, furthermore, that art. 136 TFEU could also serve as a particularly appropriate

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2. In 1990 the European Commission argued that 'a major effect of EMU is that *balance of payments constraints will disappear* in the way they are experienced in international relations. Private markets will finance all viable borrowers, and savings and investment balances will no longer be constraints at the national level': 'One market, one money – An evaluation of the potential benefits and costs of forming an economic and monetary union', European Economy No. 44, emphasis added.

legal basis for the golden rule and the debt brake mechanism provided for in the Fiscal Compact. This argument is buttressed by the fact that budgetary profligacy is much less systemically perilous when exercised by non-euro-area Member States, compared to when it happens in the monetary union. This finding could be considered as implicitly endorsed by the Fiscal Compact. Its art. 14(5) states that non-euro area Member States may be parties to this treaty, but their obligations are triggered automatically only after they join the euro area.

The problem is that the EU does not seem to have good ideas how to pursue necessary economic reforms (the Youth Guarantee corroborates this finding). It could be predicted that any more resolute actions by the Commission would most probably lead to a political opposition from national governments. Merely voicing concerns seems more comfortable for the main supranational actors (the Commission, the Parliament) politically, while also preferred by national governments.

Art. 127(6) TFEU could serve as a proper legal basis for banking supervision were it is restricted to euro-area Member States. Yet, it is much less tenable when the scope of the banking supervision transcends the monetary union. Nor could it be the correct legal basis for a supranational banking resolution or deposit insurance scheme, without which the banking union must be very vulnerable. If the banking union is primarily perceived as an internal market issue (and this might be the case as the banking union essentially aims to secure a smooth operation of the internal market in financial services), then the banking supervision should be based on Art. 114 TFEU. The main legal obstacle to do so is the *Meroni* doctrine, which the ECJ is confronted with – in the specific context of the financial market supervision – in Case C-270/12, *UK v Council and Parliament*, pending.

The decision of the ECJ in the *Pringle* case (C-370/12, judgment of 27 Nov. 2012, n.y.r) suggests that the Court is ready to accept an accommodative reading of Treaty provisions as long as this could improve the financial stability. The ECJ also seems inclined to admit compliance of the Treaties concluded formally outside the EU legal system with the Treaty, even when the literary interpretation suggests a conflict. While the subject-matter of the *Pringle* case refers to the compatibility of the ESM Treaty with art. 125(1) TFEU, the same argument could seemingly be extended to the potential conflict between art. 8 Fiscal Compact and art. 126(10) TFEU.

Restraints on introducing the reform process through the EU system primarily stem from political, not legal, considerations. By the same token, it seems hardly possible that any Treaty amendments could substantially rein-

force EU policymaking in the policy areas requiring swift improvements in social and economic policies of the Member States now in crisis.

Question 2

Intergovernmental instruments may raise some *constitutional* questions related to the form to be assumed in the process of incorporating them into domestic legal systems (Poland is an example, as described in response to Question 9).

In *institutional* terms the main concern may refer to the limited effectiveness (enforcement problems) of the instruments mentioned in the question. Quite naturally, purely soft-law measures perform worst on this account. Yet, also supranational instruments providing for economic coordination are hardly enforceable, for many – primarily other than legal – reasons. The fact that no excessive macroeconomic imbalance procedure has ever been launched and that only in respect to Belgium the excessive deficit procedure has been stepped up in 2013 seems to corroborate this conclusion.

Bailout packages, based on a combination of the modalities mentioned in the question, have not performed significantly better, with a growing necessity of renegotiating the agreements with Greece, Portugal, and Cyprus.

The ineffectiveness of all the arrangements may stem primarily from the fact that they do not really change the distribution of powers between the EU and the Member States. Therefore they intend to counteract the externalities produced by sovereign decision-making without allowing EU institutions to eliminate those externalities in the first place. This result, however, may be justified by the fact that EU institutions do not seem to feel sufficiently legitimized to press for more powers, nor do they seem to know how to use such powers more effectively were they bestowed on them.

After the *Pringle* decision it is rather obvious that EU institutions can be used even outside the Treaty framework, at least as long as it sustains the economic stability.

Question 3

The crisis has not been caused by *insufficient* redistribution in the countries now in the economic slump, but rather by *inefficient* redistribution, which has undermined competitive positions of several individual economies. More fiscal capacity may therefore be an inadequate remedy to the problem, as long as the inefficiency of redistribution is not addressed first. Additionally, the

point is legally moot now, as the idea of a separate euro-area budget is off the table, for political reasons.

Increased *ex-ante* coordination of major structural policies could indeed help improve the efficiency and effectiveness of domestic institutions, though now this process has been enforceable 'from the outside' only in respect to the countries on programme (Ireland, Portugal, Greece, Cyprus), leading in each case to public backlash, primarily due to the excessive pressure put on fiscal issues. Other countries have pursued structural reforms – as well as fiscal adjustments – depending on domestic political factors. More scope for *selective* intervention (addressing individual Member States) given to EU institutions (e.g. the idea of 'reform contracts') could cause serious political frictions at the national level, since selective interventions always impart a perception of patronising more vulnerable nations by the economically stronger ones.

From the legal perspective this problem could, in principle, be solved by reinterpreting EU powers in the areas (structural policies) responsible for the crisis, in which the EU exercises coordinating powers only. The last few years have demonstrated that a narrow interpretation of EU's powers in this domain has not been sufficient to guarantee a proper functioning of the internal market. Therefore, extending the Community method to structural policies seems justified by the principle of subsidiary, in this setting advocating for more centralisation (due to the externalities produced for the internal market by mistakes made so far at the national level in many EU countries). In addition, a scope for 'reinterpreting' the primary law, as long as such a reinterpretation could more properly maintain the economic stability, has been upheld by the ECJ in the *Pringle* case. Then, however, the Union would act as a major force behind dismantling the traditional welfare state. It is very doubtful whether EU institutions have courage, vision, or political appetite to do so.

Question 4

While the issue raised in the question has been highlighted in particular in the decisions of the German Constitutional Court, it is very uncertain whether the problems of the economic governance in the Economic and Monetary Union may be solved by more democratic accountability (political accountability of policymakers towards elected representatives and of elected representatives towards voters) and hence, by more input legitimacy. The main issue, which the economic governance has been confronted with seems to stem, quite conversely, from the politicians' fear that they would be held accountable by vot-

ers had they ventured reforms necessary to improve the economic competitiveness towards the rest of the world. Jean-Claude Juncker, the Prime Minister of Luxemburg, has framed this 'accountability paradox' famously: 'We all know what we need to do, but we don't know how to win elections after we have done it'. More electoral accountability may actually only make things worse from this perspective, while a scope for more legal accountability in economic and monetary affairs is very limited (see also response to Question 14).

On the other hand, the EU seems to have been losing its ability to build its legitimacy on output factors (output legitimacy) – i.e. by delivering prosperity and economic stability. Just as national politicians, supranational institutions have manifested a disinterest in raising difficult issues, not even to mention solving them. This situation will probably persist as long as EU politicians are unable to convince European societies that they can solve problems common for those societies better than can the national politicians (which is very uncertain in any predictable future). Yet, even assuming that this highly improbable scenario materialises, the path towards it might lead through stronger cooperation with civil society organizations (possibly even more so than through stronger cooperation with national parliaments), as quite often those organizations have both built better expertise in sophisticated matters and enhanced ability to mobilise citizens around certain causes.

Question 5

The recently adopted Capital Requirements Directive IV (Directive 2013/36/EU) and Capital Requirements Regulation (Regulation 575/2013) maintain all the main flaws of the previous system (e.g. the problematic principle of risk-weighing of assets, which – among others – motivates banks to become overexposed to government bonds). Those flaws will maintain the fragility of the European banking system(s) in the future (even if to a somewhat lesser degree than in the past, due to the elevation of capital ratios).

Furthermore, the role of the ECB in the SSM as it has been institutionalised may be less exponential than it is generally assumed, as the former can be quite easily outvoted in the internal bodies of the latter by national supervisors. This, too, may make the supervision shaky.

Finally, until the euro area develops more credible methods than those used in the past for handling (especially) banking resolution and (also) deposit insurance, it will be extremely difficult to effectively clean balance sheets of European banks in the Member States where the banking exposure to sovereigns and non-performing private loans has been particularly high. Delayed

actions on this account have already – by interfering with the monetary transmission mechanism – negatively impacted the economic growth in many euro-area countries.

Legal orders of the Member States

Question 6

The answer to this question should be properly divided into two parts: one on macroeconomic imbalances and the other dealing with fiscal questions.

It is highly problematic whether there has been any impact whatsoever of the new institutional arrangements at the EU level on macroeconomic imbalances, as both the pace and priorities of structural reforms have depended entirely on domestic political processes. Countries on programme (Greece, Ireland, Portugal, Cyprus) are a (limited) exception, since the adjustment of structural policies necessary to remedy the balance of payment crises has been imposed in exchange for financial assistance. Yet, even there the scope and pace of adjustments largely – and quite naturally – depend on domestic political processes. The fact that the reforms are much more successful in Ireland (where the sense of the reforms' ownership by the government is high) as compared to the much worse performance of Portugal and Cyprus, and especially as compared to Greece (where a similar sense of ownership is hardly existing) demonstrates the point.[3]

The fiscal adjustment is progressing somewhat more resolutely. As the Commission framed it in its recent 'Assessment of the 2013 national reform programmes and stability programmes for the euro area',[4] 'Significant progress has been made on fiscal consolidation in the euro area. The headline deficit is expected to fall from 3.7 % of GDP in 2012 to below 3 % of GDP in 2013 for the first time since 2008. However, the debt-to-GDP ratio continued to rise in 2012, exceeding 90 % of GDP and is expected to reach 95.5 % in 2013, and stabilise at 96 % in 2014'. It is highly questionable, whether the correction should be mainly attributed to any modifications in the governance architecture at the EU level, as it seems to be primarily correlated with reactions of financial markets and thus with the costs of servicing sovereign

3. For an excellent overview see: Pisani-Ferry, Sapir, Wolff, 'EU-IMF assistance to euro-area countries: an early assessment', Bruegel Blueprints, May 2013, available from <www.bruegel.org>.
4. COM(2013)379, of 29.05.2013, p. 3.

debts. It is also largely problematic whether it has been sufficient or not, since the debt sustainability has become a major issue, and not only in the euro-incearea countries on programme.

Question 7

The macroeconomic governance, which has almost exclusively been exercised at the national level, has been plagued by time inconsistencies of policymakers' incentives, mixed with rational ignorance of voters. The first problem betokens a situation in which policymakers are incentivised to please voters with policies which pay off in a short perspective – esp. various fiscal transfers and stimuli – and yet are devastating in the long run (i.e. in the time horizon exceeding the electoral cycle). Due to the second problem, i.e. the rational ignorance, voters do not have either knowledge or insight necessary to sift good policies from bad. More democratic (electoral) accountability may further exacerbate the problem, so this is hardly a remedy for ineffective macroeconomic governance processes. Democratic legitimacy could arguably support the soundness of macroeconomic policies where voters tend to think in a longer perspective, and where the economic awareness is traditionally better ensconced.

The picture of accountability and legitimacy becomes even more complicated under the framework of financial rescue schemes (countries on programme). Their basic institutional assumptions inevitably amplify the role of creditor countries. When referred to the ESM, this is manifested, first, by the unanimity vote in the Eurogroup on launching rescue programmes. Second, it is palpable in the Troika inserting a paramount impact on the terms of the financial assistance and overseeing their implementation. Those patterns may undermine the perception of legitimacy on the debtors' side, as the terms of assistance are essentially imposed on them. National institutions of debtor countries may, however, also influence rescue packages, as exemplified by two recent developments. Namely, in March 2013 the Cypriot Parliament refused the terms of the package initially offered to it by the UE and the IMF, while in April the Portuguese Constitutional Tribunal quashed some of the austerity measures (as violating the principle of equality before the law) intended by the government of the country in order to meet the requirements of its international rescue package. Here, therefore, (some) additional legitimacy and accountability (towards debtor countries) has also been introduced, even if primarily by a 'back door'. It is rather problematic, though, whether democratic credentials could go any further in the context of providing Member States in the balance of payments crisis with necessary financial liquidity.

Question 8

The Fiscal Compact was ratified by the Polish President only in July 2013, after the President was authorised to do so by the Act of the Parliament enacted in February 2013.[5] So far, no further steps have been taken, nor are there any planned by the government in the predictable future.

It could even be argued that currently budgetary developments in Poland go in the opposite direction, because – due to the government deficit, which has been much higher than originally forecast for 2013 – in July 2013 the Parliament adopted an Act[6] suspending – for 2013 – two important fiscal rules.

According to the first rule suspended for 2013 (Art. 86(1)(1) Act on public finances[7]) whenever the public debt/GDP ratio exceeds 50 %, yet is not higher than 55 %, the government is not allowed to propose a deficit for the next year higher than the relation of the budget deficit to revenues in the previous year.

The second suspended provision (Art. 112a Act on public finances) applies to multiannual financial frameworks and to draft state budgets since Poland is addressed with a recommendation based on Art. 126(7) TFEU, until the excessive deficit procedure has been abrogated (Art. 112b Act on public finances). It states that government expenditures may not – with certain important exceptions – be higher than what has been planned in the previous year, plus the rate of inflation and the additional one percentage point.

Now the government is proceeding with a draft amendment to the Act on public finances, which aims to replace the two fiscal rules with a new one. The new expenditure rule, which would apply each year (i.e. regardless of whether the excessive deficit procedure has been instigated against Poland) is

5. Ustawa z dnia 20 lutego 2013 r. o ratyfikacji Traktatu o stabilności, koordynacji i zarządzaniu w Unii Gospodarczej i Walutowej pomiędzy Królestwem Belgii, Republiką Bułgarii, Królestwem Danii, Republiką Federalną Niemiec, Republiką Estońską, Irlandią, Republiką Grecką, Królestwem Hiszpanii, Republiką Francuską, Republiką Włoską, Republiką Cypryjską, Republiką Łotewską, Republiką Litewską, Wielkim Księstwem Luksemburga, Węgrami, Maltą, Królestwem Niderlandów, Republiką Austrii, Rzecząpospolitą Polską, Republiką Portugalską, Rumunią, Republiką Słowenii, Republiką Słowacką, Republiką Finlandii i Królestwem Szwecji, sporządzonego w Brukseli dnia 2 marca 2012 r., Dz. U. poz. 283.
6. Ustawa z dnia 26 lipca 2013 r. o zmianie ustawy o finansach publicznych, Dz. U. 2013, poz. 938.
7. Ustawa z dnia 27 sierpnia 2009 r. o finansach publicznych, Dz. U. 2009, Nr 157, poz. 1240, with further ammendments.

to reduce the number of expenditures excluded from it, but would be calculated more flexibly (and more counter-cyclically) than any of the two abovementioned.

Question 9

There have been two cases brought before the Constitutional Tribunal by a group of MPs. Both have been decided by now. The first one dealt with the procedure of ratification of the European Council Decision No. 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro. The other targeted the Fiscal Compact.

According to the main argument in both cases, acts of the Parliament authorising the President to ratify the instruments have infringed the Constitution's requirement that international treaties transferring competencies of Polish authorities to international organisations, or international bodies, may be incorporated into the Polish legal system only when the Parliament consents by a qualified majority of 2/3 MPs voting in both chambers, with the quorum 1/2 (Art. 90 Polish Constitution). Both acts have been passed by the ordinary majority instead.

The case involving the Decision 2011/199/EU was decided in late June 2013.[8] The Constitutional Tribunal considered that the ESM Treaty concerns euro-area Member States only, so – because Poland is not a euro-area Member State yet – at this point no conferral of powers has taken place. Hence, the violation of the Constitution could not be proved. The Tribunal added, however, that the point might have to be considered from the constitutional perspective when the process of an actual Polish accession to the euro-area starts (a future event, with an unspecified date), depending on what the shape of the ESM is at this point.

The Fiscal Compact case was decided on merely procedural grounds.[9] The Court opined that the case had been filed before the President ratified the Fiscal Compact, which rendered it inadmissible on procedural grounds. The Compact has since been ratified, another case is probable.

8. Decision of 26 June 2013, K 33/12.
9. Decision of 21 May 2013, K 11/13.

Question 10

The legal landscape of the economic governance is clearly more detailed now than it once was. The pool of information provided by national governments is now broader (as well as more reliable) and hence allows for more informed deliberation. Yet, it could hardly be credited for more sustainable agency (in the sense of an ability to act). The case of the Polish excessive deficit corroborates this finding.

Furthermore, it has become evident that joining the euro area may be perilous for the countries with relatively weak macroeconomic foundations (which is the case of Poland), as the membership renders improving price competitiveness particularly difficult (external devaluation must be replaced with the socially much more costly internal devaluation).

Also, the prospect of joining the banking Single Supervisory Mechanism has not gained many supporters in Poland, as the country has traditionally been undertaking a careful and conservative banking supervision, which has been facilitated by the relatively limited size of its banking sector.

Monetary policy

Question 11

In the *Pringle* case the ECJ said that 'a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions' (§ 136). The same logic could arguably be applied *mutatis mutandis* to actions of the ECB. So far the Bank has been very careful in making sure that its monetary actions attempting to maintain financial stability of the euro area are triggered only after politicians have pledged to pursue economic reforms reducing the necessity of ECB's interventions in the long run. It could also be argued that without those interventions the euro area would probably have disintegrated by now, which further demonstrates that the functional requirement of preserving its financial stability may be particularly important in determining the ECB's mandate and the legality of its actions. What is also important in this context, is that the main objective of the ECB (price stability) has not been corrupted by those actions.

On the other hand, all the actions by the ECB may only be described as 'painkillers', while the deep threats to the financial stability of the euro area

could arguably be remedied only by reforming core structural (national) social, and economic policies. As the Bank for International Settlements put it in this context: 'What central bank accommodation has done during the recovery is to borrow time – time for balance sheet repair, time for fiscal consolidation, and time for reforms to restore productivity growth. But the time has not been well used, as continued low interest rates and unconventional policies have made it easy for the private sector to postpone deleveraging, easy for the government to finance deficits, and easy for the authorities to delay needed reforms in the real economy, and in the financial system. After all, cheap money makes it easier to borrow than to save, easier to spend than to tax, easier to remain the same than to change.'[10]

If the pressure the ECB has been inserting to pursue necessary structural reforms therefore proves futile (which might be the case of the majority of the 'Med Club' countries), the ECB may find it very difficult to maintain financial stability. This would – as if retroactively – undermine the legitimacy of its actions and could render the ultimate result worse than had the ECB never involved itself in the first place. Seen from this perspective, the legality of ECB's policies will ultimately depend on how effective the macroeconomic conditionality offered in exchange for facilitated access to the ECB's liquidity will turn out to be.

Question 12

It seems rather indisputable now that financial crises are highly probable unless a strong supervisor is in charge of market oversight.[11] Especially in Member States where the financial sector has grown disproportionately since it was liberalised (not the case of Poland), national supervisors may find it difficult to fulfil their mission as the accountability relationship is then 'skewed': the agent (the financial sector) may become too powerful – financially and often also politically – to be effectively controlled by the principal (the supervisor). Bestowing supervision on the ECB could help solve this fundamental problem.

10. 'Making the most of borrowed time: repair and reform the only way to growth. 83rd Annual Report', 23 June 2013, available at http://www.bis.org/publ/arpdf/ar2013e.htm.
11. See e.g. P. Amri, B. Kocher, 'The Political Economy of Financial Sector Supervision and Banking Crises: A Cross-Country Analysis', 18 European Law Journal (2012), 24-43.

The ECB is also a natural banking supervisor for the euro-area, as it is the banker's bank there. Also, after a surge towards establishing banking supervisors separate from central banks more than a decade ago, it has subsequently been realised that combined regimes, in which the central bank is in charge of both, have certain advantages (the central bank, in particular, finds it easier to hold the banking system to account due to its strong institutional position) over divided regimes. At the same time, conflicts of interests stemming from somewhat different goals of the banking supervision as compared to the monetary policy, may be handled rather easily (by appropriate internal institutional arrangements and commitments to certain ethics), as it is in the interest of the central bank to mitigate those conflicts in the first place.

While the very strong institutional position of the ECB could – as abovementioned – support the proper balance between the principal and the agent in the accountability relationship, the fact that the ECB is 'alien' to domestic banking systems of non-euro-area countries could seriously reduce the ultimate advantages of yielding banking supervision to the SSM in those countries. This essential economic finding has legal ramifications. Art. 127(6) TFEU is a very poor legal basis for extending banking supervision to non-euro-area Member States. To allow those countries to have a say in the Single Supervisory Mechanism, the role of the ECB's Governing Council has been downgraded and – paradoxically – it is not a final decision-maker in the banking supervision under the new arrangement. Not only will this render it more difficult for the ECB to fulfil its new role in banking supervision (because national supervisors will ultimately control the process), but it will also differentiate the SSM from the powers which the Commission has in the competition policy.

Next, the competition policy is based on a generic set of rules, while the banking supervision relies on an extensive body of prudential norms, among which many are open-ended and leave substantial discretion to national supervisors. The resultant situation, in which the ECB (or the SSM, to be more precise) is to act upon national laws, is constitutionally very problematic.

The quality of the micro-prudential rules is also far from optimal (see response to Question 5). The probability of supervisory errors is high in such a situation.

The independence of the ECB is its serious asset, as 'dependence' on political bodies (veiled under the argument of political accountability) both in the monetary policy and in banking supervision easily translates into suboptimal decision-making and may corrupt the statutory tasks of the supervisor. On the other hand, the fact that – under the pressure of other institutions – the ECB is willing to improve transparency of its actions to alleviate charges of

arbitrariness is a promising process supporting its institutional credibility and, hence, legitimacy.

Question 13

It is problematic whether a redefinition of the ECB's statutory objectives is necessary or even recommendable. In particular, it is hardly probable that the ECB could have any more influence on the problem of unemployment, as wherever the unemployment is high, reasons for it stem from national, social, economic, and fiscal policies.

So far the ECB has paid a lot of attention in demonstrating to policymakers that the crisis has been caused by failures in national, social, and economic policies. Its strategy of pressing Member States for reforms in exchange for more favourable access to liquidity has been rational, considering that only when structural policies work properly the monetary transmission mechanism (financing of the real economy) functions properly.

Yet it may also prove treacherous, as non-orthodox actions by the ECB have been undertaken in exchange for promises of actions on the national level. If the promises are not fulfilled – for reasons within or outside the remit of national politicians – the ECB may easily end up with the necessity to write down some of its claims and become recapitalised. The emerging necessity of restructuring the Greek (again), Portuguese, and Cypriot debts demonstrates that previous actions of the ECB may easily backfire when they are not appropriately supported by domestic reforms.

All in all, it seems that the current mandate of the ECB – to some extent reinterpreted in the current crisis – has been sufficiently accommodative to undertake necessary actions aimed at maintaining financial stability without excessively endangering the goal of price stability.

Question 14

Monetary policy is certainly not an area in which the ECJ could ever be sufficiently specialised to perform any actual oversight of individual monetary policy actions (the situation is similar in respect to economic policies). This may explain the position of the ECJ in the *Pringle* case, where the Court did not want to interfere with economic and political calculations of other European institutions, and accepted a very accommodative reading of the TFEU. While this case was on the economic policy, its logic as to the mandate of the ECJ should arguably be *a fortiori* extended to the monetary policy.

Open question

Question 15

There are many possible responses to this question. First, it could be a negative answer if it aims to determine whether any actions actually taken so far have raised legal concerns due to the already mentioned broad interpretation – confirmed in the *Pringle* case – of the leeway with which European institutions are entitled to interpret primary law to maintain economic stability.

Therefore omissions rather than commissions are more puzzling. They all stem from the ultimately constitutional discrepancy between the exclusive powers of the EU in the monetary policy in the euro area, and purely coordinating powers in (structural) economic and social policies. The resultant diversity of approaches to the policies determining economic resilience and competitiveness has led to the situation in which the countries with weaker institutional arrangements cannot catch up economically. In other words – the divergence between the countries performing good and bad has been growing. This is by far a smaller problem for the countries outside the euro area as they can improve their competitive position using tools of the monetary policy (external devaluation), but it becomes more tempting for members of the euro area. The fact that art. 136 TFEU has not been used to puisue a more coordinated approach to structural policies is largely disturbing in this context.

The picture remains somewhat different from the legal perspective in respect to the prospect of establishing the European Banking Resolution (and Deposit Insurance) Authority, which may be a requisite particularly in the weaker euro area Member States experiencing difficulties in using domestic institutions to restructure their banking systems. The example of the highly specialised, professional and experienced US Federal Deposit Insurance Corporation demonstrates that establishing a strong federal agency – particularly for the euro area – is essential. Were it to be efficient, though, it would need to be both institutionally strong and independent. While the process of creating it has been forestalled for political, not legal, reasons, it has engendered some important legal questions as well (esp. whether the *Meroni* doctrine can hinder powers of such an agency, whether enhanced cooperation based on art. 20 TEU could serve as a more appropriate Treaty basis than art. 114 TFEU, etc.).

PORTUGAL

Eduardo Paz Ferreira, Nuno Cunha Rodrigues and Miguel Sousa Ferro[1]

Economic policy

EU legal order

Question 1

Primary EU Law clearly proved to be an insufficient basis for an appropriate response to the euro area debt crisis.

These shortcomings were demonstrated by Decision 2011/119 of the European Council, adopted on 25 March 2011, which added a new provision to the Treaty on the Functioning of the European Union – Article 136(2) – according to which the Member States who have adopted the euro may create a mechanism to be activated whenever necessary in order to safeguard the stability of the euro zone as a whole.

The truth is that the Member States have not yet demonstrated a desire to surpass the shortcomings inherent in the architecture of the Economic and Monetary Union, identified from its very inception, at least not by revising the founding treaties. Indeed, post-Maastricht revisions of the treaties have left these matters untouched.

At a time of urgent needs, when the euro zone problems play out in the short term, it is paradoxical to decide to focus energies on drafting a new treaty – the Treaty on Stability, Coordination and Governance – especially when it was determined that there was no consensus between the 27 Member States, which only weakened the solution arrived at.

This is all the more surprising since nothing which was included in the Treaty approved by the 25 Member States is truly innovative. And what

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would truly justify a revision treaty – through the ordinary revision procedure – is absent from the Treaty on Stability, Coordination, and Governance.

Indeed, what we observed was, in essence, an attempt to raise the failed (not by accident) Growth and Stability Pact to the level of a treaty, in exchange for the creation of the European Stability Mechanism (ESM).

The Treaty's preamble explicitly sets up a direct link between the granting of financial assistance in the framework of new programmes under the European Stability Mechanism, and the ratification and coming into force of the Treaty, as well as on the adoption of provisions of binding force and permanent character, preferably constitutional, to strengthen budgetary discipline.

The modifications made to the governance of the euro area are of little importance.

There is no credible plan to solve the euro area's problems, nor is there an action plan set out, beyond insisting on budgetary discipline and on the stipulation of sanctions for States who fail to uphold it.

The solutions arrived at do not represent a step towards federalization, despite of what has been widely suggested.

In that regard, even though the Treaty's provisions introduce a stricter discipline for the public finances of the Contracting Parties, they do not bring about any significant innovation, their main impact being to expose the insufficiency of EU primary law to react to Europe's sovereign debt crisis.

As an ensemble, the new model of 'European economic governance' reflects the dominating opinion in Berlin and Paris regarding the origin of the sovereign debt crisis of the subsequent crisis of the European banking system: the excessive accumulation of debt by the public and private sectors, resulting from persistent budget deficits and external deficits.

This being said, some provisions of the TFEU themselves seem capable of allowing for apt responses to the sovereign debt crisis.

Thus, for example, the overly shy structure for the convergence of economic policy and multilateral supervision may be complemented through Council and Parliament Regulations, and adopted in accordance with the ordinary legislative procedure, under Article 121(6) of the TFEU.

On the other hand, Article 122(2) of the TFEU seemed to allow for requests of assistance from States who were confronted with exceptional financial difficulties, resulting from an international crisis and a difficulty to access the capital market. However, the European Commission refused to accept this possibility, leading to the atypical solution of resorting simultaneously to credit by the IMF and the EU.

Question 2

This question raises some issues that have not yet been fully clarified by the ECJ, even despite its judgment of 27 November 2012 (case C-370/12).

In that case, which questioned the legal validity of the Treaty that created the ESM, the Court stated that *'the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM. In those circumstances, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it'* (paras 168-169).

This means, that the European Union – and its institutions, including the European Commission – has exclusive competency only in what concerns the coordination of the monetary policy of its Member States whose currency is the euro.

Some of the recently adopted legal instruments seem to go farther, stepping into areas of budgetary sovereignty that have, so far, been reserved to Member States.

Such examples can be found in the Treaty on Stability, Coordination and Governance.

The Treaty aimed at creating the institutional conditions required to implement the Euro-Plus Pact, decided in March 2011, with the objective of reinforcing the economic pillar of the monetary union, granting the coordination of economy policies a new dimension based, not so much on community initiatives or on the Union's institutional framework, but on national initiatives, coordinated at the intergovernmental level by the Council.

With that goal in mind, measures were included in order to reinforce coordination in matters of budgetary policy (criterion of the equilibrium of the structural balance; reduction of public debt; partnership programmes, and public debt issuance plans).

The Treaty on Stability, Coordination, and Governance seems, therefore, to be a kind of 'integration core' or 'advance guard', aimed at going further in the strengthening of the EMU's economic policy, consecrating budgetary discipline in national provisions of reinforced value and accepting more intense degrees of economic policy coordination.

The new treaty rests on an intergovernmental logic which may contribute to reinforcing the democratic legitimacy of decisions to be taken in the future.

It is true that something is lost by not applying the community method, but something is gained in strengthening cooperation between States – considering, namely, that States have undertaken the commitment to consult their

partners regarding each important economic reform which may have a contagion effect; that specific national commitments were made; and that the respect for these commitments and the progress in reaching common political objectives are the object of annual supervision by the Heads of State or Government of the euro area and of the participating countries, on the basis of a Commission report.

The Treaty on Stability, Coordination, and Governance thus inaugurates an entirely novel experience that goes beyond the institutional framework in force, excluding the Member States that are not willing to participate in this form of integration with an intergovernmental twist.

This is something that goes beyond the open coordination method and the enhanced cooperation mechanisms referred to in Article 10 of the Treaty.

On the other hand, the relationship between this Treaty and the EU's legal order is yet to be fully clarified. The Treaty is not a part of EU law, the scope of its provisions is questionable and coordination with EU practice uncertain. It is true that the Treaty incorporates into itself some EU law, including procedural law, whenever it is necessary to adopt secondary legislation (see Article 2(1)). One may wonder if the Treaty is to function in parallel, in overlap or in competition with the TEU and the TFEU.

The Treaty on Stability, Coordination, and Governance brings about a transformation of the project of European integration resulting from the Lisbon Treaty, giving rise to different levels of deepening of the Economic and Monetary Union, distinguishing the countries that go further ahead and are willing to proceed with the process of integration in parallel (or in overlap or competition) with the TEU and TFEU, benefiting from a specific institutional framework, and the countries which may wish to proceed at a slower pace or which do not want to go beyond certain limits.

Question 3

The affirmation of the euro zone and the consequent replacement of the Member States' monetary and exchange policies, along with the simultaneous affirmation of the European internal market, have brought to light the frailties of some European countries.

These frailties were made worse by tax competition from some northern European countries, which, namely, led dozens of Portuguese companies to change their headquarters to the Netherlands so as to benefit from a more favourable fiscal regime.

We must, consequently, still implement a process of true European fiscal harmonization that is compatible with the existence of the euro and the internal market.

In addition, the crisis has shown the need to approve a European budget that allows for an effective correction of economic asymmetries between Member States.

In reality, the creation of the Economic and Monetary Union has deprived the Member States that make up the euro area from essential instruments in a context of crisis – such as the exchange policy – without the simultaneous creation of other instruments that might duly compensate this loss.

Today, there seems to be no room for doubts that European integration is not sustainable without a Union budget that allows for the financing of common policies aimed at correcting the structural imbalances found within the Union.

The financial outlook for 2014-2020 (see COM(2011)500 final, of 29/06/2011) has been set far short of what is necessary according to those wishing to make the European budget an instrument of integration, with the current framework being maintained, resting on the limitation of the EU's budget to a maximum of 1 % of the Union's GDP.

Question 4

A sound European economic governance depends, above all else, on a greater level of budgetary and monetary federalization and of a new approach to fiscal matters, especially in what concerns direct taxation.

In the current model, the autonomy granted to Member States simply means the mastery of large States over small ones and the tendency for the creation of directories that choose and administer economic models to their own benefit.

The Eurogroup should find new procedural provisions of a more flexible and proactive nature.

The subsidiarity mechanisms should allow national Parliaments a timely, constant and in-depth assessment of the relevant issues raised within the Union.

Also, new ways must be found to ensure a greater level of information of civil society.

In the realm of fiscal policy, the current situation is unsustainable. We are not simply referring to the existence of 'tax havens' within the Union, but also the complete descent to anarchy, with the manipulation of the principles of taxation and the clear violation of business ethics and competition rules.

Additionally, some of the European Commission's powers should be strengthened, especially since the volatility of the relevant phenomenon requires an intervention that is best met by executive and centralized models.

In what concerns control instruments, the rules regarding legitimacy in access to justice within the Union should be revised. The current rules lead to certain diffuse areas of power against which it is very difficult to react, and in which economic actors with little weight are limited to observing the unfolding of events that commentators are able to explain, but which no one seems capable of preventing.

Question 5

The creation of a European banking union offers the prospect of solving the coordination problems by putting in place, on top of national supervisors and national resolution authorities, a European supervisor and a European resolution authority. A European deposit guarantee mechanism, acting as a complement to national deposit insurance systems, should also become part of the banking union in due time.

In parallel, the creation of three authorities for each of the financial subsectors – the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority – may create difficulties in the regulation of financial conglomerates, even though the coordination between those bodies is seemingly to be ensured through the Joint Committee of the European Supervisory Authorities.

Article 127(6) of the TFEU excludes insurance companies from its scope, leading to doubts as to how prudential supervision will be carried out in the future, in the case of financial conglomerates that include credit institutions subject to the supervision of the European Central Bank.

On the other hand, the new mechanisms for banking regulation within the European Union should not distinguish between the Member States within the euro zone and those who have not joined the euro, as this could jeopardize the functioning of the internal market, leading to a step back in the affirmation of the fundamental market freedoms.

Legal orders of the Member States

Question 6

The new legal instruments approved by the European Union were aimed at reinforcing the preventive component of the budgetary stability pact.

This positive perspective allows for a watering down of the repressive or sanctioning perspective adopted in the Stability and Growth Pact, considering that the latter proved absolutely incapable of serving as a basis for solving the problems arising from the sovereign debt crisis.

Indeed, the Stability and Growth Pact was infringed repeatedly, without consequences – leading to the cases of Germany and France, in 2003 and 2004, that gave rise to the judgment of the ECJ of 13 July 2004 (C-27/04) – and it became evident that the (hypothetical) imposition of sanctions would merely worsen the economic situation of countries badly hit by the crisis, such as Ireland, Portugal, and Greece.

However, the strengthening of the SGP's preventive component – expressed, *inter alia*, in the creation of the European Semester – further restricts the budgetary sovereignty of the Member States, which still stands as one of the last bastions of sovereign power of each Member State and of its democratic legitimacy.

While all these legal instruments will, to the extent necessary, be integrated into the Member States' internal law, this does not change the fact that the budgetary sovereignty of these States will be limited accordingly.

We are, therefore, faced with a problem of centripetal attraction, to the European Union, of national budgetary competencies that is not accompanied by the corresponding transfer of democratic legitimacy.

Considering that the Lisbon Treaty sought to attenuate this problem by reinforcing the role played by national parliaments, namely through the early warning system. Granting national parliaments greater powers in this context, as well as infra-State public bodies in the cases of territories provided with political autonomy, in the Member States where this applies, would have the added advantage of making it easier to persuade civil society to accept the reality that, in the future, budgets should, be approved jointly by national parliaments and by the European Union, and that this will not entail external interventions of a type and nature that would *a priori* be rejected by national populations.

Indeed, one of the criticisms that can be made to the Treaty establishing the European Stability Mechanism is that it rests on very scarce democratic foundations. And we are not referring merely to the process through which

the Treaty was adopted, but also – and especially – to the mechanisms for supervising the execution of the Treaty.

The only – very limited – form of intervention by national parliaments that is provided for in the Treaty is that which derives from Article 30(5), according to which: *'The Board of Governors shall make the annual report accessible to the national parliaments and supreme audit institutions of the ESM Members and to the European Court of Auditors'*.

National parliaments were, thus, excluded from the process of providing – whenever necessary – financial assistance to Member States of the euro area.

On the other hand, the Treaty establishing the ESM once again consecrated the idea of a two-speed Europe, deepening the distinctions between the countries which belong and which do not belong to the euro area. It would have been desirable to allow for the inclusion of the countries which are not a part of the euro area, allowing them to actively participate in the ESM, not merely as observers.

Question 7

The ongoing reform calls into play the debate on an essential problem of the process of European integration: its (lack of) democratic legitimacy.

With the legal instruments that have been adopted, the European Commission is empowered to act, not just *a posteriori* but also – and especially – *a priori* in the definition of microeconomic and macroeconomic budgetary policies, analyzing and intervening in fiscal, para-fiscal and labour policies of each Member States, insofar as they are reflected in the budget proposal which each State must submit to Brussels prior to its adoption. This relates, namely, to the creation of the so-called 'European semester'.

The possibility of the European Commission having direct influence on the budget proposals of Member States may accentuate the tensions that are currently felt in the population of several Member States who are aware of the possibility of a split in the European project. For several reasons – in the case of Germany, considering the impossibility of ensuring a homogenous growth of the European economy and the desire to be freed from those who cannot keep up with their economic growth, or, in the case of Greece (and also in the case of Portugal, Spain, and Ireland), considering the illusion maintained until recently by the low interest rates and the exchange stability created by the euro and the realization that, after all, the European Union also carries costs.

The European Commission's prior intervention in the drafting of the budgets of the Member States may be seen as calling into question the old

principle of '*no taxation without representation*', distorted by the possibility of the European executive determining (imposing) adjustments to the budget policies of the Member States, namely in the fiscal area or in what concerns the supply of public goods.

It can therefore be argued that the democratic process is circumvented by the intervention of a European institution that does have to face political accountability for its actions. In a sense, this leaves national parliaments to be held politically accountable for decisions actually taken by European institutions.

This raises a crucial problem of the process of building Europe: the tension between integration and democracy which normally is (faintly) debated only in light of the failure of European policies or in situations of financial crisis such as the one we are now facing.

This centripetal movement that awards growing budgetary competences to the European Union, even if legitimized by the Lisbon Treaty, in an issue so central to the sovereignty of Member States – budgetary sovereignty – pushed forward largely without the involvement of European citizens, who remain oblivious of European reality and tend to focus on national governments when it comes to questioning budgetary policy.

Ultimately, we may be faced with the never-ending issue of the supremacy of national constitutions over EU law, recently taken up again by the German Constitutional Court in its judgment of 30 June 2009 relating to the approval of the Lisbon Treaty.

In Portugal, the Constitutional Court, in its judgment no. 353/2012,[2] assessed the constitutional validity of the memorandum of understanding on specific economic policy conditionality, signed between the Portuguese Government and the European Union – adopted with reference to Council Regulation (EU) no. 407/2010, of 11 May 2010. If established a European Financial Stabilization Mechanism – especially Article 3(5), which sets out the general conditions of economic policy such as those included in Council Implementing Decision no. 2011/344/EU, of 17 May 2011, on granting of financial assistance to Portugal.

For the Constitutional Court, such memoranda *'are binding upon the Portuguese State, to the extent that they are based on legal instruments – the founding Treaties of the international bodies which took part in them, and of*

2. See: http://dre.pt/pdf1sdip/2012/07/14000/0384603863.pdf. In this regard, see also: judgment of the Constitutional Court no. 396/2011, of 21 September, available at: http://dre.pt/pdf2sdip/2011/10/199000000/4109641106.pdf.

which Portugal is a Member – of International Law and European Union Law, which are recognized by the Constitution, namely in Article 8(2).'

'Thus, the technical memorandum of understanding and the memorandum on economic and financial policies are based on article V, Section 3, of the Agreement of the International Monetary Fund, and the memorandum of understanding on specific economic policy conditionality are based, ultimately, on Article 122(2) of the Treaty on the Functioning of the European Union.'

'These documents impose on the Portuguese State the duty to adopt the measures prescribed in them, as a condition for the implementation, in stages, of the financing contracts signed by the same entities.'

'According to these memorandums, read jointly with the Council of Ministers Resolution no. 8/2011, of 5 May 2011 (published in the Official Gazette, Series II, of 17 May 2011), under the said Programme, Portugal must adopt an ensemble of measures and legislative initiatives, inclusively of a structural nature, related to public finances, financial stability and competitiveness, which must be implemented within a period of 3 years.'

Following the *troika*'s intervention and the subsequent measures adopted by the Portuguese Government, the Constitutional Court issued rulings on some of the financial measures taken by the Government, namely related to the reduction of salaries in the civil service. In some cases, the Constitutional Court found that such measures were unconstitutional, forcing the Government to find alternative ways to cut expenses.

Question 8

In Portugal, there was some debate between the main political parties on the issue of integrating, into national law, the obligations set out in the Treaty and, specifically, on the need to incorporate the so called 'golden rule', foreseen in Article 3(1)(b) of the Treaty, in the Portuguese Constitution.

However, in the end, all the parties agreed to include those Treaty obligations – including the above mentioned provisions – in the State Budget Framework Law. For this purpose, Law no. 37/2013, of 14 June, was adopted, which revised the prior version of the State Budget Framework Law, complying with the Treaty's requirements.

As a result, the Framework Law now includes, in its provisions, the drafting foreseen in the Treaty on Stability, Coordination, and Governance. This law has reinforced value, being hierarchically superior to others. In particular, each annual State Budget Law must comply with it.

Question 9

In Portugal, only the Constitutional Court has issued rulings on the legal instruments adopted by the European Union and its Member States in the context of the financial crisis.

In its judgment no. 353/2012,[3] the Constitutional Court assessed the constitutional validity of the memorandum of understanding on specific economic policy conditionality: Signed between the Portuguese Government and the European Union, adopted under Council Regulation (EU) no. 407/2010, of 11 May 2010, it established a European financial stabilisation mechanism, particularly Article 3(5), which sets out the general conditions of economic policy, such as those included in Council Implementing Decision no. 2011/344/EU, of 17 May 2011, on granting of financial assistance to Portugal. Please refer above to question VII for highlights of the Court's position regarding the memorandums.

Question 10

The legal challenges for Member States outside the euro area and for those in the antechamber of the euro area depend, fundamentally, on the conditions of their respective economies.

In the case of Member States with strong economies – such as Denmark – the emergence of an economic government in the euro zone should not raise difficulties.

However, the same cannot be said in what concerns other Member States, such as the Czech Republic.

In this case, the furtherance of integration arising from the creation of an European economic government may imply, in the future, the affirmation of a 'two-speed' Europe, faced with the gradual distancing of States not included in the euro zone.

In this area, it would be desirable for the legal system of those States to integrate the solutions put forward at the intergovernmental level – namely those foreseen in the Treaty on Stability, Coordination, and Governance – otherwise the medium to long term impossibility of some Member States joining the Economic and Monetary Union may jeopardize its very survival.

3. See: http://dre.pt/pdf1sdip/2012/07/14000/0384603863.pdf. In this regard, see also: Judgment of the Constitutional Court no. 396/2011, of 21 September, available at: http://dre.pt/pdf2sdip/2011/10/199000000/4109641106.pdf.

Monetary policy

Question 11

It cannot be said that the ECB has acted outside or beyond its legal mandate as set out in the TFEU.

However, the ECB has found imaginative means of indirectly financing public debt, taking on an active role in the secondary market and providing liquidity for banks, anchored on public debt collatera. Hence, it has allowed these banks to respond to public bonds issuance at acceptable levels, preventing an explosion of public debt which was recently imminent, and which would have led the sovereign debt crisis to expand to encompass Spain, France, and other European countries.

Question 12

The implementation of the so-called 'Banking Union' will allow, forthwith, the reduction of the fragmentation of the credit market and the dissociation between national bank risk and sovereign debt, allowing for a greater European harmonization in access to credit by companies.

Since the ECB is also entrusted with monetary functions, these must be *a priori* clearly separated from its supervisory functions, avoiding potential conflicts of interests between the objectives of monetary policy and those of prudential supervision.

In this context, the recent tendency for segmentation between micro-prudential and macro-prudential supervision – expressed, *inter alia*, in the creation of the European Systemic Risk Board – reflects the recognition for the desirable separation between both forms of supervision, as was recently acknowledged by the ESRB in the September 2013 document entitled *'The consequences of the single supervisory mechanism for Europe's macro-prudential policy framework*'.

In this regard, we would recall the words of the ESRB in the said document: '*one could conclude not only that there is a lot of overlap between the ESRB and the SSM* (*single supervisory mechanism), but also that the ECB will have far greater powers in macro-prudential policy than the ESRB. Hence, the creation of the SSM, in which the ECB will play the central role, would essentially make the ESRB irrelevant.'*

Question 13

The Statutes of the ECB can no longer ignore, in the phrasing of the mandate, objectives of economic policy such as the pursuit of full employment. Nor can they prevent the European Central Bank from acting as a last resort lender, a role which is played by central banks of industrialized countries such as the United States of America and the United Kingdom.

Question 14

The Court of Justice may play a fundamental role in the interpretation of primary and secondary European Union Law in this regard, as was recently demonstrated in its judgment of 27 November 2012 (case C-370/12).

Also in the past, the ECJ played a decisive role through the interpretation of the Stability and Growth Pact, namely when, in its judgment of 13 July 2004 (case C-27/04), it annulled the conclusions of the Council of 25 November 2003, adopted in relation to France and Germany, to the extent that they included a decision to suspend the procedure relating to excessive deficits.

That judgment led to the subsequent revision of the Stability and Growth Pact in 2005.

In short, the ECJ can contribute to clarify the part to be played by the European Union in responding to the crisis, under EU primary and secondary law, as well as providing the impulse for necessary legislative reforms.

Open question

Question 15

The current EMU model is outdated – because it rested on pro-cycle budgetary policies and on the (false) assumption that there was an optimum currency area – and it failed drastically when it was confronted with the current financial crisis, given the asymmetric economic shocks that it generated and, particularly, the excessive debt contracted by some of the Member States.

It will, therefore, be necessary to modify the legal instruments that make up the EMU, if we are to finally preserve the single European currency.

The legal instruments currently in force were developed on the basis of a faulty diagnostic – it failed to take into account Government's inability to

discipline their budgetary policies as required by the Growth and Stability Pact. The worsening of the budget deficits as a result of the financial crisis that begun in 2007 and of the subsequent need to grant large amounts of financial support to the financial sector and, on the other hand, of the Keynesian need to ensure the maintenance of the level of public expense in a degrading economy, in the framework of a reduction of fiscal income.

On the other hand, the response to the crisis cannot be found in an ensemble of legal instruments which, as has been pointed out, were born out of a fear of the markets, rather than out of a love for Europe.

That which, when the euro came to be, seemed like a natural process of economic, social, and political convergence did not withstand the first large financial crisis and has now led to a process of divergence at all levels.

We should, therefore, reflect on the European economic model which we want. Here too, we have witnessed an apparent contradiction between the so-called European social model, included in the Constitutions of all the Member States, and a neo-liberal view of the European economy expressed in the Treaties. The European people must be called to take part in this debate, so that we can move beyond the crisis together, with measures provided by democratic legitimacy.

We must return to the process of convergence, keeping in mind that, since it has to be of an economic nature, it must go beyond the mere Union of States, achieving – also and especially – the Union of the European people.

The adoption of a legal framework that is merely restrictive will not allow us to surpass and overcome the current financial crisis and challenges of European integration.

SLOVENIA

Meta Ahtik, Maja Brkan and Živa Nendl[1]

Economic policy

EU legal order

Question 1

In the framework of Question 1, we analyse selected issues concerning the scope of certain provisions of primary EU law as well as the questions of compatibility of certain instruments, adopted in response to the economic crisis, with the primary EU law.

Article 121(6) TFEU has been used as a legal basis for several regulations, either on its own (e.g. on prevention and correction of macroeconomic imbalances)[2] or in combination with Article 136 TFEU (e.g. on enforcement of budgetary surveillance[3] and on enforcement measures to correct excessive macroeconomic imbalances).[4] Given the fact that this article can be a legal

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2. Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, p. 25). This article has also been a legal basis for the Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions, and the surveillance and coordination of economic policies (OJ L 306, 23.11.2011, p. 12).
3. Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1).
4. Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23.11.2011, p. 8).

basis for preventive (not corrective) measures, it seems that its scope could potentially cover the instruments adopted.

As far as Article 122 TFEU – also named 'solidarity clause'[5] – is concerned, it seems rather problematic to base economic governance reform measures on this article. Whereas the first paragraph of this article refers only to the possibility of adopting measures in cases of severe difficulties in the supply of certain products, and is therefore clearly not an appropriate legal basis for the adoption of economic governance reform measures, the second paragraph provides for the possibility of adoption of measures in cases of 'severe difficulties caused by natural disasters or exceptional occurrences beyond its control'. An economic crisis evidently does not fit into the category of a natural disaster, but it is also very doubtful whether it can be classified as an 'exceptional occurrence' within the meaning of this article. Also, if the sovereign debt crisis of a Member State has been caused by imprudent financial politics of this state, it is difficult to see how such a situation could be covered by this article.[6]

Nevertheless, measures have been adopted on the basis of Article 122(2) TFEU,[7] such as the Regulation establishing a European financial stabilization mechanism (EFSM),[8] even if there were doubts expressed in the literature that this can be a correct legal basis for this instrument.[9] Moreover, with regard to Article 122(2) TFEU, another question can be asked, namely, whether this article allows for assistance also by the Member States. However, according to the literature – that the authors of this report agree with – such as-

5. This term is used, for example, by Adamski, 'National power games and structural failures in the European macroeconomic governance', 49(2012) *CMLR*, p. 1329.
6. See Palmstorfer, 'To Bail Out or Not to Bail Out? The Current Framework of Financial Assistance for Euro Area Member States measured against the Requirements of EU Primary Law', 37(2012) *ELR*, p. 780. Differently de Gregorio Merino, 'Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance' 49(2012) *CMLR*, p. 1633-1634, who argues that this article empowers the EU legislator to assist Member States suffering budgetary problems.
7. It is also to be noted that a new budget item has been created to provide for the financial assistance to Member States in accordance with Article 122(2) TFEU. See, for example, the 'European Parliament resolution of 22 September 2010 on Council's position on Draft amending budget No. 7/2010 of the European Union for the financial year 2010, Section III – Commission' (13476/2010 – C7-0261/2010 – 2010/2120 (BUD), OJ C 50 E, 21.2.2012, p. 13).
8. Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1).
9. See Adamski, *supra* note 5, p. 1329.

sistance of the Member States on the basis of this provision should not be possible.[10] Therefore, an amendment of this article would probably be desirable.[11]

With regard to the first paragraph of Article 122 TFEU, as well as Article 136(1) TFEU, a case is pending before the EU General Court. More precisely, in the case T-450/12, *Anagnostakis v Commission*, a Greek national filed an action for annulment against the decision of the Commission of 6 September 2012 by which it rejected registration of the proposed citizens' initiative entitled 'One million signatures for a Europe of solidarity'.[12] Mr. Anagnostakis claims that the Commission could have adopted a proposal for the adoption of a legal measure concerning this initiative on the basis of Article 122(1) or Article 136(1) TFEU. It is yet to be seen what position the General Court will take in this regard, but it is possible that it will establish the lack of individual and direct concern of the applicant.

The issue of the scope of Article 123 TFEU is pertinent in particular in relation to the ECB's Securities Markets Programme (SMP) that the ECB started in May 2010. In the framework of this programme, the ECB had the possibility to buy bonds on the secondary market.[13] The programme was terminated in September 2012 and replaced with the possibility to conduct so-called Outright Monetary Transactions (OMT). As SMP they are dedicated to transactions in secondary markets. Contrary to SMP, the OMT is associated with explicit conditionality attached to an appropriate EFSF/ESM programme and remains unlimited in size.[14] Those programmes touch upon the scope of Article 123 TFEU – but it is to be stated that this article does not prohibit the indirect purchase of debt instruments, but only a *direct* purchase of such instruments. Therefore, an argument can be made that this article does not stand

10. See Palmstorfer, *supra* note 6, p. 780.
11. However, as Maduro, de Witte and Kumm rightly point out, in the present political circumstances, 'a formal revision of the European Treaties [...] would be a very hazardous enterprise'; see Maduro, de Witte and Kumm, 'The euro crisis and the democratic governance of the euro: Legal and political issues of a fiscal crisis', in Maduro, deWitte and Kumm, (eds), The Democratic Governance of the Euro, RSCAS PP 2012/08 (Badia Fiesolana, 2012), p. 7.
12. OJ C 399, 22.12.2012, p. 24.
13. Cour-Thimman and Winkler, 'The ECB's non-standard monetary policy measures: the role of institutional factors and financial structure', Oxford Review of Economic Policy, 28 (2012), p. 779. 'Asymmetry or Dis-integration? A few considerations on the new 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'', 19(2013) *European Public Law*, p. 465.
14. Ibidem.

in the way of the SMP and OMT. The views in the doctrine, however, do not follow this line of reasoning.[15]

The scope of Article 125 TFEU has been discussed both in the doctrine, as well as in the case-law of the ECJ. While part of the doctrine before the *Pringle*[16] case was of the view that this article 'bans all forms of financial assistance given by the [EU] or through a Member State to another',[17] the ECJ in *Pringle* adopted the view that this article prohibits only financial assistance – either of the Union or of the Member States – 'as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished'.[18] Therefore it did not completely exclude the possibility of granting such financial assistance. We discuss the *Pringle* case more in detail in the framework of Question 14.

As far as the Treaty on Stability, Coordination and Governance (TSCG)[19] is concerned, it has been claimed in the literature that one of the provisions of the TSCG that could be problematic is its Article 8(1) that confers to the ECJ the jurisdiction to judge on the actions brought by one or more contracting parties of this treaty against another contracting party for failure to comply with the provisions of the TSCG.[20] However, it can be equally claimed that such jurisdiction is in accordance with Article 273 TFEU – to which the preamble of the TSCG refers to. In fact, this article allows for the ECJ to have jurisdiction 'in any dispute between Member States which relates to the subject matter of the Treaties' (which seems to be the case, given the fact that the treaty in question relates to the Economic and Monetary Union) and 'if the

15. Ruffert, 'The European debt crisis and European Union law', 48(2011) *CMLR*, p. 1788, nevertheless considers that the SMP goes 'beyond what the bank is empowered to do under Article 123(1) TFEU'.
16. Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000.
17. Palmstorfer, *supra* note 6, p. 778. See, for a different view, de Gregorio Merino, *supra* note 6, pp. 1625-1627; the author argues that the loans or credits that do not defeat the purpose of budgetary discipline should be allowed under this article.
18. Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000, para. 136.
19. For the text of the treaty, see for example URL: <http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf>.
20. See in this sense Cantore and Martinico, 'Asymmetry or Dis-integration? A few considerations on the new 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union',' 19(2013) *European Public Law*, p. 465.

dispute is submitted to it under a special agreement between the parties' (which is the case of TSCG).[21]

Question 2

One of the issues that the set of the newly adopted economic governance instruments raises is the tension between, on the one hand, the 'classic' EU instruments (e.g. regulations and a directive in the so-called Six-Pack[22] and Two-Pack[23]), adopted to tackle the economic crisis and, on the other hand, the instruments that have not been adopted within the EU framework (e.g. TSCG, EFSF or EMS). Certain authors (rightly) argue that the EU responses to the economic crisis have not sought to strike the balance between the EU and non-EU instruments, but have taken place mostly in the form of the latter.[24]

21. See de Gregorio Merino, *supra* note 6, p. 1639-1640.
22. Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1); Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23.11.2011, p. 8); Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 306, 23.11.2011, p. 12); Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306, 23.11.2011, p. 25); Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306, 23.11.2011, p. 33); Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306, 23.11.2011, p. 41).
23. Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (OJ L 140, 27.5.2013, p. 1); Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (OJ L 140, 27.5.2013, p. 11).
24. See, for example Chiti and Teixeira, 'The constitutional implications of the European responses to the financial and public debt crisis' 50(2013) *CMLR*, p. 686 *et seq*.

One of the most striking questions that can be asked is whether the Member States are even allowed to act outside the framework of the EU in order to adopt the latter category of instruments. In this regard, it can be argued, on the one hand, that this should be the case as long as they do not encroach upon or act within the area in which the EU has exclusive competence, such as the monetary policy.[25] In this case, the Member States maintain their power under international law to conclude such international agreements.[26]

On the other hand, it can also be argued that such an approach could undermine – or even completely downplay – the mechanism of enhanced cooperation which allows the Member States to act 'within the framework of the Union's non-exclusive competences'.[27] This argument gains force if we consider that the Member States can make use of the EU institutions by virtue of an international agreement and thereby circumvent the strict conditions for the enhanced cooperation. It is, however, also true that the possibility of concluding international agreements allows the Member States more flexibility, as well as the possibility to react faster to the events in the economic world. The ECJ in *Pringle*,[28] by making a reference to the so-called *Bangladesh* cases,[29] rejected the argument that the Member States are not allowed to act outside the framework of the Union by stating that 'the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union [...], provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties'.[30]

Finally, in this regard it is also interesting to note that Article 10 TSCG expressly refers to the mechanism of enhanced cooperation, in the sense that the contracting parties of this treaty engage to make active use of this instru-

25. See, in the doctrine, Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' 37(2012) *ELR*, p. 239.
26. Ibidem, p. 238.
27. See Article 20(1) TFEU.
28. Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000.
29. Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685.
30. Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000, para. 158. In the doctrine, see for example Van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution', 14(2013) *German Law Journal*, p. 163.

ment.[31] This raises the question why those same contracting parties did not opt for enhanced cooperation to conclude this instrument in the first place; it can be assumed that the reason lies in difficult conditions connected to the use of this mechanism.

Question 3

There have been (informal) initiatives on the level of the EU pleading in favour of a full fiscal, economic, and political union.[32] Among the three, we consider that the introduction of the full fiscal union would be the most problematic from the point of view of the division of competences between the Union and its Member States. Whereas the Union does have competence in the domain of the Value Added Tax (VAT), the same does not hold true for direct taxation. In its case-law, the ECJ has repeatedly stressed that the latter domain falls within the competence of the Member States, although it is true that they have to exercise that competence in accordance with EU law.[33]

Consequently, if the Union was effectively to create a full fiscal union, it would be necessary to provide an express legal basis in the primary EU law in this regard. Such an express legal basis opens a panoply of questions: Would such an EU competence be exclusive or shared? According to which revision procedure (ordinary, simplified) would the change go about? Which article of the Treaties could be amended for this purpose (or would it require adding a new article to the Treaties)? What could be a potential role of enhanced cooperation with regard to such amendment of the Treaties?[34] Would

31. On the use of enhanced cooperation and the interplay between this mechanism and TSCG, see Cantore and Martinico, *supra* note 20, p. 463-479.
32. See, for example, Communication from the Commission 'A blueprint for a deep and genuine economic and monetary union. Launching a European Debate' (COM(2012) 777 final/2), p. 30 *et seq*, as well as the Report by President of the European Council, Herman Van Rompuy 'Towards a Genuine Economic and Monetary Union' (EUCO 120/12), p. 5 *et seq*.
33. See, for example, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16; Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 28; Case C-487/08 *Commission* v *Spain* [2010] ECR I-04843, paragraph 37; Case C-284/09 *Commission* v *Germany* [2011] ECR I-09879, paragraph 44, and Joined Cases C-338/11 to C-347/11 *Santander Asset Management SGIIC and Others* [2012] ECR I-0000, paragraph 14.
34. It is obvious that the mechanism of enhanced cooperation could only come into play after the competence was created on the EU level, and provided that such competence is non-exclusive. See Article 20(1) TFEU.

this new power be valid for the whole EU or only for the Member States who are part of the Eurozone? It seems that at least the answer to the last question could be inferred from the blueprint of the Commission according to which 'other Member States' (i.e. those who are not part of the Eurozone) could freely choose to 'opt in to such a fiscal capacity, as a step in preparing their joining the euro area'.[35]

Question 4

The shift in powers and the changed institutional balance due to the plethora of the recent swiftly adopted measures related to the economic governance of the EU and its Euro-zone are a fact; the question that remains is who are the winners and who are the losers of this shift and to what point is the current balance sustainable. Looking through the prism of institutional balance,[36] the winner is clear; the European Commission's reinforced powers, *inter alia* through the reversed qualified majority rule voting in the Council on its proposals,[37] the *de facto* guardian role of the 'balanced budget rule',[38] as well as the increased competences in the budgetary surveillance of the Member States,[39] are notable. Yet, these novel competences were not counterbalanced by the increase in democratic legitimacy on the EU level.[40] The EP, despite being an unquestionable laureate of the Treaty reforms,[41] remains sidelined with the multiplication of the intergovernmental treaties,[42] only holds a weak position in the cornerstone strengthened Stability and Growth pact,[43] and the

35. See the 'blueprint' from the Commission, *supra* note 32, p. 33.
36. C-25/70, *Einfuhr- und Vorratsstelle für und Getreide Futtermittel v. Köster*, ECR [1970], p. 1161, at 9.
37. Article 7 of the TSCG.
38. Article 8(1) of the TSCG: the 'matter will be brought to the Court of Justice of the European Union' if the Commission issues a negative report.
39. Notably through the Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro area (OJ L 140, 27.5.2013, p. 11-23).
40. Pernice, 'Challenges of the Multitier Governance in the European Union – What future(s) of democratic governance in Europe: learning from the Crisis', *WHI – PAPER 03/2013*, p. 24. Available at: http://www.whi-berlin.eu/tl_files/documents/Multitier%20governance%20in%20the%20EU.pdf
41. Jacqué, 'The principle of institutional balance', 41(2004) *CMLR*, p. 387.
42. TSCG, Treaty Establishing the ESM.
43. Mostly limited to the participation in the economic dialogue and having the right to information, see http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.5.pdf. See also

'atomic' motion of censure remains nothing but an empty threat. The vocal calls for respecting the 'community' method in further integration[44] and its weariness[45] over being left out of the processes which are currently reshaping the EU landscape thus come as no surprise. However, despite its unenviable situation, the EP does not come out of the race last. The basic rule of the EMU's 'fourth pillar' states that the accountability and legitimacy should be ensured at the level on which the decisions are taken.[46] In view of the vertical shift in powers in favour of the EU, such an otherwise reasonable rule nevertheless leaves the national parliaments with little say in the budgetary matters which were primarily theirs and form an inherent part of the State's sovereignty.[47] In the short term, the national parliaments should aim at strengthening their role through the existing mechanisms, e.g. through engaging in the inter-parliamentary cooperation,[48] and monitoring the respect for the principle of subsidiarity, thereby acquiring a 'greater participatory role in the EU'.[49] With this situation certainly not being tenable in the long run, institutional reforms in the governance of the Euro-zone are being called for. Among the most debated[50] is the establishment of the EP's 'Eurozone subcommittee',[51] which quite expectedly triggered lukewarm responses in the doctrine[52] and a sceptical attitude of the EP itself, especially in view of the problematic delimitation between the 'euro' and 'non-euro' matters, the insti-

Ruffert, 'The European Debt Crisis and European Union Law', 48(2011) *CMLR*, p. 1801.

44. European Parliament resolution of 12 June 2013 on strengthening European democracy in the future EMU, P7_TA(2013)0269.
45. Resorting to 'packaging' of the legislative proposals to ensure the use of the ordinary legislative procedure and obtaining concessions in the revision of the Stability and Growth Pact in the nick of time (economic dialogue), see http://euobserver.com/economic/113761 and http://www.europarl.europa.eu/ ftu/pdf/en/FTU_5.5.pdf.
46. European Council Conclusions of the 18th and 19th of October 2012, point 17.
47. See for example the judgment of the German Constitutional Court of 7th September 2011, 2 BvR 987, 1099 and 1485/10, see also *infra* Question 6.
48. Article 13 of the TSCG.
49. Manzella, 'Is the EP legitimate as a parliamentary body in EU multi-tier governance', WHI-PAPER, *supra* note 40, p. 146.
50. For recent proposals, see 'France and Germany – Together for a stronger Europe of Stability and Growth', of 30th of May 2013, accessible at: http://www.bundesregierung.de/Content/DE/_Anlagen/2013/05/2013-05-30-dt-frz-erklaerung-englisch.pdf?__blob=publicationFile&v=3.
51. 'MEP lukewarm on special powers for eurozone deputies', EU Observer, 10 June 2013, accessible at: http://euobserver.com/political/120402.
52. For a debate and similar hesitation on the topic, see Pernice, *supra* note 40, p. 17.

tutional questions related to voting and legislative powers of the sub-committee, which would, if they came to be, most likely require a Treaty change.[53] It is also important to mention the exacerbated feeling of the countries in the ante-chamber to the Euro being 'left out' of democratic processes of the Euro-zone.[54] Conversely, the suggestions such as the permanent presidency of the Eurogroup and more regular Euro area summits[55] appear to be reasonable and constitutionally less controversial steps to ensure responsiveness of the Eurogroup (whilst admittedly not contributing to the legitimacy of the decisions taken), especially in the light of its increased role in fiscal surveillance.[56] In view of the foregoing, an appeal must be made for any far-reaching institutional changes to be tailored in a way to include sufficient checks and balances characteristic of the EU governance, minimize differentiation which could harm the internal market, and comply with the principle of the rule of law as elaborated in the 'perennial' judgment in *Les Verts*.[57]

Question 5

Financial crisis has revealed insufficiency and inefficiency of the world's financial market regulation and supervision. Deregulation encouraged by the neoliberal economic doctrine enjoying a dominant position in the last decades has had disastrous consequences.[58] The problem of insufficient supervision has been even more apparent within the European Union that faces a fragmented system of supervision. National supervisors cannot efficiently control more and more interconnected financial markets.[59] Nevertheless, eventually a globalised world would also need a supervisor at a global level in order to control the risks in the system.[60]

53. *Ibidem*.
54. See *infra*, Question 10.
55. 'Together for a stronger Europe of Stability and Growth', *supra* note 50, p. 9.
56. Articles 6(1) and 7(5) of the Regulation (EU) No. 473/2013, *supra* note 39.
57. Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23.
58. Štiblar, '(Ne)uspešna reforma gospodarskega in finančnega sistema', Podjetje in delo, 7(2012), p. 1269, Tanzi, The Economic Role of the State Before and After the Current Crisis, Paper presented at the plenary session of the 65th Congress of the International Institute of Public finance, Cape Town (South Africa), August 13, 2009, p. 33-34.
59. Schoenmaker, 'Financial Supervision in the EU', 2011, <http://personal.vu.nl/d.schoenmaker/Encyclopedia_Financial_Supervision_in_the_EU_v1%20(28-4).pdf>.
60. Štiblar, *supra* note 58, p. 1285.

Financial sector problems resulted in spill-overs to other sectors of the economy and amplified their own problems (especially over-indebtedness). National governments had to intervene in the financial sector and this interference caused an increase of public debt. Since in a distressed position as proven by the Great Depression of the thirties, the State is the only economic subject that can supplement reduced spending of other economic subjects, austerity measures imposed hit economies, and even amplified their economic downturn.[61]

Re-regulation is necessary; although risk exists that response might be exaggerated resulting in too extensive regulation. Besides that, benefits of the regulation remain remote, while in the short term (especially if introduced too fast) it might have a downside effect on the already distressed economy. Regulation should create level playing field and prevent regulatory arbitrage.[62]

For Slovenia introduction of a single supervisory mechanism, as a first pillar of the banking union would be very welcome, provided it assures a break with old practices and brings new knowledge to the supervisory profession. Currently foreseen structure, with the ECB in charge of the supervision, at least for the most important banks in an individual Member State,[63] would probably enable this. However, the banking union as a whole has to be established, not limiting itself to the SSM.

Single resolution mechanism at the EU level and harmonised national resurrection mechanisms, as well as EU level deposit guarantee scheme (DGS), should be founded in accordance with the legislative proposals of the European Commission,[64] although the proposal of DGS Directive should go further and not limit itself to national guarantee schemes.

The proposed Directive establishing a framework for the recovery and resolution of credit institutions and investment firms[65] is aimed at providing

61. Tanzi, *supra* note 58, p. 3-4.
62. Štiblar, *supra* note 58, p. 1270-1271.
63. European Parliament legislative resolution of 12 September 2013 on the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012)0511 – C7-0314/2012 – 2012/0242(CNS)).
64. More: <http://ec.europa.eu/internal_market/finances/committees/index_en.htm>.
65. Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC, Regulation (EU) No. 1093/2010 and (COM(2012)280 final).

national authorities with instruments to avert bank crises and to resolve any financial institution in the event of failure (including bail-in solution), while preserving essential bank operations and minimising taxpayers' exposure to losses. Legislative proposal on single resolution mechanism followed in July 2013. This mechanism is supposed to complement the SSM and would ensure an efficient resolution of banks (being subject to single supervision), that faced serious difficulties.[66]

According to the proposal of the Directive on Deposit Guarantee Schemes, cross-border cooperation is supposed to strengthen; host country DGS is in certain cases also supposed to repay the depositors on behalf of the home country deposit guarantee scheme. However, the final step towards a real banking union would be to establish an EU level deposit guarantee scheme.[67]

The fully functioning banking union would break a vicious cycle between (troubled) banking sector and public finance, and assure stable financial and economic systems. The solution follows (within the limits of the EU, of course) the principle that supervision should be organized at the level of the functioning of the supervised system. Establishment of a banking union at the level of the euro area Member States is necessary, since (along with the fiscal union) it represents a missing part in the structure that would move the euro area closer to being an optimal currency area.[68]

Among current legal initiatives being pursued at the EU level due to the underdeveloped financial system regulation and supervision of the core banking and insurance functions, capital adequacy, solvency, liquidity etc., are the most important for Slovenia and Slovenian financial sector; other areas (OTC derivatives, FTT etc.) are of lower importance. Proposal for structural reform (already being conducted in the US or UK, such as activity restrictions, size limits, and structural separation of certain activities) is included in the Liikanen report,[69] however, except for the consultation document issued by

66. Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No. 1093/2010 of the European Parliament and of the Council.
67. Ahtik, 'European Union Depositors in Cases of Cross-Border Bank Insolvencies: Identifying Deficiencies', v: Grenzüberschreitende Insolvenzen im europäischen Binnenmarkt – die EuInsVO, Wien: Neuer Wissenschaftlicher Verlag, 2011.
68. Ahtik, 'Bančna unija v EU?', Podjetje in delo 7(2012); Ahtik and Mencinger, 'Ekonomika evropske integracije', Ljubljana: GV Založba 2012.
69. High-level Expert Group on reforming the structure of the EU banking sector, 2012 <http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf>.

the Commission, it has not been followed by a concrete regulatory proposal yet. Slovenian financial institutions are small; therefore structural reform of financial institutions would not address them directly. What remains of importance for a small country is specific regulation of national systemically important institutions – institutions that are important at a country level, but do not significantly affect the financial system of the EU.[70] The previously described Directive establishing a framework for the recovery and resolution of credit institutions and investment firms should assure this, although the final outcome depends on national transposition of the directive and most importantly, its implementation. Due to several corporate governance failures in the Slovenian financial sector, regulation aimed into achieving sound corporate governance is necessary as well. However, as recognised by Štiblar, rewarding managers with bonuses when they do well, but on the other hand also punishing them with 'maluses' when they perform badly probably remains a utopia.[71]

Legal orders of the Member States

Question 6

The project of 'saving the Euro' brought to the surface the decades-long debates and tensions between the defenders of supranationalism and intergovernmentalism in the EU,[72] as well as exacerbated the sovereignty debate. What is left,[73] how much fiscal sovereignty do the Member States retain[74] and how far can the EU go in adopting rules impinging on the fundamental prerogatives of the national parliaments in deciding on what matters the most – the money?[75] The most visible impact on the Slovenian national budgetary process so far was achieved through the reform of the Stability and Growth

70. See also: Basel Committee on Banking Supervision: A framework for dealing with domestic systemically important banks, October 2012.
71. Štiblar, (Ne)uspešna reforma gospodarskega in finančnega sistema, Podjetje in delo, 7(2012), p. 1272.
72. Hojnik, 'Snovanje novih Le Corbusierjevih stolpov Evrope', 33(2012) *PP*, p. 3.
73. Mencinger, 'Kaj je narobe z 'zlatim pravilom?',' 15(2012) *PP*, p. 3.
74. Nahtigal, 'Evropski fiskalni pakt – preveč tog in omejevalen', 12 (2012) *PP*, p. II.
75. Vuksanović, 'Fiskalni pakt – večni prisilni jopič?', 15(2012) *PP*, str. 9-10.

Pack and the ensuing introduction of the stricter fiscal rules,[76] the obligation of publishing the forecasts on which the draft budget is based,[77] and the duty of regular reporting.[78] While the Slovenian budgetary process easily accommodated for all of the above,[79] as well as the 'two-pack's' requirement of submitting the draft budgetary plan to the Commission in October[80] due to the timeline coinciding with the submission of the draft budget to the National Assembly, at least some controversy is anticipated to spring with the upcoming significant reshaping of the fiscal rules and the budgetary process, which will take place in the Autumn 2013. In view of the necessary amendment of the Public Finance Act, *inter alia* for the transposition of the Directive 2011/85/EU,[81] and the adoption of the act implementing the now constitutionally protected 'golden rule',[82] the reassuring statements of the EU institutions[83] on the national parliaments retaining the crucial 'power of the purse',[84] seem to be to little avail. The margin of manoeuvre to adopt decisions of economic policy is, especially in the case of Slovenia, which is currently in the excessive deficit procedure, notably limited; not least through the duty of submitting an economic partnership program to both the Council and the Commission for monitoring and endorsement.[85] Given that the EPP is expected to take into account the existing Country Specific Recommenda-

76. Notably through the amendments of Regulations 1466/97 and 1467/97, as well as through their strengthening in the Fiscal Compact, such as the stronger focus on debt, new expenditure benchmark and emphasis on the medium-term budgetary objectives.
77. Article 4(4) of Regulation (EU) No. 473/2013, *supra* note 39.
78. Given that Slovenia is in the Excessive Deficit Procedure, reporting requirements of Article 10 of Regulation (EU) No. 473/2013, *supra* note 39 are applicable to it.
79. Interview with a public official of the Ministry of Foreign Affairs, 27th of July 2013.
80. Article 6 of Regulation (EU) No. 473/2013, *supra* note 39.
81. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306 of 23.11.2011).
82. See *infra*, question 7.
83. See for example European Commission, »2013 Report on Public finances in EMU', European Economy, 4 July 2013, available at: http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee-2013-4-02.pdf, p. 78.
84. Reestman and Besselin, 'The Fiscal Compact and the European Constitutions: 'Europe speaking German', 8(2012) *European Constitutional Law Review*, p. 3.
85. Slovenia is obliged to submit the EPP before the 1st of October in line with Council Recommendation with a view to bringing an end to the situation of an excessive government deficit in Slovenia of 19th May 2013, accessible at: http://ec.europa.eu/europe2020/pdf/nd/edp2013_slovenia_en.pdf.

tions developed in the context of the European Semester,[86] the set of appropriate reforms and priorities to introduce seems to be rather evident and hardly a result of autonomous policy choices of the legislator. The fear thus remains that the economic policy decisions taken at the EU level, much like Le Corbusier's design for skyscrapers, neglect to take into account that they are ultimately destined for and bear an impact on the people.[87]

Question 7

Through successive Treaty amendments, the national parliaments have made visible efforts to obtain influence in the legislative procedure by proxy of the decision-making in the Council as a trade-off for the increasing loss of legislative competence to the benefit of the Union.[88] The vertical shift of powers brought about by further integration of the EMU[89] spilled over into notable changes in the institutional balance on the national level as well. The Slovenian National Assembly thus vocally calls for an ever closer cooperation with the Government in the decision-making in EU affairs, which is regulated in a two-thirds majority Act.[90] The latter was adopted at the time of Slovenia's accession of the EU and simply no longer corresponds to the needs of the present pace of the EU and EMU decision-making. The National Assembly wishes to be fully included in the European semester and wants to discuss the National Reform Program and the Stability Program before they are submitted to the European Commission,[91] as well as debate on the draft CSRs forwarded to the Council by the Commission. Whilst the Government showed a lot of flexibility as to the first two requests,[92] the participation of the parlia-

86. European Commission,'2013 Report on public finance in the EMU – Part II', p. 81, accessible at: http://ec.europa.eu/economy_finance/publications/european_economy/2013/pdf/ee-2013-4-02.pdf.
87. This calls for the future integration of the EMU taking into account the EU citizen was made by Hojnik, *supra* note 72, p. 3.
88. Auel, 'Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs', 13(2007) *ELJ*, p. 488.
89. See *supra*, Question 6.
90. Act on Cooperation between the National Assembly and the Government in EU Affairs, OG RS No. 34/2004.
91. Conclusions of the Parliamentary Committee for European Affairs – 'On the path to a deepened and full economic and monetary union – Democratic Legitimacy and the Accountability of the Process', 57th Regular Session, 22 March 2013.
92. Response of the Government during the debate in the Parliamentary Committee for European Affairs on its conclusions, *supra* note 91, p. 1.

ment in the adoption of the CSRs proves practically difficult, since the Member States are only given two working days to take their position on them. Good administrative practice is thus crucial in the short term perspective for ensuring democratic legitimacy on a national level, yet in the long run it should find its place in a legislative text.

As what the cooperation of the National Assembly on the EU level with its peers is concerned, the latter views the implementation of Article 13(1) of the TSGC as preferably taking place within the existing structures and to that effect proposes the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union as an appropriate forum.[93]

Finally, whilst acknowledging the role of the EP in establishing a full EMU,[94] the Slovenian National Assembly asserted that the key competences in the process and after its accomplishment should remain reserved to the national parliaments, since the budgetary policy represents one of their crucial factors of power.[95] This statement appears to determine the attitude the National Assembly intends to adopt towards future EMU integration – favourable, but cautious as to its prerogatives, as (at least on paper) also protected in Article 3(2) of the TSCG.

Question 8

At the outset it must be pointed out, that Slovenia only adopted measures to transpose Article 3(1) of the TSCG. Accordingly with the directly applicable nature of the regulations[96] of the 'six-pack' and the 'two-pack', which in substance correspond to Articles 4, 5, and 6 of the TSCG, the latter was not integrated in its national legal order.[97] The present answer will thus focus on the 'golden rule' and its broader implications for the Slovenian constitutional order. First of all, some Slovenian legal practitioners and academics questioned the need for the 'balanced budget rule' to be transposed at all. The Slovenian Public Finance Act, as it stands, does not include the latter rule, yet does it contain a provision determining that 'The budget revenues and expenditures need to be balanced'.[98] However, as it was pointed out,[99] the notion of 'reve-

93. Conclusions of the Parliamentary Committee for European Affairs, *supra* note 91, p. 1.
94. *Idem*, p. 2.
95. *Ibidem*.
96. Article 288 TFEU.
97. Interview with a public official of the Ministry of Foreign Affairs, 27th of July 2013.
98. Article 2(7) of the Public Finance Act, OG RS, No. 79/1999.

nues'[100] also includes the resources from the acquired debt; therefore, the definitions of the Public Finance Act do not correspond to the requirements of Article 3(1) of the Fiscal compact.[101] Other authors also noted that the ratified international treaties are binding in the Slovenian legal order and in hierarchy rank above the laws.[102] Thus, the mere ratification of the TSCG already represents 'binding' rules of a 'constitutional' character rendering any additional transposition of Article 3(1) unnecessary.[103] It is not wholly convincing that this interpretation would hold the test before the Court of Justice,[104] thus while recognizing the need to transpose Article 3(1) in the Slovenian legal order, it is rather clear that the TSCG does not impose a constitutional amendment.[105] Nevertheless, a decision, criticized by some as 'a threat to the principle of the social state',[106] and as 'unduly petrifying temporary economic concepts',[107] was taken for Article 3(1) rules to be inserted into the Constitution, in order to provide for a principle which will guide the preparation and the execution of the State budget and allow for a consolidation of public finances.[108] On 31 May 2013, the Constitutional Act on amending Article 148 of the Constitution entered into force.[109] The amended Article 148 determines that the revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures, whereas the temporary deviation is only allowed when exception-

99. Vuksanović, 'Ustava in ekonomska politika', 41-42(2011) *PP*, p. 12 and interview with a Public Official at the Ministry of Foreign Affairs, 27th July 2013.
100. Article 3(1)(10) of the Public Finance Act.
101. Vuksanović, *supra* note 99.
102. See articles 8 and 153(2) of the Constitution of the Republic of Slovenia.
103. See the opinion of Ude as a member of the Constitutional Commission, the 9th of May 2012, available at: http://imss.dz-rs.si/imis/2cd704e6815827d32ce6.pdf. Similarly, Vuksanović, *supra* note 75.
104. Its jurisdiction being established through Article 8 of the TSCG.
105. See also Bugarič, 'Reševanje evra in začetek konca EU?', 5(2012) *PP*, p. 3 and Nahtigal, *supra* note 74, p. II.
106. Strban, 'Ustavna zapoved socialne države ni pravno nezavezujoča norma', 22(2012) *PP*, p. 3.
107. Bugarič, *supra* note 105, p. 3 and Vuksanovic, *supra* note 99.
108. Statement of the former Minister of Finance dr. Janez Šušteršič at the Constitutional Commission of the National Assembly, 20th March 2012, accessible at: http://www.delajozate.si/seje/6-mandat/30/1-nujna/2012-03-20/. Similarly, Petrovič, 'Ustavno omejevanje javne porabe – načelo izravnanega proračuna in fiskalno pravilo', 39-40 (2011) *PP*, p. 11.
109. Constitutional Act Amending Article 148 of the Constitution of the Republic of Slovenia, adopted on 24 May 2013, OG RS No. 47/2013, see Annex I.

al circumstances affect the state.[110] The details on how this principle should be implemented, including the criteria for determining exceptional circumstances, the manner of acting when they arise, as well as the correction mechanism and the monitoring institution and its functions, will be regulated in detail by a law adopted by the National Assembly with a two-thirds majority vote of all deputies, which has to be adopted before 31 November 2013.[111] The balanced budget rule as well as the implementing law will be used for the first time in the preparation of the budget for the year 2015.[112] While the economic implications of the 'golden rule' remain to be seen, some authors[113] already expressed weariness over the effect it might have on the fundamental constitutional principles, such as the rule of law, the principle of the social state,[114] and on the principle that the power in Slovenia is vested in its citizens.[115] Namely, one of the most debated consequences of the 'balanced budget rule' was whether it would serve as a limitation to the right to a referendum on the widely unpopular austerity laws.[116] Despite the fact that the rule in itself cannot serve as an outright prohibition of the referendum, since that would run counter Article 3 of the Constitution,[117] a constitutional amendment entering into force on the same day as the Act introducing the 'golden rule', henceforth prohibits a referendum on certain categories of acts, including the act of ratification of an international treaty.[118] This is particularly relevant from the perspective of achieving a genuine EMU, which in the long run, will most likely require a modification of the Treaties or failing that, another intergovernmental agreement. Be that as it may, in both scenarios the Slovenian citizens are henceforth deprived[119] of the opportunity to voice their

110. Paragraphs 1 and 2 of the Constitutional Act, *supra* note 109.
111. Paragraph 3 of the Constitutional Act, supra *note* 109.
112. Part II of the Constitutional Act, *supra* note 109.
113. See for example Strban, *supra* note 106, p. 3, Ribičič, 'Porušeno ravnotežje?', 41-42 (2012) *PP*, p. 41 and Cerar, 'Dve pomembni ustavni spremembi', Ius-Info, 27.5.2013, accessible at: http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?id=99045.
114. Article 2 of the Constitution of the Republic of Slovenia.
115. Articles 2 and 3 of the Constitution of the Republic of Slovenia.
116. See for example Mencinger, *supra* note 73, p. 3.
117. See the statements by Jerovšek and Ude during the second sessions of the Constitutional Commission, available at: http://www.delajozate.si/seje/6-mandat/30/2-redna/2012-04-10/ and Ribičič, *supra* note 113, p. 41.
118. Constitutional Act Amending Articles 90, 97 and 99 of the Constitution of the Republic of Slovenia, adopted on 24 May 2013, OG RS Nr. 47/2013.
119. Despite the text of the constitutional amendment excluding the referendum on any act of ratification of international treaties, some experts stated that a referendum about an act of ratification of the treaties based on Article 3.a of the Constitution (the 'Europe

opinion on the measures that affect their day to day lives, which might be pragmatically justifiable, yet does not contribute to their legitimacy.[120] Furthermore, it impinges on the principle of the governance of the people[121] and ultimately runs counter to the strong tradition of referenda in Slovenia, enabling constitutional pluralism.[122]

Question 9

For the purpose of providing an answer to the present question, two decisions of the Slovenian Constitutional Court will be discussed, the first one being the decision on the constitutionality of the Act Regulating the Guarantees of the Republic of Slovenia for Ensuring Financial Stability in the Euro Area,[123] adopted for the participation of Slovenia in the European Financial Stability Facility.[124] Thirty seven members of the Slovenian National Assembly bringing the case to the Court claimed firstly, that the 'umbrella' Act on guarantees to be given does not comply with Article 149 of the Constitution, which requires for the State guarantees to be identifiable and authorized on the basis of an act. Secondly, the Act allegedly ran counter to the principles of the separation of powers (Article 3), and proportionality (Article 2) due to the reducing of the national parliament's powers, with the latter henceforth only being informed by the Government of the guarantees given. Third claim, based on Article 148 of the Constitution,[125] alleged that the adopted budgets for the years 2010 and 2011 did not include the sums of the guarantees engaged for in the Act. Finally, the Act purportedly did not comply with the private law notion of a guarantee.[126] The Constitutional Court, however, dismissed, one after another, all the arguments of the claimants and found the Act to be compliant with the Constitution and exercised clear judicial restraint in relation with the matters of economic policy, which fall within the margin of ap-

clause') would still be possible. See the debate during the 6th Session of the Constitutional Commission, 21st March 2013. Accessible at: http://www.delajozate.si/seje/6-mandat/30/7-redna/2013-03-21/.

120. Vuksanović, 'Ustavne omejitve referenduma', 2(2013) *PP*, p. 14.
121. Articles 1 and 3 of the Constitution. See also Ribičič, *supra* note 113, p. 41.
122. Avbelj, 'Konec ali začetek slovenskega ustavnega prava?', 1(2013) *PP*, p. 6.
123. OG RS, No. 59/10.
124. Decision of the Constitutional Court, 3rd February 2011, U-I-178/10.
125. *'All revenues and expenditures of the state and local communities for the financing of public spending must be included in their budgets'.*
126. Code of Obligations, OG RS No. 97/07.

preciation of the legislator.[127] In reaching the conclusion that the Act at stake complies with the principles of the rule of law and of a social state, the Court interestingly remarked that the latter principle represents an upper limit of the State's debt, even in the absence of an express written constitutional rule to that effect, in order to ensure a social minimum for the present and future generations.[128] This conclusion will be touched upon subsequently, namely in the joint analysis of the two decisions of the Constitutional Court.

The second ruling, whilst not dealing with a challenge to national measures for implementing one of the EU instruments adopted for countering the debt crisis, elucidates the problems of the balance to be struck between the exercise of a referendum as an instrument of direct democracy and the entry into force of Acts,[129] adopted primarily for the purpose of stabilizing public finances.[130] The arguments of the thirty members of the National Assembly bringing the claim focused on the potential unconstitutional consequences of holding a referendum on (and of a potential rejection of) these acts, for the very organization of the state, as well as for the protection of human rights, human dignity, and the social state. They also considered that requesting international financial assistance and the conditions attached to it, would run counter to the principle of sovereignty. The 'dictated' measures from the part of the international institutions and parliaments of other Member States of the EU would amount to a violation of Article 3a of the Slovenian Constitution.[131] They also recalled that Slovenia is bound to transpose the Directive 2011/85/EU[132] and the requirements of the TSCG,[133] as well as respect the obligations under the excessive deficit procedure.

Whilst first pointing to the broad right to a referendum[134] as then recognized by the Constitution,[135] the Court went on to underline its relative na-

127. Paragraph 9 of Decision U-I-178/10, *supra* note 124.
128. Paragraph 25 of Decision U-I-178/10, *supra* note 124.
129. Act Determining the Measures of the Republic of Slovenia to Strengthen Bank Stability (the 'Law on the Bad Bank'), OG RS, No. 105/2012 and the Slovenian Sovereign Holding Act, OG RS, No. 105/2012.
130. See *supra* Question 8.
131. Article 3a of the Constitution represents the Slovenian 'Europe clause', albeit not specific to the EU, allowing for the transfer of the exercise of the competences to international organizations.
132. Council Directive 2011/85/EU, *supra* note 81.
133. Article 3(1) of the TSCG.
134. Paragraph 22 of the decision of the Constitutional Court U-II-1/12-23, U-II-2/12-22.
135. The original article 90 of the Constitution allowed for a referendum on any issue which was the subject of regulation by law. The Constitutional Act adopted on the

ture[136] when juxtaposed with the weight of the other constitutional values at hand, such as the effective functioning of the State in the conditions of severe economic crisis, especially in light of the principles of the rule of law and the social state,[137] as well as the obligations entered into under international[138] and European Union law.[139] By siding with the National Assembly to the discontent of some academics[140] and practitioners,[141] the Constitutional Court again aimed at ensuring social rights for the generations to come. The latter conclusion, in particular, is worth pointing out since most of the responses in Slovenia concerning the insertion of the 'balanced budget rule' in the Constitution[142] assessed this step as running counter to the essence of the social state,[143] which should in their view, if the occasion arose, take precedence over the 'golden rule'.[144] However, it stems from the judgment on Slovenia's participation in the EFSF that the Constitutional Court through the interpretation of the principle of the social state inserted in the Constitution an upper limit to the State's debt by linking it to the social rights of its citizens. The question remains then whether the 'golden rule' represents the written epitome of the previously unwritten debt cap, or whether it indeed takes a step too far in limiting the state's margin of manoeuvre for guaranteeing the respect for the value that the Court appears to hold at the heart of its reasoning – the proper functioning of the State and its social component. The necessary bal-

24th May 2013, introduced notable limitations in that respect, *supra* note 118 and *supra* Question 8.

136. Decision of the Constitutional Court of 19th January 1995, U-I-47/94.
137. Paragraphs 42 and 45 of the decision of the Constitutional Court U-II-1/12-23, U-II-2/12-22 and articles 74(1), 66, 50(1), 51 (1) and (2), and 52 of the Constitution.
138. TSCG, which was ratified in Slovenia on the 19th April 2012.
139. Excessive deficit procedure triggered against Slovenia on the basis of Article 126 TFEU and the obligation stemming from the Directive 2011/85/EU through the application of the *Inter-Environnement Wallonie* (C-129/96) doctrine.
140. Pirnat assesses the Sovereign Holding Act to be contrary to at least Articles 148, 146, and 3 of the Constitution, and to the jurisprudence of the Constitutional Court (U-I-203/93), see Pirnat, 'Neskladnost Slovenskega državnega holdinga z Ustavo', 43(2012) *PP*, p. 7.
141. The Act was criticized for running counter to the principle of legality and legal certainty in view of the uncertain interplay with the pre-existing acts, see Merc, Koritnik, 'Zakon o ukrepih Republike Slovenije za krepitev stabilnosti bank', 46(2012) *PP*, p. III.
142. See *supra*, Question 8.
143. Vuksanović, *supra* note 75, p. 12. See also *supra*, Question 8.
144. Strban, *supra* note 106, p. 3

ance remains to be struck and the Constitutional Court will be watched closely.[145]

Finally, the Court in no way excluded the possibility that *inter alia* due to the participation of the IMF in the agreement on the potential financial assistance, the latter would breach the 'Europe clause' and threaten Slovenia's sovereignty.[146] Yet, tt would appear highly unlikely for the Court to indeed make such a bold finding and hopefully, the occasion for it to do so will never even arise.

Question 10

The principle of equal treatment of the Member States[147] was an illusion from the moment of the establishment of the EMU, as its beginning was instantaneously marked by differentiated integration through the opt-outs[148] granted to two Member States. The recently expressed wish to resort more frequently to the enhanced cooperation and to the adoption of measures specific to Eurozone countries[149] permeates the TSCG, with the latter being one of the most vivid examples of this wish. Furthermore, the TSCF, unlike the past differentiating steps taken by the EU, did not entail the consent of all the Member States,[150] since it was not ratified by all twenty seven. Despite Articles 15 and 16 of the TSCG clearly aiming at bridging this gap, they cannot, however, wholly remedy the overall impression of further fragmentation and multi-speed progression of the EU legal order. Unsurprisingly, the EP regularly reminds the Member States that the strengthened EMU should not divide the EU[151,152] and remains weary of institutional changes aggravating the differences between the Euro and non-Euro countries, whilst the latter remain le-

145. The Fiscal Balance Act (OG RS, No. 40/2012), the 'umbrella' austerity law, is currently subject to over 25 constitutional challenges and the Constitutional Court's decisions will shortly provide more clarity about the side on which the balance will tip.
146. See paragraph 41 of the decision U-II-1-12 and U-II-2-12.
147. Article 4(2) TFEU.
148. Protocol Nr. 16 on certain provisions relating to Denmark and Protocol nr. 15 on certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland.
149. Recital 22 of the TSCG.
150. Fischer-Lescano, 'Legal Opinion – The European TSCG and EU law', 2012, http://www.zerp.unibremen.de///streamfile.pl?mod=cmsbrowser&area=AFL_PDF/&file=Fiskalpakt_Gutachten%20ENG.pdf&mime=application/pdf&id=, p. 5.
151. European Parliament resolution of 12th June 2013, *supra* note 44, point 6.
152. See *supra*, Question 4.

gally obliged to one day take on the Euro.[153] Not only constitutionally, but also purely economically problematic is also the consequence of the rescue mechanisms being tailored for the Eurozone Member States without much regard to those not belonging to it. Welcome measures[154] are underway to ensure a level playing field for all Member States, notably through the amendment of the Regulation 332/2002[155] and the strengthening of the Balance of Payments facility.[156] Yet, steps to full equality, inter alia through the non-euro Member States being able to benefit from the ESM, remain to be taken along with the EP's so desired all-embracing 'communautarisation' of the further integration of the EU.[157]

Monetary policy

Question 11

Central bank's independence is composed out of several elements, including institutional, personal, functional, and financial independence. Since the regulation of the independence of the ECB followed traditionally the pro-independence oriented German approach, all of the previously listed elements can be found either in the TFEU and/or in the Statute of the ESCB and ECB. Besides that, the ECB functions at a supra-national level, so there is no fiscal au-

153. Articles 119 and 139 TFEU, as well as Article 4 of Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic as well as the adjustments to the Treaties on which the European Union is founded.
154. Which Slovenia supports, see Declaration on the Republic of Slovenia's guidelines for acting within the institutions of the European union (2013 – 2014), OG RS No. 22/2013.
155. Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 053, 23.2.2002, p. 1).
156. Proposal for a Council Regulation establishing a facility for providing financial assistance for Member States whose currency is not the euro/* COM/2012/0336 final.
157. Resolution of the European Parliament of 20 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', 2012/2151(INI).

thority at the same level by which its independence could be threatened.[158] The provision of Article 123 further prohibits monetary financing – the ECB is not allowed to buy any government bonds on the primary market. Some, for example the German Bundesbank that started the procedure before the German Constitutional Court are convinced that although this provision has been formally respected, it has been violated indirectly through the introduction of the OMT programme. They claim that if substantial purchases of government bonds on secondary markets took place, the financing of government budgets would be supported, which would increase stability risks and endanger the goal of price stability. The central bank may become the biggest creditor of one state, which entails the risk of the Eurosystem not acting independently anymore in its monetary policy.[159] They are further afraid that the OMT programme might have (through losses of the Bundesbank) implications on the German budget.[160]

According to Article 127 of the TFEU, the primary objective of the European System of Central Banks should be to maintain price stability. German fear that ECB's monetary policy decisions might cause inflation is not supported by the latest learning of economic science. According to de Grauwe, the crisis situation is special and the limits to the amount of money base that can be created without triggering inflationary pressures is currently much higher because of the existence of a liquidity trap.[161] As long as prices are stable, no legal obstacles exist for the ECB to support other goals as stated in the Article 127 of TFEU.

Besides that, no actual threat exists to increase countries' debt. According to Article 33/2 of the Statute of the ESCB and ECB, potential loss incurred by the ECB may be offset against the general reserve fund of the ECB and, as assured by the Executive Board member Asmussen[162] if a net loss remains even after taking into account all provisions and reserves, it could be recorded on the balance sheet as losses carried forward and be offset by any net income in the following years.

158. Ahtik, 'Načelo neodvisnosti centralne banke v evrskem območju na preizkušnji?', 30(2010) *PP*, p. 15-16.
159. Unicredit, A guide for the German Constitutional Court hearing on the OMT, 5. 6. 2013, http://www.astrid.eu/Dossier--L4/Tribunale-4/Unicredit_OMT-Guide_05_06_13.pdf.
160. Vuksanović, 'Kaj je na kocki v Karlsruheju?', 25(2013) *PP*, p. 19.
161. Fiscal implications of the ECB's bond-buying programme, 14. 6. 2013, http://www.voxeu.org/article/fiscal-implications-ecb-s-bond-buying-programme.
162. Asmussen, Introductory statement by the ECB in the proceedings before the Federal Constitutional Court, Karlsruhe, 11 June 2013.

Vuksanović sees the role of small countries like Slovenia in this dispute as negligible since the most important euro area Member State can afford practically everything – its Constitutional Court can even take the right to decide the destiny of the whole European Union.[163]

Question 12 and Question 13 are answered together

According to the Article 127 of the TFEU, price stability is superior to other (non)-economic objectives described in Article 3 of the Treaty on European Union. Formally setting multiple objectives as listed in the Article 2a of the Federal Reserve Act (maximum employment, stable prices, and moderate long-term interest rates) may not be necessary to enable a central bank to follow other goals besides price stability as long as inflation remains under control.

ECB has been acting as monetary policy authority of the euro area since 1999. In terms of its main objective, price stability, which was defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2 % over the medium term, it has performed very well. However, opinions exist that the ECB does not explore the second part of the provision of the Article 127 enough and it focuses on the price stability objective excessively.[164]

Nevertheless, financial stability is not only a foundation for achieving goals of the Article 3 of the Treaty on European Union, but, as emphasised also by the Governing Council member Yves Mersch,[165] a stable financial system with sound and solvent banks hat also supports the smooth transmission of monetary policy, and ultimately contributes to macroeconomic stability. Macro-prudential stability tools are therefore of extreme importance for the proper functioning of the monetary policy. On the other hand, there are more arguments for the separation of micro-prudential surveillance from monetary policy conduct and macro-prudential supervision, although the crisis has pointed out several benefits of one institution being in charge of both. Beck and Gros[166] in a document prepared at the request of the European Par-

163. Vuksanović, *supra* note 160, p. 19.
164. See for example: De Grauwe & Gros, 'A New Two-Pillar Strategy for the ECB', CEPS Policy Brief No. 191/30 June 2009.
165. Mersch, 'Keynote Speech at the 6th Policy Roundtable of the European Central Bank: 'The future of global policy coordination',' 6 September 2013.
166. Beck & Gros, 'Monetary policy and banking supervision: coordination instead of separation', CESifo Forum 4/2012.

liament's Committee on Economic and Monetary Affairs as a background document for its Monetary Dialogue with the European Central Bank list the advantages and disadvantages of supervision and monetary policy tasks under the same roof.

The central bank has access to better information and can exercise monetary policy better; a central bank with supervisory powers may be able to manage a potential crisis more effectively; further central banks are known for their independence, which is important also for successful supervision. Yet, with the new functions, the central bank might become more prone to political capture, which could undermine its independence. Besides that potential for conflicts of objectives exists (the central bank might conduct excessively loose monetary policy in order to avoid the adverse effects on bank earnings and credit quality). For an institution with so many objectives risk exists, that it will tend to misallocate resources and neglect one of its tasks.

Change of the supervisory structure will affect the relationship between ECB and national central banks as well. So far the established division of tasks regarding monetary policy has been functioning well. As the crisis has proved, the same cannot be claimed for the supervisory responsibilities that are not part of the NCB's tasks in all euro area member states. As currently foreseen, transfer of supervisory competences is obligatory only for euro area members. From the economic perspective it is necessary to create the banking union at least at the euro area level. However, all EU members benefit from the Single market and cross-border banking is not limited to euro area members. Additional steps in the supervisory integration remains to be done.

The lender of last resort or so called emergency liquidity assistance (ELA) function of a central bank was first described by Bagehot in 1873.[167] This task, immanent to a central bank has not been transferred to the ECB when the monetary union was established, but remained with the NCBs. Provision of emergency liquidity assistance (ELA) to individual credit institutions against adequate collateral was described in ECB's Monthly Bulletin in 2007.[168] Liquidity support is supposed to be provided in exceptional circumstances to a temporarily illiquid credit institution which cannot obtain liquidity through either the market, or participation in monetary policy operations. This exceptional and temporary liquidity provision should respect the prohibition of monetary financing. The provision of ELA is not automatic, but it remains within the discretion of the national central bank. The Governing

167. Bagehot, 'Lombard Street', London: H. S. King, 1873.
168. ECB Monthly Bulletin February 2007, p. 73.

Council of the ECB can object to the provision of ELA.[169] However, the procedural rules for provision of ELA to individual credit institutions have been published only in October 2013.[170] Slovenia has the possibility to use ELA, explicitly listed among so-called other tasks of its central bank. In accordance with this description, Statute of the Bank of Slovenia[171] states that the Bank can grant credit to banks against adequate collateral, and in accordance with (current) Articles 123 and 124 of the TFEU and Article 21 of the Statute of the ESCB and the ECB. Yet, ELA was used by the Bank of Slovenia for the first time when two smaller banks went into supervised liquidation in September 2013.

Together with the establishment of the single supervisory mechanism and other elements of the banking safety net, it would be useful to transfer ELA to the euro area level in order to fully align the level of all the safety net elements.[172]

Question 14[173]

The case law in the field of Economic and Monetary Policy is not abundant, but some cases can nevertheless be identified.

First, an early case law in this domain concerns mostly the questions relating to the introduction of the common currency, or, more precisely, the interpretation of the Regulation No. 1103/97 on the introduction of the euro.[174] It comprises cases relating to the issues of increase of consumption tax due to the conversion of the national currency into the euro,[175] or cases concerning

169. Article 14.4 of the Statute of the ESCB.
170. ELA procedures, the procedures underlying the Governing Council's role pursuant to Article 14.4 of the Statute of the European System of Central Banks, and of the European Central Bank with regard to the provision of ELA to individual credit institutions, 17. 10. 2013.
171. Article 12, OJ RS, 58/2002, 85/2002, 39/2006, 59/2011.
172. Ahtik, 'Bančna unija v EU?', Podjetje in delo 7(2012), Goyal, R., Koeva Brooks, P., Pradhan, M., Tressel, T., Dell'Ariccia, G., Leckow, R. & Pazarbasioglu, C.: A Banking Union for the Euro Area, IMF Staff Discussion Note, 2013.
173. The answer to this question is largely inspired by Brkan, 'The Role of the European Court of Justice from Maastricht to Lisbon: Putting Together the Scattered Pieces of Patchwork', in de Visser and van der Mei (eds), *Twenty Years Treaty on European Union: Reflections from Maastricht* (Intersentia 2013), pp. 82-85.
174. Council Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ L 162, 19.6.1997, p. 1).
175. Case C-359/05, Estager SA v Receveur principal de la recette des douanes de Brive [2007] ECR I-581.

the rounding of the amounts of the per-minute price of telephone calls.[176] This case law shows that, during the conversion from national currencies to the euro, the EU was, as expected, facing certain problems; it is therefore not surprising that interpretation issues regarding this conversion were raised before the EU courts.[177]

Secondly, another category of cases concern those that relate to the core of the Economic and Monetary Policy, for example the questions of the excessive government deficits or the European Stability Mechanism (ESM). As far as the questions of excessive government deficits, the case *Commission v Council*[178] should be mentioned. In this case, the ECJ decided that the Council cannot hold the excessive deficit procedure in abeyance for reasons other than those expressly provided for,[179] by which, it could be claimed, the ECJ to a certain extent strengthened the procedure for the enforcement of the Stability and Growth Pact.[180] Given the circumstance that the competence to ensure compliance with the Stability and Growth Pact is entrusted with the Council,[181] and that the Commission cannot bring infringement procedures against a Member State in this regard,[182] the decision of the ECJ is particularly important.

The most important case in the field of Economic and Monetary Policy is, however, without doubt the *Pringle*[183] case in which the ECJ enabled the functioning of the European Stability Mechanism (ESM). It did so, on the one hand, by deciding that the ESM does not fall within the monetary, but economic policy and, on the other hand, by an interpretation of the provisions of

176. Case C-19/03, *Verbraucher-Zentrale Hamburg eV v O2* [2004] ECR I-8183.
177. Compare Belorgey, Gervasoni, and Lambert, 'Comment arrondir les sommes d'argent lors du passage à l'euro?', 41(2004) *L'actualité juridique: droit administratif*, p. 2267.
178. Case C-27/04, *Commission v Council* [2004] ECR I-6649.
179. Notably if the Member State takes appropriate action or acts in accordance with the recommendations of the Council. Ibid., paras 83-89.
180. See Bandilla, 'Ist der Stabilitäts- und Wachstumspakt rechtlich durchsetzbar? Anmerkungen zum Urteil des Gerichtshofes in der Rechtssache Kommission/Rat (C-27/04)', in Gaitanides, Kadelbach, and Iglesias (eds), *Europa und seine Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (Nomos, 2005), p. 549.
181. See Bandilla, *supra* note 180, p. 549; Belorgey, Gervasoni and Lambert, ''Recommandations de décisions' de la Commission européenne et 'conclusions' du Conseil européen – A propos des règles du pacte de stabilité et de croissance', *Revue française de droit administrative* (2004), p. 1200.
182. See Articles 104(10) TEC and 126(10) TFEU.
183. Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000.

primary EU law[184] in a way that enables the conclusion of this instrument. Given the depth of the economic crisis, the decision of the ECJ came as no surprise.[185] One of the most important issues that this judgment addresses is the interpretation and the scope of the 'no-bailout' clause contained in Article 125 TFEU. As mentioned earlier in this report,[186] the ECJ constructed this article not in a way that would prohibit, the financial assistance by the EU or its Member States (interpretation that could have been inferred from the text of this article), but in a way that solely prohibits the financial assistance which results in diminishing of the incentive of the recipient Member State to conduct a sound budgetary policy.[187] This means, in view of the ECJ, that the financial assistance should not be without the conditions attached to such assistance and that the Member States should remain responsible for its commitments towards its creditors.[188] In practice, a question can be asked whether, for example, a loan for which the Member State remains (legally) responsible, but regarding that there is a high probability that it would never be repaid, is effectively a mechanism that would not diminish the incentive of a receiving Member State for a sound budgetary policy.[189] Nevertheless, the ECJ in *Pringle* (expectedly) decided to remain rather reserved concerning the judicial intervention in the area of economic and monetary policy.

It is to be noted that there is another case pending before the ECJ that could potentially shape the Economic and Monetary Policy. C-270/12, *United Kingdom v Council and Parliament,* in which the ECJ will need to decide about the question concerning the validity of the provision allowing the European Securities and Markets Authority to adopt legally binding acts in case of a threat to the functioning of financial markets, or to the stability of the finan-

184. More precisely, Articles 2 TEU, 3 TEU, 4(3) TEU, and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, as well as general principles of effective judicial protection and legal certainty.

185. Compare in this sense Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', *Maastricht Journal of European and Comparative Law* 20(2013), p. 5; Hinarejos, 'The Court of Justice of the EU and the Legality of the European Stability Mechanism' 72(2013) *Cambridge Law Journal*, p. 240.

186. See *supra* Question 1.

187. *Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General* [2012] ECR I-00000, para. 136.

188. Ibidem, para. 137.

189. See, in this sense, Craig *supra* note 185, p. 98.

cial system in the Union.[190] Advocate General Jääskinen in this case suggests that the ECJ should annul the provision in question, notably because Article 114 TFEU – that allows for the adoption of the acts that have as their object the establishment and functioning of the internal market – was not an appropriate legal basis for the adoption of the regulation in question.

Finally, it is to be mentioned that, in some cases concerning the Economic and Monetary Policy, the ECJ and the General Court declared the action inadmissible due to the lack of individual[191] or direct concern of the applicants,[192] or because the action was not brought forward within the time limit.[193] Due to their inadmissibility, these cases did not enable the EU judicial institutions to shape the Economic and Monetary Policy in any way.

190. The provision in question is Article 28 of the Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

191. Case T-116/94, *Cassa Nazionale di Previdenza ed Assistenza a favore degli Avvocati e dei Procuratori Legali v Council* [1995] ECR II-00001 and Case T-175/96, *Georges Berthu v Commission* [1997] ECR II-811 and Case T-207/97, *Georges Berthu v Commission* [1998] ECR II-509.

192. Case T-149/11, *GS Gesellschaft für Umwelt- und Energie-Serviceleistungen mbH v European Parliament and Council [2011] ECR II-359* and Case C-682/11 P, *GS Gesellschaft für Umwelt- und Energie-Serviceleistungen mbH v European Parliament and Council* [2012] ECR I-000.

193. Case T-74/99, *Karl L. Meyer v Council* [1999] ECR II-1749.

Annex I

Article 148[194] (Budgets)

All revenues and expenditures for the financing of public spending must be included in the budgets of the state:

Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing, or revenues must exceed expenditures. Temporary deviation from this principle is only allowed when exceptional circumstances affect the state.

The manner and the time frame of the implementation of the principle referred to in the preceding paragraph, the criteria for determining exceptional circumstances, and the manner of acting when they arise, shall be regulated in detail by a law adopted by the National Assembly by a two-thirds majority vote of all deputies.

If a budget has not been adopted by the first day it is due to come into force, the beneficiaries financed by the budget are temporarily financed in accordance with the previous budget.

The original text of Article 148 reads as follows:
All revenues and expenditures of the state and local communities for the financing of public spending must be included in their budgets.

If a budget has not been adopted by the first day it is due to come into force, the beneficiaries financed by the budget are temporarily financed in accordance with the previous budget.

194. As amended by the Constitutional Act Amending Article 148 of the Constitution of the Republic of Slovenia, which was adopted on 24 May 2013 and entered into force on 31 May 2013 (Official Gazette of the Republic of Slovenia No. 47/2013).

Abbreviations

CMLR – *Common Market Law Review*
DGS – Deposit Guarantee Scheme
ECB – European Central Bank
ECJ – European Court of Justice
ECR – European Court Reports
EFSF – European Financial Stability Facility
ELJ – *European Law Journal*
ELR – *European Law Review*
EMU – Economic and Monetary Union
EP – European Parliament
EPP – Economic Partnership Program
EU – European Union
ESM – European Stability Mechanism
OG – Official Gazette
OJ – Official Journal
OMT – Outright Monetary Transactions
PP – *Pravna Praksa* (*Law in practice*)
SMP – Securities Market Programme
SSM – Single Supervisory Mechanism
TFEU – Treaty on the Functioning of the European Union
TSCG – Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

SPAIN

Antonio Sáinz de Vicuña[1]

Economic policy

EU legal order

Question 1

The response to the euro area debt crisis has had the following main aspects:

a) With regard to the **sovereign indebtedness**:
   a. The reform of the Stability and Growth Pact in order to make it more robust, by the ex-ante scrutiny of the planned budgets of Member States, and the ex-post scrutiny, assorted with a compliance function entailing the possibility of compulsory deposits and financial sanctions based on a system of silent approval to Commission proposals unless objected by a majority of the Council. The instruments used are the so-called '*Six-pack*' and the '*Two-pack*': as these are secondary EU law based in Art. 126 of the Treaty, there is no doubt about their legal soundness under EU primary law.
   b. A new inter-governmental treaty, the Treaty on Stability, Coordination and Governance, known as '*Fiscal compact*', the main provision of which is the so-called '*Golden rule*' (budgetary balance). The use of an inter-governmental instrument instead of a EU instrument is the result of a political decision, in view of the opposition of two Member States to such kind of mandatory act. Should there have been full political support by all Member States, the EU institutions would have preferred most probably a EU act, entailing a likely amendment to the Treaty. The fact that the Fiscal compact has an inter-governmental character is not in breach of any TFEU provision; the Fiscal compact states also

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explicitly the full respect of its provisions to Union Law; the jurisdiction given to the European Court by the Fiscal compact does not contradict the TFEU, as the TFEU admits the vesting of jurisdiction to the Court in agreements by Member States.

c. The establishment by euro area Member States of collective financial facilities to assist individual euro area Member States in emergency situations where there is stress in their sovereign debt market:
   i. The European Financial Stability Facility (EFSF) created in June 2010 by way of a private law company established in Luxembourg under Luxembourgish law, with its capital subscribed by the euro area Member States. It complemented the granting against the EU budget of a loan to the Hellenic Republic, named 'European Financial Stability Mechanism' (EFSM); such funding was granted under Article 122 of the TFEU, which stipulates that only Member States facing "*severe difficulties caused by exceptional occurrences beyond its control*" were eligible for financial assistance.
   ii. The above-mentioned two facilities were eventually replaced by the establishment of the European Stability Mechanism (ESM) as an international organisation created by a Treaty, ratified by the euro area Member States, and in currency since October 2012.[2] The use of an inter-governmental instrument was motivated in the need to address exclusively the euro area Member States. The parallel amendment to Art. 136 TFEU in 2013,[3] clarified doubts about the full consistency with the TFEU of such inter-governmental rescue funds.

2. The Treaty establishing the European Stability Mechanism was signed by the Member States of the euro area to found the European Stability Mechanism (ESM), an international organisation located in Luxembourg, to act as a permanent source of financial assistance for euro area Member States in financial difficulty, with a maximum lending capacity of €500 billion. It replaced two earlier temporary EU funding programmes: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). All new bailouts of euro area Member States will be covered by ESM, while the EFSF and EFSM will continue to handle money transfers and program monitoring for bailouts previously approved for Ireland, Portugal and Greece. The treaty stipulated that the ESM would be established if Member States representing 90 % of its capital requirements ratified that treaty. This threshold was surpassed with Germany's ratification on 27 September 2012, bringing the treaty into force on that date for 16 Member States which had ratified the agreement. The ESM commenced its operations at a meeting on 8 October 2012.
3. A treaty amending Article 136 of the Treaty on the Functioning of the European Union (TFEU) to clearly authorize the establishment of the ESM under EU law, was planned to enter into force on 1 January 2013. However, the last of the 27 EU Mem-

b) With regard to the **macro-economic convergence**, the response to the increasing divergence among euro area Member States has been faced by way of three Regulations (number 1174, 1175 and 1176 / 2011) with clear base in the TFEU, establishing a Macroeconomic Imbalances Procedure composed of surveillance measures and indicators, corrective measures, their coordination and implementation.[4] Thus, there is no doubt about their legal soundness.

c) In what regards the crisis in the **financial sector**, the measures adopted fall into three categories:

   a. Financial regulation for the whole internal market. The EU has followed basically the global guidance given by the G20 meetings based on the proposals of the newly-established[5] Financial Stability Board (FSB), itself the grouping of several global standard-setters.[6] The several acts on the implementation of Basel III Accords, completed and consolidated in the Directive 2013/36/EU and Regulation 575/2013; the directives on bank recovery and resolution (BRRD) and on deposit guarantee schemes (DGSD); the regulations establishing the European Banking Authority (EBA) and the European Systemic Risk Board; the regulation on markets in derivatives (named EMIR) and on financial products (known as MiFiD II). The above acts are further complemented by the so-called Single Rulebook, a term that encompasses the tech-

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ber States to ratify the amendment, the Czech Republic, did not do so until 23 April 2013, resulting in its entry into force on 1 May. Croatia, a new EU Member State as of 1 July 2013, ratified also such amendment.

4. The new Macroeconomic Imbalance Procedure (MIP) broadens the EU economic governance framework to include the surveillance of macroeconomic trends. The aim of the MIP is to identify potential risks early on, prevent the emergence of harmful imbalances and correct the imbalances that are already in place. In this respect the objective of the MIP is to ensure that appropriate policy responses are adopted in Member States in a timely manner to address the pressing issues raised by macroeconomic imbalances. In doing so, the MIP relies on a graduated approach that reflects the gravity of imbalances and can eventually lead to the imposition of sanctions on euro area Member States should they repeatedly fail to meet their obligations under the corrective arm of the MIP. Sanctions follow a semi-automatic procedure, consisting of a Commission's proposal and the need for a negative qualified majority vote in the Council to reverse such proposal.
5. It had a pioneer and informal group, established by the G10 under the name of Financial Stability Forum and hosted by the BIS in Basle.
6. The FSB has taken the form of a Swiss Civil Society, thus, a private-law instrument. It does not produce legal acts, but soft-law instruments like reports, recommendations, peer-reviews, etc.

nical standards prepared by the EBA and adopted by delegated power by the Commission. All these secondary legal acts take their base on the internal market TFEU provisions, namely, Art. 114; thus, there is no doubt about their legality.

b. Acts aimed at the specific situation of the euro area, for which they are mandatory, but which are open to other non-euro area Member States. The main acts being:
   i. Council Regulation (EU) No 1024/2013[7] conferring specific supervisory tasks to the ECB and establishing a Single Supervisory Mechanism (SSM), adopted on 15 October 2013 by unanimity of all 28 EU Member States. It applies to euro area Member States and to those other Member States having decided to enter into close cooperation within the SSM. This legal instrument is directly based on Art. 127(6) TFEU, and thus has a clear legal basis in primary law.
   ii. Proposed regulation on a Single Resolution Mechanism, composed by a new Single Resolution Authority and Single Resolution Fund. This act is to be based on Art. 114 TFEU, as it complements the BRRD – which is based on that provision – by addressing the manner for the implementation of the BRRD within the SSM perimeter, without changing the BRRD substantive provisions that continue to apply to the whole internal market. This seems to be a sound legal basis.
c. ECB acts, which apply only to the euro area credit institutions. These are the measures adopted to modify the interest rate and the length of Eurosystem's lending operations, to adapt the collateral framework for such lending operations, as well as the secondary market direct interventions on sovereign bonds and on covered bonds (the *Securities Market Program* of 2010 and the *Outright Monetary Transactions* policy program decided in 2012, not yet implemented) designed in order to mitigate exceptional market distortions to the monetary transmission mechanism. All these instruments are based on Arts. 17 and 18 of the Statute of the ECB, and aim at preserving the price stability primary objective as stated in Art. 2 of such Statute. Thus, these acts are soundly based on EU primary law.

7. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. (OJ L287 of 29.10.2013).

Two judicial challenges have reached the European Court against some of the legal instruments above described.

a) A group of Italian holders of Greek sovereign bonds have launched two claims before the European Court against the ECB (*Accorinti and others vs. ECB*).[8] The first case asks to annul the ECB Decision of 5 March 2012 on 'the eligibility of market debt instruments issued, or fully guaranteed, by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer'. The challenged ECB act addressed the lack of eligibility of Greek Government bonds (GGBs) for the period of voluntary exchange[9] of such bonds held by Eurosystem counterparts, during which they did not meet the statutory conditions for their eligibility as collateral in Eurosystem liquidity operations. In order to avoid their temporary illegibility, which had a systemic risk, the Hellenic Republic had arranged with the EFSF the grant to the Eurosystem of a buy-back option to swap GGBs against EFSF bonds (rated AAA) in the event of a default –during the GGB exchange period – of a bank in the due reimbursement of borrowed funds to a Eurosystem lender. Based on such option right, the ECB act maintained such GGB eligibility throughout the exchange period. The main arguments of the Accorinti challenge were the breach to the principle of equal treatment (as the Euroystem members were treated better than other ordinary creditors secured with GGBs), the breach to the '*principle of sovereign debt*' (sic), as the buy-back option against EFSF bonds entailed a mutualisation of Greek debt, and the misuse or abuse of power. In the second Accorinti Case the claimants asked for compensation for damages based on the ECB's civil liability; the main argument being that the requirements for compensation based on Art. 340 TFEU are met, namely, illegal action by the ECB, causal nexus and monetary damage. The ECB is asking the inadmissibility of the two claims. The challenged ECB Decision was temporary and expired following the completion of the GGB swap process, without the buy-back option having been activated as no Eurosystem counterpart defaulted.

b) In one particular case the European Court was seized by way of preliminary procedure whereby the Court confirmed the legality of the inter-govern-

8. Case T-224/12 and Case T-79/13
9. Such voluntary exchange was based on a Collective Action Clause introduced by legislation adopted by the Hellenic Parliament whereby by the vote of a super-majority of bondholders GGBs would be exchanged against new GGBs with different terms and conditions.

mental treat act establishing the European Stability Mechanism (ESM). Indeed, by way of interim procedure, in the *Pringle vs. Ireland* case[10] the European Court confirmed on 27 November 2012 the legality of such intergovernmental treaty establishing the ESM. Mr Pringle had alleged before an Irish court that the ESM Treaty interfered with the Union's competence in the areas of monetary policy and of coordination of national economic policy, and thus should not be ratified by Ireland. Mr Pringle's arguments were rejected by the European Court. It rejected arguments that the roles assigned to the European Commission, the European Central Bank and the Court of Justice itself by the ESM Treaty were outside their statutory powers. A significant element of the applicant's argument was that the ESM Treaty infringed two provisions of Union law designed to maintain the Member States budgetary balance: the prohibition to lend to Member States under Article 123 TFEU, and the prohibition for Member States to rescue other Member States under the so called '*no bail-out*' clause of Article 125 TFEU. This somehow proves the legal soundness of the wide panoply of legal acts used to fight the euro area debt crisis.

c) Apart from the *Accorinti* and *Pringle* cases, above-mentioned, a national case should be reported that has triggered the attention of public opinion: in 2012 a series of individuals and organisations claimed before the German Federal Constitutional Court ('BVerfG')[11] (i) that the ESM Treaty and the Fiscal Compact impinged upon the budgetary sovereignty of the German Parliament as stated in the German Constitution; and (ii) that the ECB had acted *ultra vires* when deciding to add to its monetary policy *instrumentaria* the capacity to make secondary market interventions on covered bonds and on sovereign bonds, in order to correct temporary malfunctioning of such market segments, and based on its market intervention powers under Art. 18.1 first indent of the ECB's Statute; this second constitutional claim was targeted not at the ECB[12] but at the German Parliament and the German Federal Govern-

10. Case C-370/12.
11. Cases 2 BvR 1390/12, 2BvR 1438/12 and 2BvR 1995/12. Decision of 7.2.2014 to seek a ECJ preliminary ruling in http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html
12. The ECB was only invited to appear before the BVerfG as expert witness at the oral hearing that took place on 11 and 12 June 2013, in parallel to 9 other experts of German nationality. The ECB explained to the BVerG the conditional basis and narrow-targeted instrument, aimed at protecting the integrity of the monetary transmission mechanism of the euro to ensure price stability throughout the monetary area.

ment, defendants, for failure to act against such ECB monetary instruments in the European Court. The BVerfG rejected a claim for an interim decision to stop the German ratification of the two inter-governmental treaties.[13] The main proceedings have been concluded and the BVerfG final judgement is still pending when this Spanish Report to FIDE is being written. However, the competent court to adjudicate on whether the said ECB instruments are *ultra vires* is clearly the European Court, and not a national court; on 7 February 2014 the BVerfG has decided to seek a preliminary ruling by the European Court on whether the OMT exceeds the statutory mandate of the ECB and entails a monetary financing (Case 62/2014).

Question 2

a) **Supranational instruments**. The use of secondary EU legislation requires a sound legal basis. As stated in the previous response to Question 1, all legal acts adopted by the EU above described have been based on primary law bases. Thus, *prima facie*, such acts respect the constitutional/institutional EU framework.
   Points of discussion have been:
   – Whether the use of the enabling clause of Art. 127(6) TFEU to confer wide-ranging supervisory tasks to the ECB is consistent with the wording of the provision, whereby it is permitted to confer '*specific tasks*' and these when they concern '*policies*' related to prudential supervision. Some have argued that the principle of conferral (Art. 5 TEU) requires an enabling clause being restrictively interpreted, and that a Treaty revision would be a sounder procedure to vest wide-ranging supervisory powers to the ECB. Such argumentation motivated the drafters of Council Regulation (EU) No 1024/2013 of 15 October 2013 (the 'SSM Regulation') which confers the ECB supervisory tasks to elaborate a lengthy Preamble of 87 paragraphs justifying the specific needs to confer each of the specific supervisory tasks to the ECB, as well as the detailed description throughout the normative text of such tasks. Although one could agree that it is a wide-ranging conferral of supervisory tasks, the primary law requirement of being *specific* is being met by such a detailed text. Indeed, *specific* is a term contrary to *generic*, and not to *wide-ranging*. The Preamble also enumerates the tasks that

13. Judgement of 12.9.2013.

are to remain at national level.[14] The interpretation given to the term '*policies*' in that SSM Regulation encompasses not only its stricter interpretation (i.e. not encompassing individual supervisory decision-making) but the wider one: supervisory decisions are to be framed by the ECB in criteria to be applied throughout the SSM perimeter, so as to ensure equal treatment of credit institutions, one of the aims of the SSM;[15] adopting a framework for the SSM is necessary, and required by the SSM Regulation,[16] to frame precisely individual decisions.

- Whether the principles of subsidiarity and of proportionality would not demand that the SSM is limited to major systemic banks, whilst leaving in national supervisory hands the medium and small credit institutions. The SSM regulation applies to all credit institutions, as such concept is defined by EU Law, both major, medium-sized or small. That the SSM applies to all credit institutions of the euro area is also justified in the Preamble of the SSM Regulation, with a basis in the interconnectedness of the banking system within a monetary union and the systemic potential for crisis arising from medium or even small credit institutions.[17] Proportionality is served by the introduction in the SSM Regulation of two differentiated supervisory regimes, 'direct' and 'indirect', based on the 'significance' of individual credit institutions, a concept defined in such SSM Regulation. Although the issue was intensively debated by Eurogroup members in 2012 and 2013, the solution contained in the final SSM Regulation seems correctly justified on proportionality grounds and thus sound.
- With regard to the Commission's proposal for a Regulation establishing a Single Resolution Mechanism,[18] a discussion took place as to

14. See e.g. par. 15 and 28.
15. See, e.g., par. 5 of Preamble: '*to reduce the risk of different interpretations and contradictory decisions*', particularly when addressing multinational credit institutions. The overall aim of the SSM to avoid market fragmentation and foster its integration underlies the need for equal treatment.
16. See e.g. its Arts. 6, 7 and 8.
17. See e.g. par. 16. That small credit institutions may be the origin of a systemic crisis is proven by history (e.g. the Herstatt Bank case) and by the current crisis (e.g. the Spanish saving banks crisis).
18. Commission proposal for a Regulation establishing a Single Resolution Mechanism and a Single Bank Resolution Fund 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) No 1093/2010 of the European Parliament and of the Council.

whether the legal basis for it could be Art. 114 TFEU (internal market). As explained in the proposal memorandum of the Commission, the draft regulation contemplates only the manner to implement the BRRD, itself based on Art. 114 TFEU, but which leaves room of manoeuvre to Member States for its implementation; to the extent that the draft regulation aims at furthering the degree of harmonisation within the perimeter of the SSM, but with full respect to the BRRD, Art. 114 TFEU is validly used as legal basis. The Commission's proposal further justifies the respect of the draft to the principles of subsidiarity and proportionality.

b) **Inter-governmental instruments.** The ESM Treaty[19] and the Fiscal Compact[20] are the examples of inter-governmentalism in dealing with the crisis. They are the result of the need to address without delay the euro crisis, in a situation where non-euro area Member States were not ready to support the euro area, at least some of them, or only subject to addressing the issues at stake through TFEU changes. Clearly, inter-governmentalism suffers from the important shortcoming of unanimity as its decision-making method, as compared with the 'community method' where veto rights have been in the course of time rightly deleted from most of the TFEU. But to the extent that inter-governmental acts are compatible with EU Law, it is a valid method to achieve objectives that cannot be achieved otherwise. The European Court Pringle Case judgement confirms such approach. In the case of the Fiscal Compact, despite being an international treaty outside the EU legal framework, all its provisions function as an extension to existing EU regulations, utilising the same reporting instruments and organisational structures already created within EU in the three areas of budget discipline (enforced by Stability and Growth Pact, addressed in Title III of the Fiscal Compact), coordination of economic policies (addressed in Title IV), and EMU governance (addressed in Title V). The European Court is also given a specific jurisdiction: if a ratifying Member State fails to enact the required implementation laws within one year of the treaty's entry into force, it can ultimately be fined up to 0.1 % of its GDP by the European Court.

19. In currency as of 8th October 2012. Its signatories are the euro area Member States. Latvia was the last euro area Member State to join the ESM Treaty on January 30th 2014.
20. In currency as of 1st January 2013. It has 26 EU Member States as signatories (all except the Czech Republic and the United Kingdom).

The treaty states that the signatories shall attempt to incorporate the Fiscal Compact into the EU's legal framework, on the basis of an assessment of the experience with its implementation, by 1 January 2018 at the latest.

Admittedly, when the possibility exists to use the 'enhanced cooperation' method,[21] it should be given preference to that community method over inter-governmentalism; in the ESM Treaty and Fiscal Compact cases, the 'enhanced cooperation' approach could not regretfully be used, as the substance-matter in both cases (national budgetary and fiscal issues) did not have a clear legal basis in the TFEU,[22] and verifying the 'last resort' requirement would have needed a time-frame that was not available under the circumstances.[23]

c) **Private law instruments.** The EFSF, whose creation was decided on 9 May 2010, was formally established in June 2010 under the form of a private law company per shares ('Société Anonyme') based in Luxembourg, owned by euro area Member States and subject to Luxembourgish law. States have legal personality for both public and private law matters. They have legal capacity to enter into private law contracts and to be part of private law companies. However, constitutional, budgetary and administrative laws do normally subject States' private law capacity to some procedural or substantive constraints. Subject to these legal constraints, euro area Member States could validly enter into the establishment of a private law company based in Luxembourg, as a kind of Special Purpose Vehicle for sovereign rescue operations. However, the method followed in this EFSF case is susceptible of some points of criticism:

   i. It could be argued that the social objective of a private company by shares could not encompass the public law objective of the EFSF, i.e., to provide financial assistance to euro area Member States under temporary budgetary difficulties. Normally, companies by shares have a lucrative objective, i.e. to provide some profit to the shareholders as return to their investment. In the EFSF case the company's objective is not profit, but helping a Member State that is under stress. Thus, the

21. See Arts. 326 et seq. TFEU.
22. The 2013 amendment to Art. 136 TFEU goes in the direction of creating a legal basis for enhanced cooperation within the euro area Member States; however, it came after the time of the entry into currency of the ESM Treaty (8th October 2012), thus too late for the ESM itself.
23. See Art. 20 TEU requiring a pre-existing TFEU competence and the need for a 'period' to verify the 'last resort' concept for enhanced cooperation.

creation of an SPV could arguably be seen as an artificial use of private law for a public law purpose.

ii. A private company under a national law is subordinate to that law and is subject to the jurisdiction of that national State; the EFSF could in theory be subject to Luxembourg legislative action; corporate taxes on its profits, if any, could be levied, income taxes on its resident officials, and – importantly in view of the likely size of EFSF operations– it is subject to the statistical framework of Luxembourg.

iii. A private company whose corporate object is to issue bonds and grant credits is a financial intermediary that falls under the EU definition of credit institution,[24] with the consequence of being subject to the legal regime for banks (e.g. solvency and liquidity ratios, supervision, governance, access to central bank liquidity, etc.).

On 1 July 2013 the ESM, a public law international organisation, became the only vehicle for new sovereign rescues. However, the Eurogroup decided that EFSF loans to Greece, Ireland[25] and Portugal should be kept in the books of the EFSF instead of being replaced by ESM loans. It may be argued that an opportunity was then lost to improve the legal construction of euro area sovereign rescue instruments and removing the oddity of a private law vehicle for such operations, if they simply had decided to substitute the ESM for the EFSF.

d) **Soft instruments.** In the context of the euro crisis the asymmetry between the monetary and the economic legs of EMU became evident: indeed, Europe shares a currency among countries whose economies are very diverse. By applying to them the 'one-size-fits-all' ECB's monetary policy, the effect has been an increasing economic divergence among euro area Member States and the fragmentation of the financial markets. The correction of such negative process has required measures in the domains above described of fiscal policy and the financial markets; this is not enough. The economies of the euro area Member States need to converge if the euro is to succeed in a non-optimal currency area. Such goal is the main aim of

24. Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms defines a 'credit institution' as an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.

25. Ireland repaid its outstanding EFSF loans and exited the EU/IMF assistance program on January 2014.

the Euro-Plus Pact (the EPP), itself a document that has a policy nature rather than a legal one.[26]

The EPP contains five strategic goals and specific strategies for them:

i) The five goals are the fostering of (a) competitiveness, (b) employment, (c) sustainability of public finances, (d) financial stability and (e) tax policy coordination.

ii) The listed strategies to achieve those goals are: (i) entertain structured discussions, (ii) mutual exchange of best practices and benchmarking the best ones, (iii) commitment to avoid practices harmful to others, (iv) cooperation to fight tax evasion, (v) peer examination[27] of 'national reform programs' to be submitted/updated yearly in April, (vi) consult ex-ante major economic reforms, (vii) labour reform aimed at achieving '*flexicurity*', avoidance of wage indexation, decentralisation of wage negotiations, sustainability of pensions, with the use of non-binding guidelines,[28] (viii) mutual monitoring of evolution of unit labour costs, and (ix) entering into '*Competitivity Contracts*', where a Member State commits certain reforms against some financial support by way of EIB loans or EU Structural Funds lines; in the domain of labour, EU-funded incentives may be also the subject of legal acts adopted by Parliament and Council.[29]

iii) The choice of specific actions aimed at the above goals and strategies remain the responsibility of each Member State; of course the Competitivity Contracts require common agreements.

The soft law approach above described lacks the strength of 'hard law' instruments, but at the same times gives flexibility in areas such as labour or taxation where national sovereignty and political sensitivities are important. It is also inter-governmental, as shown by the differing degree of participation; this has the inconvenience also of avoiding the intervention of the European Parliament, which should provide the European-wide legitimacy to the economic convergence process, does not provide for jurisdiction of the European Court to enforce occasional commitments, and gives the Commission a support role (e.g. monitoring, reporting) rather than a leadership role. Such kind

26. The EPP is a document approved by the European Council on 25th March 2011 by the European Council, subscribed by all 18 euro area Member States and by six non euro-area Member States.
27. Sometimes nick-named as '*naming and shaming*'.
28. See e.g. Art. 148 TFEU.
29. See Art. 149 TFEU.

of soft instruments is sometimes termed as 'open method of coordination' or OMC, in particular in the labour policy domain.

The evaluation of these soft instruments is generally positive, as a flexible tool to achieve basic convergence. It is regrettable that a few EU Member States remain alone and outside of this continental project, at a moment when global challenges to the European economy require an overall coordination and consistency. Results of these soft measures are still modest, but positive.

Question 3

a) Banking union. The normative part at EU level is basically either done and in the period of implementation by Member States, or in good course to be done in the short future.

Indeed, this is the case for the internal market directives and regulations on banking, namely, the Basel III implementation (CRD4+CRR), the bank recovery and resolution (BRRD), and the deposit guarantee schemes (DGSD). All EU Member States are in the course of adapting the national legislation to these legal acts, in many cases well in advance of the statutory timetable. In particular, EU Member States under a EU/IMF program have implemented the conditionality foreseen in the respective Memoranda of Understanding which contemplated the advanced adaptation of their national legislation to the –then – proposals for bank recovery and resolution, aiming at minimising the taxpayers contribution to the bank recovery costs.[30] Also, some EU Member States outside any program but under

30. This is the case for Greece, Ireland, Portugal, Cyprus, Spain. As this is a Spanish Report to FIDE, it may be pertinent to mention that in Spain the period 2008-2013 has seen probably the most important regulatory changes of the whole Spanish banking history. In October 2008 and following the Paris post-Lehmann European Summit, the Spanish Government adopted legislation to (i) create a State fund to acquire assets from banks in funding difficulties (FAAF), (ii) to allow the State Treasury to guarantee bank bonds, and (iii) to allow the Treasury to subscribe bank preferred shares in order to improve their solvency. In parallel, secondary regulations on bank solvency were adopted, and introduced very conservative criteria for capital calculation. Also in parallel, the legislation on saving banks was modified to facilitate mergers among them with the aim to increase their resilience in the downturn of the real estate cycle; in particular, a calendar was put in place for the saving banks to re-convert into companies by shares and facilitate their re-capitalisation. In June 2009, a State new fund for bank recapitalisation and recovery (FROB) was created, with financial firepower reaching € 9 bn as capital plus € 99 bn as limit for bond issuance (guaranteed by the Treasury), vested with important tools for bank intervention, which were increased by subsequent legislation of February 2011 and November 2012. This latter piece of leg-

acute banking crises, have introduced in their national legislation the methodologies later contained in the BRRD aimed at putting the recovery burden on bank shareholders, holders of hybrid instruments, subordinate bondholders and non-insured depositors.[31] Transitory periods foreseen in the BRRD have been shortened. In parallel to the adoption of the CRD4-CRR, many EU Member States have advanced its implementation or shortened the transitory period there foreseen. Thus, it can be said that national legislation has advanced at the same path as the EU legislation, and the likelihood is that its implementation will be generally done before the statutory periods foreseen. The name of the game being 'bank confidence restoration', all Member States have actively hurried the adaptation of their laws to the standards set in the global fora (Basel Committee, FSB), which are the basis for the EU banking crisis legislation.

For the euro area, the SSM Regulation was adopted in 2013 and the ECB is at full steam preparing its implementation and the ex-ante Asset Quality Review exercise imposed by that SSM Regulation. Difficult debates about the compatibility of ECB's independence with democratic accountability for ECB's supervisory tasks, about the separation or contamination of monetary policy with bank supervision, and on proportionality and decentralisation, have been correctly settled. Implementation will show whether the governance solutions are correct. One matter for future discussion is whether at a certain point in time there will be a need to start

islation was adopted in the context of the MoU entered between Spain and the EU on July 2012 to obtain an ESM credit line of up to € 100 bn to recapitalise banks that, following an independent audit, would be proven short of capital. It also anticipated the bail-in instruments foreseen in the BRRD (in spite of such EU Directive being still in draft), and contained an accelerated calendar to introduce in Spain the Basel III new ratios (in spite of the CRD4-CRR being still in draft). Finally, and out of the MoU above-mentioned, in November 2013 new legislation on saving banks introduced the mandatory separation between banking activities, which should be done through companies by shares duly capitalised, and their social activities, which should be transferred to a new kind of entities named 'Banking Foundations' against shares in the company's operating the banking side. Such banking foundations are to be subject to prudential supervision of Banco de España as long as they remain 'significant shareholders' of the bank (removing from local politicians the control of the saving banks). The historical distinction between 'banks' and 'saving banks', which goes back centuries into past Spanish history, disappears, as the banking side of such saving banks becomes a separate 'normal' bank by shares, and the social activities hitherto funded by such saving banks, are to be managed by the new banking foundation, a separate entity, which is a shareholder of the bank.

31. This is the case, e.g., of the United Kingdom, Germany, or France.

harmonising the National Competent Authorities, an SSM term that encompasses very different national constructions, now part of a '*single*' SSM. And one aspect that will certainly need to be achieved, is more convergence of accounting rules for credit institutions, still very diverse, and where par. 19 of the Preamble of the SSM Regulation states that '*Nothing in this Regulation should be understood as changing the accounting framework applicable pursuant to other acts of Union and national law*'.

The EU institutions are intensively discussing the 2013 Commission's proposal for direct bank recapitalisation via the ESM, with the establishment of a European Authority and a Fund. The political aim being that such legislation ought being adopted before the European Parliament dissolves in the course of this 2014, and this being legislation to be adopted by qualified majority voting (i.e. without veto rights), it is thus likely that it will be in place soon.

b) Fiscal union. Also here, the EU legislation has been already adopted and a substantial part of it applied already in 2013, in particular the Stability & Growth Pact EU provisions, revised in 2011 and contained in the so-called *Six-pack* and *Two-pack*. The implementation of the Fiscal Compact – signed by 26 but ratified by 24 Member States – at national level ought to have been made by the initial signatories as of January 2014.[32]

32. Member states that have ratified the treaty are required to have enacted, within one year of the Fiscal Compact entering into force for them, a domestic "implementation law" establishing a self-correcting mechanism, guided by the monthly surveillance of a governmentally independent fiscal advisory council, which shall guarantee their national budget be in balance or surplus under the treaty's definition and parameters. At the time of writing, parliamentary ratification of Fiscal Compact Treaty was completed in 24 of 25 signatory countries, out of which 15 in the euro area. Finland deposited the ratification instrument as the twelfth Euro area member state on 21st December 2012; the Fiscal Compact Treaty entered into force on 1st January 2013 between the countries that did ratify it, thus with a duty to implement it by 1st January 2014. To date the Council received 24 ratification instruments together with two interpretative declarations from Denmark and Romania concerning the applicability of the title III, IV and V. Other non-euro area member states indicated to be bound only by the title V (Hungary, Lithuania, Poland, Sweden). Cyprus, a euro area Member State, signed but has neither ratified nor implemented the Fiscal Compact. And Croatia, a new EU Member State, has not yet ratified the Fiscal Compact. The European Parliament maintains a detailed regular monitoring of national implementations of the ESM Treaty and of the Fiscal Compact Treaty (see link in: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/afco/dv/2014-01-15_pe462455_v21_/2014-01-15_pe462455_v21_en.pdf)

c) Economic union. The legal acts aimed at fostering economic convergence of euro area (and some other) EU Member States, were already adopted and implemented. Adaptations to national law are not necessary, as the implementation of the EU acts by the EU is done basically by soft instruments, except for the enforcement of sanctions which of course require 'hard law' instruments.

d) Political union. The measures already taken on banking, economic and fiscal union, above-described, entail a massive shift of powers to the EU level, either to the EU institutions or to the more inter-governmental bodies arising from the ESM and Fiscal Compact treaties. For instance, on banking union EU bodies will be able to license, supervise, sanction, intervene, recapitalise, bail-in and bail-out, close, credit institutions, and guarantee their deposits. On fiscal union, the 'European Semester' regime entitling the Commission to monitor ex-ante something so close to sovereignty as the national budgets, the preventive and corrective powers given to the Commission on budgets and on imbalances, the capacity given to the ESM to impose conditionality on fiscal and economic reforms, etc. All of this would have required, as the European Council Conclusions of 13/14 December 2012, being assorted with measures aimed at '*ensuring democratic legitimacy and accountability at the level at which decisions are taken and implemented*'.[33]

The SSM Regulation reflects throughout its text the above Summit conclusions by requiring parliamentary intervention in the ECB's performance of the conferred supervisory tasks; in particular, Arts. 20 and 21 provide for such parliamentary control, and this is supplemented by an In-

33. Par. 14 European Council Conclusions: '*Throughout the process, the general objective remains to ensure democratic legitimacy and accountability at the level at which decisions are taken and implemented. Any new steps towards strengthening economic governance will need to be accompanied by further steps towards stronger legitimacy and accountability. At national level, moves towards further integration of the fiscal and economic policy frameworks would require that Member States ensure the appropriate involvement of their parliaments. Further integration of policy making and greater pooling of competences must be accompanied by a commensurate involvement of the European Parliament. New mechanisms increasing the level of cooperation between national parliaments and the European Parliament, in line with Article 13 of the TSCG and Protocol No 1 to the Treaties, can contribute to this process. The European Parliament and national parliaments will determine together the organisation and promotion of a conference of their representatives to discuss EMU related issues*.'

ter-Institutional Agreement entered on 9th October 2013 between the ECB and the Parliament with all the procedural arrangements.[34]

Similarly, in the Commission's proposal for a Regulation establishing a Single Resolution Mechanism and a Single Bank Resolution Fund[35] contains in Arts. 41 and 42 similar provisions on parliamentary intervention both at EU and at national level regarding the Single Resolution Board.

It is submitted that by an increased role for the EU and national parliaments, the basis for political union are being set.

A different debate is whether such enhanced democratic accountability for the new banking union mechanism satisfies the – still unclear – concept of 'Political Union'. The answer is probably not. A proper Political Union would most probably require changes in primary law, agreed by Member States under their constitutional procedures. As first suggested by the then ECB President Mr. Jean-Claude Trichet when the Charlemagne Prize was granted to him in 2011,[36] the wide powers elevated to the EU level in what regards what was later termed as banking union, fiscal union and economic union, may require a well-staffed euro area Ministry of Finance. Such 'Minister' requires democratic accountability, vis-à-vis the EU Parliament and the national parliaments. This would be a quantum jump to the existing situation, and may set the path for other intense areas of EU activity (e.g. agriculture). The above-described situation of parliamentary control of the SSM and, in the near future, of the SRM, based on EU secondary law and inter-institutional agreements, is not fully satisfactory: democratic accountability requires a constitutional provision, for which only primary law, duly ratified by all EU sovereigns, is sufficient.

Since such a reform of the TFEU needs approval by all 28 EU Member States, there it might be a need to circumscribe its geographic scope to EU Member States clearly affected by the establishment of the fiscal, economic and banking unions (i.e. euro area and SSM participants), or for all but with the provision – once more – of *opt-outs*, so that non-affected Member States could agree to this constitutional reform as something alien to them.

34. http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0404&language= EN#BKMD-2
35. Commission proposal for a Regulation establishing a Single Resolution Mechanism and a Single Bank Resolution Fund 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) No 1093/2010 of the European Parliament and of the Council.
36. http://www.ecb.europa.eu/press/key/date/2011/html/sp110602.en.html

An alternative to the above proposals is the use of enhanced cooperation, whereby only the Member States affected by the transfer of powers to the EU level accept the creation of such EU Finance Ministry and the democratic conditions for the exercise of such function.

A connected question is whether there could be two different EU budgets: one for EU policies applying to the whole EU membership, kept at the current modest levels, and another larger budget for those Member States that are within the fiscal, economic and banking unions. An increased political union may permit for a wider EU budget aimed at fiscal countercyclical actions. For instance, the 'Genuine Economic and Monetary Union' 4-Presidents Report of 5.12.2012 already contemplated for the future a '*Central shock-absorption function*', which requires a sound legal base. Other possibilities entailing a central fiscal capacity have been discussed (e.g. Europe 2020 Strategy,[37] Project Bonds,[38] Stability bonds[39]). But a clear pre-condition for these ideas involving an improved EU budgetary capacity is the improvement of democratic control ('*no taxation without representation*').

Question 4 [See Q7]

See response to Question 3 above on Political Union. It is here submitted that secondary law and inter-institutional agreements do not suffice, and only a Treaty provision, ratified by national parliaments, would be adequate. The use of enhanced cooperation might be an alternative worth exploring.

A difficult question is whether in an asymmetric Banking Union, whereby several but not all 28 EU Member States are within its scope, would deserve a democratic accountability limited to those participating Member States. The European Parliament has rejected any idea that the democratic control on ECB's performance under the SSM Regulation be limited to MEPs elected by the people of SSM participants, and the Inter-Institutional Agreement between ECB and Parliament does not provide for a distinction. To the extent that non-SSM countries may have financial interests different from those of the SSM participant Member States, the democratic control may suffer from interference, confidential information leakages or home biases from non-SSM MEPs. This is an issue that may merit further reflection if the intra-EU

37. http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm
38. http://europa.eu/rapid/press-release_MEMO-11-707_en.htm?locale=en
39. Green Paper in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM: 2011: 0818:FIN:en:PDF

scope asymmetries in Banking, Economic and Fiscal unions are to be permanent rather than transitory.

Question 5

Financial regulation. The pending piece of today's 'to do list' is the implementation of the 'Liikanen Report'.[40] Indeed, the ethical and 'too-big-to-fail' concerns that motivated the introduction of the so-called 'Volcker Rule' in the US's Dodd-Frank Act,[41] imposing separation between investment banking and traditional deposit-taking banking, triggered changes in the British,[42] French[43] and German[44] legislations, similar but different. The Commission has made on 29th January 2014 a proposal[45] for a Regulation implementing the Liikanen Report and thus avoid the surge of national differing approaches to address the same issue. With regard to the SSM, the main challenge is for (i) the ECB to adopt the SSM implementing regulatory framework, and (ii) for the EBA to achieve the so-called *Single Rulebook* in the course of 2014.

40. High-level Expert Group on reforming the structure of the EU banking sector, Chaired by Erkki Liikanen. Brussels, 2 October 2012. http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf
41. Summary of the Dodd-Frank Act on Wall Street Reform and Consumer Protection Act of 21st July 2010, in: http://en.wikipedia.org/wiki/Dodd%E2%80%93Frank_Wall_Street_Reform_and_Consumer_Protection_Act
42. *Financial Services (Banking Reform) Act 2013* derived from the *Vickers Report* ('The Independent Commission on Banking', chaired by the Oxford scholar Sir John Vickers; www.parliament.uk/briefing-papers/sn06171.pdf).
43. Law on separation and regulation of banking activities, dated 26th July 2013 (http://www.legifrance.gouv.fr/ affichLoiPubliee.do?idDocument=JORFDOLE000026795365&type=general)
44. Banking Law reform of 28th August 2013 (http://www.gesetze-im-internet.de/kredwg/ BJNR008810961.html)
45. Proposal of 29th January 2014 for a Regulation on structural measures improving the resilience of EU credit institutions (http://ec.europa.eu/internal_market/bank/docs/structural-reform/140129_proposal_en.pdf). This regulation will apply only to the largest EU banks with significant trading activities, and will: (i) ban proprietary trading in financial instruments and commodities; (ii) grant supervisors the power and, in certain instances, the obligation to require the transfer of other high-risk trading activities to separate legal trading entities within the group ('*subsidiarisation*'); (iii) provide rules on the economic, legal, governance, and operational links between the separated trading entity and the rest of the banking group; and (iv) improvement of the transparency of *shadow banking* activities.

a) Financial supervision. With regard to supervision, the main challenges for this 2014 are: (i) the compulsory Balance Sheet Assessment and Asset Quality Review exercises of the ECB for some 130 banking groups in the first quarter of 2014, which will require setting similar standards of asset valuation in a context of differing accounting rules; (ii) the implementation of a wide stress-test by the EBA, in Spring 2014, with the assistance of an ECB not yet legally competent as supervisor as the start of the SSM takes place on 3rd November 2014; (iii) the logistical, data bases and systems, human resources, organisation, etc. that the start of the SSM supervision requires from the ECB and from the national competent authorities.

Legal orders of the Member State

Question 6

See above the reports on the Accorinti cases against the ECB, still on-going, and the legal challenge before the German Federal Constitutional Court which addresses the establishment of the ESM and the ECB decision to have a conditional sovereign bond secondary market intervention program available within its monetary policy *instrumentaria* (OTM). These german constitutional proceedings were submittrd to the European Court for a preliminary ruling last February 2014.

Question 7

The SSM Regulation and the draft SRM Regulation foresee a regime for democratic accountability both vis-à-vis the European Parliament and national parliaments. Whilst the first part is, or is to be, substantiated by way of Inter-Institutional Agreements, the accountability vis-à-vis national parliaments would need implementing acts. The example of the ECB, whereby its President has been invited to address only in two cases a national parliament,[46] whilst the NCB governors are the normally and more often the invitees of such parliaments, is sub-optimal when the issues refer to ECB policies or decisions.

46. The Deutsche Bundestag (22.10.2012) and the Spanish Cortes (12.2.2013).

Question 8

See the information contained in footnote 32, which summarises and refers to the comprehensive and recent comparative review of the implementation of the Fiscal Compact Treaty by the services of the Parliament.

In the case of Spain, the Constitution was amended on 25th July 2012 to reflect the fiscal balance rule of the Fiscal Compact.

Question 9

The crisis legislation adopted by Member States under a EU program, which *inter alia* entailed allocating losses and imposing cuts/savings on State obligations, have triggered local litigation. It is for the country *rapporteurs* to FIDE the reporting of such national cases.

This being the Spanish Report, it could be here mentioned that the implementation of the Spanish bank recovery and resolution legislation adopted by the Cortes in November 2012, whereby bail-in instruments have been activated, with consequent losses by shareholders, preferred shareholders and holders of hybrid instruments, of some banks, mostly saving banks, has triggered a number of litigations before Spanish Courts. In one case, the Government adopted a legal act allowing for 'consumer arbitration' (to be performed by arbitrators appointed by the Instituto Nacional del Consumo) for retail holders of preferred shares and subordinated bonds, when their marketing through the branch network of the issuers had been below required standards. Such arbitration arrangement has been an efficient and successful approach to otherwise massive litigation; litigation by deceived creditors is nevertheless important. In one widely followed case,[47] criminal proceedings are being entertained against the Board of Directors of a saving bank on the grounds that debt instruments issued some months before the activation of the bail-in had been based on incorrect corporate accounts, made transparent for likely investors in the securities supervisor (Comisión Nacional del Mercado de Valores – CNMV), and only after their issuance had been substantially corrected by the external auditor and the bank supervisor.

47. Bankia.

Question 10

The euro area crisis has been responded by 'more Europe', rather than by way of letting Greece abandon the euro (termed ingeniously as '*Grexit*'). The Eurogroup did increase the intensity of their meetings, and developed upwards into the 'Euro Summit' and downwards into the 'Eurogroup Working Group', a semi-permanent grouping of Deputy Finance Ministers or Secretaries of State for Finance, with a permanent Chair in Brussels, having the important tasks of preparing the dossiers for the ministers as Eurogroup members and coordinating the follow-up to decisions adopted at higher level. At the same time, the Commissioner in charge of '*Economic and Monetary Affairs and the Euro*' was eventually upgraded into Vice-President of the Commission in 2011. Overall, the euro crisis gives once more the evidence of the accuracy of the famous Chinese term for 'crisis' [*wei-chi;* 危机] as composed of two sub-terms, one for 'danger' and the other for 'opportunity'. The EU has seized the euro crisis to make a qualitative step forward in the process of integration: new powers elevated at European level, new governance structures, new steps towards democratic legitimacy.

What about the non-euro area Member States?

Clearly, out of the above process the centre of gravity for the EU has become the euro area. The Eurogroup in its several formats, and the ECB. Non euro Member States have abandoned the central stage of policy-making in the EU, perhaps for the world of finance also at the global level. This is worrisome: for those aiming to join the euro, they will have to accept the new governance and the new European powers as these has resulted from the euro area decision-making in the crisis; for EU Member States under an opt-out, the described outcome is unwarranted, as it will not incentivate public opinion to join a caucus where they are late-comers. In the two major euro area developments, the SSM and the SRM, and in the inter-governmental arrangements (ESM and Fiscal Compact) the principle of being open to non-euro area Member States has been preserved. Strategic decisions will have to be made by non-euro Member States, now under a threat of increasing marginalisation from the centre of power.

Monetary policy

Question 11

The only controversial item was the ECB Governing Council decisions in 2010 and in 2012 to equip the Eurosystem with the tool of secondary market interventions to counteract distortions to the monetary policy transmission mechanism. First, the Securities Market Program (SMP), later replaced by the Outright Monetary Transactions (OTM). Over them there has been public opinion debate, and some strong views uttered. Governing Council decisions are not improvised, but are the result of intra-Eurosystem debate by highly qualified professionals; indeed, monetary economists, market experts and jurists of the Eurosystem recommended the above tool. Art. 18.1 of the ECB Statute allows for open market interventions; and art. 2 of the same text imposes on the ECB the duty to preserve price stability. The market for sovereign debt is a principal part of the wholesale money market, with the consequence that its malfunction distorts that market, to the extreme of fragmenting it and hindering the singleness of the monetary policy with the result of different pricing for goods and services in the monetary area. Primary law provides for Governing Council decision-making by simple majority of votes. The result of the ECB decisions to have the SMP and the OMT tools in its *instrumentaria* has been positive: distortions in that market segment have diminish, and slowly but steadily the wholesale money market is getting again more integrated. Spreads differentials progressively diminish, and the indicator of cross-border money flows, the T2 balances, is also slowly reverting to pre-crisis sizes, proving the adequacy of the ECB decisions (together with the panoply of other decisions taken by other institutions and Member States in response to the euro crisis, examined in this report). From a more global perspective, the tool of market interventions is a fairly general tool in the hands of central banks, and all major central banks outside the euro zone have in one or another manner used it.

Question 12

The role of the ECB, both for micro- and macro-prudential supervision is defined in the SSM Regulation. It consists in applying the CRD4-CRR and the Single Rulebook using the competences and powers conferred to it by the SSM Regulation. The micro-prudential supervision is an exclusive ECB competence, performed with the assistance of the national competent authori-

ties. Macro-prudential tools defined in the CRD4-CRR are to be exercised in cooperation with the national competent authorities, as stated in the SSM Regulation. The closeness of macro-prudential tools with the monetary policy of the ECB requires also specific internal cooperation between the supervisors and the monetary policy makers.

Question 13

There is no need to re-define the statutory objectives of the ECB. If a technical amendment of the ECB Statute could be suggested, this would be the need to add as secondary objective the aim of the SSM, namely, financial stability; indeed, Art. 2 ECB Statute is silent on financial stability as an ECB objective, whilst the SSM Regulation clearly provides for that objective in its first Article.[48] But opening a wider debate about the objectives of the ECB may be counter-productive at a time where the euro crisis is still ongoing, and when any change of the Statute would need unanimity by all 28 EU Member States. Incidentally, the quantified price stability objective for the euro, i.e. the famous '*close to but below 2 % in the medium term*', has been recently introduced by two major central banks: the Federal Reserve[49] and the Bank of Japan.[50] Furthermore, it used to be understood as a medium-term upper limit, beyond which the situation would qualify as 'inflation'. Following the evolution of the crisis, where the risk is not inflation but 'deflation', the ECB interprets the 2 % objective in a positive manner, as a target to reach, rather than a limit.

48. '*This regulation confers on the ECB the* [supervisory] *tasks ... with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system.*'
49. Chairman Bernanke stated publicly in 2010 that the FOMC's '*mandate-consistent inflation rate*' is to be '*about 2 percent or a bit below.*' This judgment, he indicated, is consistent with the longer-run economic projections published quarterly in the FOMC minutes ('Survey of Economic Projections').
50. The Bank of Japan made a statement on 22.1.2013 '*The Bank sets its price stability target at 2 percent in terms of year-to-year rate of change in the Consumer Price Index (CPI)*'. Prior to that statement, the target for price stability had been 1 % yearly.

Question 14

The Court of Justice has maintained a constant jurisprudence of allowing a margin of discretion on policy-setting to EU institutions.[51] The Court has the mandate to '*ensure that the law is observed*',[52] but not to replace the other institutions; policy-making requires an assessment of available options and undergoing a certain decision-making process determined by EU Law which differs from the Court procedures; thus, it would de-naturalise a court of justice if it would be ready to replace the competence of EU institutions in assessing the options and taking policy decisions. For instance, monetary policy is a science of its own, and a very complex and difficult one; a court of justice is ill-placed to assess the correctness of monetary policy decisions, beyond of course the respect of the Law. This is why there is long-standing and constant jurisprudence of the Court recognising and protecting a certain margin of discretion for policy-making by the EU institutions, confined by their statutory scope of competence and the general principles of EU Law (subsidiarity, proportionality, non-discrimination, non-retroactivity, etc.). Such jurisprudence is particularly important for the Banking Union, as both the SSM and the SRM require a certain margin of discretion, in particular for the ECB's daily supervisory activities, which may trigger litigation by the supervised institutions affected by supervisory decisions.

Using discretion in the adoption of decisions that may have a cost, to supervised banks or to its creditors, may be affected by the concern of possible legal liability for the supervisors. Perhaps it is worth mentioning here that in the ECB's Opinion[53] of 27 November 2012 on the draft SSM Regulation a request was made[54] to include a specific regime for non-contractual liability

51. The legal foundations of that doctrine may be found in the jurisprudence of the French *Conseil d'état*, which has used the term '*marge d'appréciation*' to avoid judicial activism on policy decision-making, and in German administrative jurisprudence on the around the concept of '*Ermessensspielraum*' (degree of discretion).
52. Art. 19.1 TEU.
53. http://www.ecb.europa.eu/ecb/legal/pdf/c_03020130201en00060011.pdf
54. '*Another related aspect of the Core Principles to ensure the effectiveness of the supervision is adequate legal protection of supervisors for the exercise of their function to protect the general interest. In this regard, the ECB notes a normative trend and case-law in several Member States and at global level that tends towards limiting supervisors' liability. The ECB considers that the liability of the ECB, the national competent authorities and their respective officials should only be incurred in cases of intentional misconduct or gross negligence. First, this limitation would reflect the common principles in national banking supervisory legislation in an increasing num-*

for the ECB and its supervisory staff, along the recommendations of global stability fora[55] aimed at providing legal comfort to supervisors when confronted with the possible adoption of hard decisions; indeed, there may otherwise subsist the temptation to avoid them and to favour – instead – friendlier approaches. This ECB suggestion was not taken on board by the legislators, on the ground that the liability of EU institutions is a matter for EU Primary Law.[56]

Open Question

Question 15

The whole Banking Union exercise aims at restoring general confidence in the banking system by economic agents and public in general; this is a precondition for a well-functioning economy and thus for growth and employ-

ber of Member States as well as in various important financial centres of the world, that tend to limit supervisory liability. Second, it would be consistent with the case-law of the Court of Justice of the European Union finding liability only in case of qualified unlawfulness. Third, this provision would align the Union with the global consensus achieved with the Core Principles, according to which supervisory laws must protect the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith and for the costs of defending such actions and/or omissions, so as to further enhance the position of the supervisory authority vis-à-vis the supervised entities. Fourth, such global consensus is based on the complexity of supervisory tasks. Supervisory authorities are under an obligation to protect the plurality of interests in a well-functioning banking system and the financial system as a whole. Furthermore, supervisory authorities need to operate, in particular in crisis times, under tight time constraints. Fifth, clarifying the liability regime within a SSM operating in a multi-jurisdictional environment would contribute to: (i) a harmonised liability regime within the SSM; (ii) preserving the integrity of the SSM's capacity to act, since a too stringent and diversified liability regime within the SSM's complex structure could weaken a SSM supervisory authority's resolve to take the necessary action; and (iii) limiting speculative legal proceedings based on alleged liability for an action or omission of an SSM authority.'

55. Core Principles for Effective Bank Supervision ('The Basel Core Principles'), adopted by the Basel Committee in September 2012: '*Principle 2. Laws provide protection to the supervisor and its staff against lawsuits for actions taken and/or omissions made while discharging their duties in good faith. The supervisor and its staff are adequately protected against the costs of defending their actions and/or omissions made while discharging their duties in good faith.*'
56. Art. 340 TFEU.

ment. The move to the EU level from hitherto national bank regulation, supervision, recovery and resolution has taken place within a very short period of time; it is therefore of paramount importance that the new EU bodies being vested with Banking Union competence operate in the interest of the Union without any national bias and with professional excellence. The time of regulatory competition, of fostering 'national champions', of protecting the home market, is over. A true and clean EU internal market requires neutral authorities. This European spirit is necessary if renewed confidence in the financial markets is to be restored. The democratic legitimacy and accountability for these new European bodies should operate as a brake to vested national interests.

SWEDEN

Ulf Bernitz, Sideek M. Seyad and Joakim Nergelius[1]

Economic policy

EU legal order

Question 1

Scope of Articles 121 (6), 122 (2), 126 (14), and 136 TFEU as legal bases for economic governance reform measures

The EU's initial response to the euro crisis was to refine and strengthen the Stability and Growth Pact (SGP) and also to put in place a financial mechanism to bail-out a Member State confronted with a serious sovereign debt crisis which is on the verge of bankruptcy.

The aim of reforming the SGP was to further strengthen the competence of the European Commission to more effectively monitor the budgetary behaviour of the Member States. The EU thus adopted the so-called 'Six-Pack' and 'Two-Pack' legal acts to deepen and widen the economic governance within the euro zone.[2] The legal basis of these legal instruments are based on either Article 121(6) TFEU or Article 126(14) TFEU.

Scope of Articles 123-125 TFEU

When the Maastricht Treaty was negotiated, its drafters did not anticipate the development of a serious debt crisis as it happened within the euro zone. When the debt crisis became a reality in some countries within the euro zone,

1. Professor Ulf Bernitz, Professor of Law, University of Stockholm, Sweden: Dr. Sideek M Seyad, Associate Professor of EU Financial Integration Law, University of Stockholm, Sweden, and Professor Joakim Nergelius, Professor of Law, University of Orebro, Sweden.
2. Sideek M. Seyad, 'A critical evaluation of the revised and enlarged European Stability and Growth Pact' (2012) J.I.B.L.R. 202-211.

there was no clear legal basis for the EU to financially bail them out of the crisis. This legal vacuum may be highlighted by reflecting on Articles 123-125 TFEU read together with Article 126 (1) TFEU and Article 50 TEU. The contradiction in the legal framework governing the economic and monetary union (EMU) becomes self-evident.

Article 125 TFEU declares that the Union shall not be liable for the debts of the Member State. Since it prohibits the bail-out of a Member State, the EU had to look for other legal avenues to achieve the same goal. Article 122(2) TFEU was invoked to provide financial aid to Member States experiencing serious difficulties.[3] This legal provision could be invoked to rescue only a specific Member State and not the currency region as a whole.

It is difficult to justify the invocation of Article 122 TFEU to grant financial assistance on the basis of natural disasters such as an earth quake or tsunami as the serious debt crisis in most countries was a man-made financial disaster. The crisis was created by their failure to respect the SGP. It was pure fiscal mismanagement which culminated in the debt crisis. The serious deterioration in the international economic and financial environment in the relevant period was invoked as an exceptional circumstance to justify the invocation of this Treaty provision.

Scope of Article 127(6) TFEU in the context of the proposed Banking Union

Apart from strengthening the economic governance within euro zone, EU also proposes to establish a Banking Union to develop a genuine EMU. The Banking Union is comprised of three distinct segments, namely a Single Supervisory Mechanism (SSM), EU Deposit Guarantee Scheme and a Resolution fund. If unanimity could be secured in the Council of the European Union, Article 127(6) TFEU could be invoked as a legal basis to confer competence to ECB to matters relating to the prudential supervision of credit institutions except insurance undertakings. As far as the other segments of Banking Union are concerned, the legal basis has to be found elsewhere in the Treaty.

3. Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism.

Use of non-EU instruments to regulate EMU matters

In view of the inherent limitations in the Treaty on matters relating to EMU, it became a necessary evil for euro countries to look for external competence to regulate the EMU. Unlike monetary policy, the Treaty does not provide for the development of a common fiscal policy. This legal vacuum compelled the euro zone countries to resort to non-EU legal instruments such as the Treaty on Fiscal Compact. If the EU is to develop a common fiscal policy, it will be necessary to amend the Treaty by means of ordinary revision procedure.

Compatibility with Union law of the provisions of the Treaty on Stability, Co-ordination, and Governance

In addition to lack of clear competence, risk of veto by some Member States compelled euro countries to resort to adopt the Treaty on Fiscal Compact outside the framework of the Lisbon Treaty. There are certainly problems of compatibility between these two legal instruments. For example the Treaty on Fiscal Compact requires euro countries to either amend their national constitution or adopt special legislative measures to incorporate some of its provisions, but there is no such provision in the Lisbon Treaty. Even though the Treaty on Fiscal Compact is to be incorporated into the Lisbon Treaty, it has to be done in accordance with the constitutional requirements of all the Member States of the EU in the same way that the Schengen Agreement was incorporated into the Amsterdam Treaty.

Compatibility with Union law of the Treaty establishing the European Stability Mechanism

The legal basis of the European Stability Mechanism (ESM) was initially based on Council Regulation establishing a European Financial Stabilization Mechanism.[4] The stabilization mechanism was instituted under a solidarity clause found in Article 122(2) TFEU.[5] There had been doubts about this legal basis as it could only be invoked in times of a natural disaster or exceptional occurrences. It cannot be used to create a permanent bail out mechanism as any kind of exceptional circumstances cannot exist indefinitely. It was to by-

4. O.J. EU 12.5.2010 L 118/1.
5. Sideek M. Seyad, 'A Legal Analysis of the European Financial Stability Mechanism' (2011) 26 J.I.B.L.R. 421-433.

pass this legal impediment that a separate Treaty outside the framework of the Lisbon Treaty was ratified to create a permanent ESM. A legal space for the ratification of the Treaty on ESM was created by way of amending Article 136 TFEU, which applies only to Member States whose currency is the euro. The Treaty on ESM is thus compatible with Union law.

Necessity for amendment of the TEU/TFEU, either by using the ordinary revision procedure or the simplified revision procedure

The Lisbon Treaty was amended for the first time to pave the way to ratify the Treaty on ESM. It was done in accordance with the simplified revision procedure as the aim was not to enhance or decrease the competence of the EU. If the EU is to acquire fiscal competence or grant comprehensive supervisory competence to ECB, then the Lisbon Treaty has to be amended in accordance with the ordinary revision procedure prescribed in Article 48 TEU.

Question 2

[This is a very huge question indeed. However, some general reflections may initially be made.]

As far as economic policy is concerned, there is no doubt that the new instruments will impose on the EU Member States stricter and more detailed economic conditions, leaning towards budgetary restrictions and fiscal disciplines, than do the rules within art. 120-126 TFEU. This may partly reflect German demands and in this respect it is also interesting that to the extent that the new rules may be said to be basically similar with the old ones, they are now also being imposed through harder and stricter legal requirements. In other words, there should henceforth be no doubt that the so-called convergence criteria will have to be followed by all Member States.

Yet, all the new rules and in particular the Treaty on Stability, Co-ordination, and Governance will in the end, as explained below, lead to a further complexity of the general EU legal framework. This is due above all to the fact that the Treaty on Stability, Co-ordination, and Governance endows supra-national bodies such as the EU Commission and the Court of Justice with a number of new powers and competencies, though still formally being an international, intergovernmental Treaty in the traditional sense (and thus formally outside the scope of EU law). In other words, the Treaty makes use of the traditional Community or Union method while still not being a part of the EU legal framework, which is highly puzzling. It remains to be seen how this use of supranational bodies in an international legal framework will work

out in reality. From the outset, it is likely to make the EU legal framework more complex than ever.

In this respect, it is interesting that the new Treaty on Stability, Co-ordination, and Governance itself foresees a more frequent use of closer (enhanced) cooperation or 'variable geometry'. Of course, such possibilities do already exist through art. 20 TEU and arts. 326-334 TFEU.[6] Yet, art. 10 of the Treaty on Stability, Co-ordination, and Governance points directly to this possibility, by envisaging that closer cooperation can take place in any issue that may be 'essential for the smooth functioning of the euro area, without undermining the internal market'. In other words, an international treaty, that is not itself part of the EU legal framework has now opened the doors for closer cooperation between Member States on a huge number of topics. This looks like a recipe for future legal complexity as good as any.

Question 3

First of all, it is important to note that the Treaty on Stability, Co-ordination, and Governance as such does not call for any fiscal harmonization throughout Europe or among the euro states. It imposes a certain fiscal discipline on all the EU states, but the results intended to be met may be reached either by higher incomes – i.e. higher taxes – or through budgetary reductions and 'cut-downs'. From the point of view of the EU, this has never until now mattered, and all the new rules have not changed this fact as such, which is important to recall.

Concerning the above-mentioned reports (i.e. the Blueprint for a deep and genuine economic and monetary union and the Four Presidents Report 'Towards a Genuine Economic and Monetary Union'), it may in fact be too early to assess their full impact as far as the need for legislative changes, at the EU or the national level, is concerned. Above all, the way in which the so-called 'banking union' will be regulated should first be presented. Only then will it be possible to discuss the exact way to move forwards in these areas, both for the EU and the Member States.

Question 4

From this point of view, the Treaty on Stability, Co-ordination, and Governance may be seen as quite puzzling, since it endows supra-national bodies

6. In this particular respect, we may also observe art. 136 TFEU.

such as the EU Commission and the Court of Justice with a number of new powers and competencies, though still formally being an international, intergovernmental Treaty in the traditional sense (and thus formally outside the scope of EU law).[7] This situation may also be in conflict with the so-called principle of *attributed powers* in art. 5 sect. 2 and art. 13 sect. 2 of the TEU.

At the same time, ever since the euro crisis started in 2010, the ECB has been ever more active and visible as an agenda-setter, while the real, main political and economical power in a difficult situation seems to rest with the German government. All this has created a complicated situation, which from the points of view of democratic legitimacy and accountability is hardly helped by the various meeting arrangements and similar matters envisaged by the Treaty on Stability, Co-ordination, and Governance.

Thus, in order to remedy this problem, a clearer role in this crisis-handling process for the European Parliament should be found. It should be noted that art. 16 of the Treaty on Stability, Co-ordination, and Governance foresees that its content shall be made part of EU law within five years of its entering into force (i.e. at the end of 2017, at the latest). When this happens, through a possible Treaty reform (coinciding, then, with British wishes for such a move) or through other means, the issue of democratic legitimacy should also be addressed. A clearer role for the European Parliament and possibly also better insights for national Parliaments in the decision-making processes should then be high on the agenda.

Question 5

There are no major obstacles to regulate and supervise the EU's financial market so long as its legal basis is confined to the parameters of the internal market. It is only when legal measures are adopted, thus limiting it to a segment of the internal market such as the euro zone, that the problem of securing the correct legal basis arises.

One of the factors that have contributed to the distortion of the proper functioning of the EU's financial market is in the field of direct taxation. In this branch of EU law, legislative measures have to be adopted unanimously. Even though some harmonising measures have been adopted, there is much legislative work to be done to remove such tax distortions in the financial market.

7. See e.g. Paul Craig, 'The Stability, Coordination, and Governance Treaty: Principle, Politics and Pragmatism' (*European Law Review,* 2012 p. 231-248).

Impact of the European system of financial market regulation and supervision on economic and monetary policy

The financial market has been regulated and supervised at the national level with no or a minimum consultation with the ECB. The Banking Union with its SSM will bring the ECB and national regulator much closer than ever before. There is a clear division of responsibilities between the ECB and national regulators in the Banking Union, but there is risk of overlapping and that may be a source of potential tension between them. Adding to this disequilibrium is the future role of the European Banking Authority and even though its functions are to some extent identified in the new financial supervisory architecture, the division of responsibilities between the national and two supranational regulatory actors need to be more specifically clarified and defined. Otherwise the potential gains of the launching of the Banking Union as a bridge between monetary policy and financial stability could be jeopardised.

Need for additional financial market regulations (areas?)

The key EU legal instruments adopted to liberalise banking and securities market was supplemented by further legal measures to protect depositors and investors. These legal instruments need to be modernised and updated, and further legislative intervention is needed to deal with closed financial compensatory cultures such as bonus, shadow banking system, etc.

Need for a (further) revision of financial market supervision in the EU and/or the euro area

It is better to adopt a wait and see approach as to how effectively the proposed Regulation on SSM will contribute to the supervision of the financial market, at least within the euro zone. If it is a success story, then such a centralised system of supervision should be extended even to the financial markets outside the euro zone. In this context, it is necessary to make further studies to examine whether the ECB should be elevated as the sole supervisor for the entire EU's financial market or to give the task of such supervisory powers outside the euro zone to the European Banking Authority.

Need for differentiation between euro area Member States and other Member States?

The proposed Regulation on SSM, if adopted in its current legal framework, will effectively divide the financial market into euro and non-euro segments with varying degrees of integration. This is not a desirable development as it will harm the unity and integrity of the single market, but it is a necessary evil in view of the legal recognition of the existence of ins and outs of the EMU by the Maastricht Treaty.

Need for a more centralised supervisory system (i.e. Single Supervisory Mechanism)

A more centralised system of financial supervision is desirable if and when all Member States of the EU join the EMU. Currently, there are several Authorities both at national and Union level with different degrees of competence in the financial market. There is also a risk of overlapping of their functions and this state of affairs will continue so long as EU is divided into euro and non-euro regions.

Need for a Single Resolution Mechanism, including a common (fiscal) backstop

The Commission has drafted a proposal for a Directive for bank recovery and resolution based on Article 114 TFEU, which will form part and parcel of the Banking Union. There are detailed rules relating to the recovery planning of a credit institution with share-holders and creditors of the institution to bear the first losses. It requires Member States to set up financing arrangements funded with contributions from banks and investment firms in proportion to their liabilities and risk profile.

The controversial part of the proposed Directive is that under certain circumstances, if there are no funds available to rescue a bank in crisis, it provides for the use of funds of deposit guarantee scheme alongside the resolution fund. It also gives the option to Member States, to merge the deposit guarantee schemes and the resolution financing arrangement instead of creating separate resolution funds.

Need for more harmonised and/or centralised deposit guarantee schemes

Council Directive 94/19/EC on deposit guarantee scheme as amended by Directive 2009/14/EC is based on the principle of minimum harmonization.[8] Its provisions have not been transposed in a harmonious manner in all the Member States. Since the coverage after the financial crisis was increased from €20000 to an optimum level of €100000, it is suggested that the minimum harmonization rule should be removed from the directive. The maximum coverage for a bank deposit should be categorically fixed at the current level of €100000. This provision should not become an instrument of unfair competition which could seriously jeopardise the proper functioning of the EU's banking market.

The deposit guarantee scheme should be able to operate independently without recourse to taxpayer's money. It is necessary to improve the financing system of the deposit guarantee schemes. Currently, banks pay into this scheme a certain percentage based on the level of its deposit taking and related liabilities. If one or two banks holding large deposits get into financial difficulties at the same time, the deposit guarantee scheme may not have sufficient funds to repay the deposits. This is another potential risk that needs to be addressed.

It is also a useful exercise to examine the establishment of a pan European system of deposit guarantee scheme common to all Member States. Since the banking services are highly liberalized and could be provided across the borders, either by way of a secondary establishment such as a branch or directly, there must, correspondingly, be a deposit guarantee scheme that also operates at the Union level. Here again, there may be various issues that will arise due to the fragmented nature of the EU's financial market operating with different currencies.

Legal orders of the Member States

Question 6

In order to answer this question, a historical background must be given. When Sweden joined the European Union in 1995, the original decision to

8. Sideek M. Seyad, 'Protection of EU bank depositors after the 2008 global financial crisis' (2012) Europarättslig Tidskrift 55-80.

transfer decision-making powers to the union was based on and included the legal situation, and all the legal acts, existing at that moment; *l'acquis communautaire*, in one word. No exception was made as far as participation in the European Monetary Union was concerned, including its third step. The rules concerning the EMU did of course already exist in the EC Treaty at that time, though the common currency was not yet a reality. From that point of view, the Swedish legal situation was very similar to or in fact even identical with the situation of Austria and Finland, who joined the EU at the same time, and who are today (since 1999, in fact) full EMU members. Still, Sweden later decided to have a new, special referendum on EMU, which in September 2003 resulted in a rather massive no vote (57 per cent of the voters, representing 80 per cent of the electorate). How was this development possible? Was it even legal?

The first question is the easiest one to answer, since the reason for this peculiar Swedish deviation from its obligations as an EU member simply has to do with domestic politics. After the referendum on EU membership in 1994, only the two no to EU-parties, Environmentalists and (former) Communists, together with the small farmers party, who had been in favour of EU membership, but opposed the idea of a common currency, demanded a new referendum on this topic. Thus, the huge parliamentary majority was against such an idea. However, when returning to Swedish domestic politics in the fall of 1997, having acted for two years as a UN peace broker in Bosnia, right-wing opposition leader and former prime minister, now foreign minister, Carl Bildt, in a surprising move during a parliamentary debate, in the build-up to the 1998 parliamentary election, called for a referendum to be held on this special topic.[9] Since he had already consulted the liberals and the Christian Democrats, only the governing Social Democrats (with 45 per cent of the seats in Parliament) did not formally support the idea of a new referendum, which meant that this became a political reality or even necessity. It may also be added that the Social Democrats did never formally oppose the idea, which was logical given the internal division within the party over this issue.

Thus, no political party or force, including the media, ever really opposed the idea of organizing this referendum, at least not on legal grounds. The very simple legal fact that the membership and the result of the referendum in 1994 did not allow this second referendum has never really been invoked in the Swedish debate, which after all is slightly surprising.

9. It may be noted that since October 2006, Mr Bildt has been Foreign Minister and that his role in the EMU debacle has actually been discussed surprisingly little in Sweden.

From the legal point of view, it is clear that Sweden already in 1997, when the original decision was made not to participate in the third step of EMU, did violate its obligations as an EU member. Sweden thus became the first country to meet the so-called convergence criteria, but still not participate in the EMU, without any legally binding exception that enabled it to remain outside (of the kind that both Denmark and the UK have had since 1991).

Formally, however, this has not quite been the official truth. Instead, the Swedish non-participation in EMU was for a long time explained, e.g. by the EU Commission in a report dated 25 March 1998, by the fact that Sweden has remained outside ERM, the so-called Exchange Rate Mechanism; formally, adherence to that system for two years is a necessary, but not sufficient condition for participation in the third step of EMU.[10] Yet, if this is to be taken into account, it must be noted that Sweden has decided not to take part in ERM autonomously. EU has thus never decided to keep Sweden outside that system.

As it turned out, 57 per cent of the voters voted against the euro on 14 September 2003. It may of course be asked if that turnout might have been different, had the government spent more time and energy arguing in favour of the common EU currency already in 1999 or 2000. What is more important, however, is to analyze the legal situation that this no-vote has led to. In that respect, it should be noted that Sweden has not, not even after the referendum, asked for a formal exception from the obligation to participate in the EMU, which means that the original legal obligation to work for and try to achieve a full Swedish membership in the monetary union still remains, though very little has been said on this topic in the Swedish political debate in the last year. While it may be understood that the Swedish political establishment did not want to return to this topic immediately after the terrible days surrounding the huge failure in the referendum, this means that the EMU question will continue to haunt Sweden again in the future, most likely once the euro crisis is resolved.

Is it then a good idea at all to organize a new referendum on the topic? Does that not in reality mean endowing the referendum of 2003 with a formal legitimacy that it has in fact never possessed? And what would happen if a possible new referendum would once again lead to a negative result? How would that affect Sweden's long-time position within the EU? And how will

10. Since late 2009, the introduction of the new art. 139 sect. 1 of TFEU has slightly changed the situation and reduced the need to explain Sweden's peculiar position towards the euro with unconvincing arguments of this kind.

the situation be affected by the entrance into EMU of new Member States, such as Latvia in 2014 and maybe even Poland in a few years?

Here, of course, it may be said that the introduction in 2009 of the new art. 139 sect. 1 of TFEU, according to which Sweden may be seen as identical with other EU Member States outside the euro area, has made Sweden's situation somewhat easier and slightly less awkward, but this legally unclear situation is, still, all the more regrettable since the other Constitutional preparations for a membership of the EMU were conducted or implemented already in 1998/99, in accordance with the provisions of former Chapter 8, Article 15 (now in articles 14-17).[11] Basically, those consist of changes in Chapter 9, regulating the financial power of the realm, Articles 12 and 13. According to those rules, the Government is responsible for general currency policy matters, while the Riksbank, the central bank of the Realm, working under the Parliament and thus formally independent from the government, is responsible for monetary policy. No public authority may determine how the Riksbank shall decide in matters of monetary policy. The eleven members of the governing council of the Riksbank are all appointed by the Riksdag, who also considers whether the members of the Governing Council or the Executive Board of the bank shall be granted discharge of responsibility. A member of the Executive Board can be removed from office only if he no longer fulfils the requirements laid down for performing his duties or if he has been guilty of gross negligence. All those rules, aimed at ensuring the independence of the Riksbank, meet the criteria laid down in the TEUF for enabling Member States to join the EMU. A future Swedish EMU membership will thus be easy to obtain from a strict legal point of view, but probably not when all the political aspects are taken into account.[12]

Question 7

Generally speaking, it seems to be a good idea for national Parliaments to organize special committees for scrutiny of EU affairs, of the kind that has ex-

11. It may also be noted, in this respect, that Sweden actually conducted a severe economic policy, characterised by austerity, in 1994-1996. This was explicitly made above all in order to meet the so-called convergence criteria necessary for an EMU membership, which makes the sub-sequent development even less logical and harder to understand.
12. The current government, in which the Farmers' party oppose an EMU membership, has so far not taken any new initiatives in this area.

isted in Denmark since 1973 and in Sweden since 1995.[13] The attention of such committees may – and should – also and not least be directed to economic matters related to the euro, in particular after the entering into force of the Treaty on Stability, Co-ordination, and Governance.

In Sweden, where such a committee ('EU-nämnden') does exist, except for the measures implementing the Treaty on Stability, Co-ordination, and Governance, not very much has in fact happened here. It should be noted, though, that the powers of this committee were strengthened in 2010.[14] Preparing the implementation of the Treaty on Stability, Co-ordination, and Governance, it also worked together with the Committee for Economic Affairs. This is of course also a kind of co-operation that could work in other Member States.

Question 8

As explained in question 6, the official position of the Swedish government is that Sweden already meets those duties, as a result of economic measures as well as legal and constitutional changes carried out in the 1990's. Thus, there was no need for any further measures this time in order for Sweden to sign and ratify the Treaty on Stability, Co-ordination, and Governance.

Question 9

The simple answer here is no, since no such legal challenge has occurred in Sweden, mainly due to the fact that Sweden remains outside the euro area, but also partly due to a lack of legal tradition concerning such constitutional challenges. Denmark, where such cases have occurred, here seems to be slightly different.

Question 10

In relation to the Treaty on Stability, Co-ordination, and Governance, where it is decided through art. 12 sect. 6 that the original eight states who joined the Treaty, though not being euro states, shall be present at the special summits whenever possible and at least once a year, this – albeit very limited – aspect of participation in the future decision-making was presented as one of

13. For closer details, we will here refer to the Swedish national report to the 2010 FIDE conference in Madrid.
14. Ibidem.

the main arguments for Sweden to ratify the Treaty. During the euro crisis in particular, but also earlier, the pure political problems of remaining outside the euro and the limited influence that this gives to Sweden in the shaping of Europe's economic policies, have from time to another been underlined in the public debate. The emergence of the Treaty on Stability, Co-ordination, and Governance thus presented the Swedish government with a choice between joining the 'hardliners' the UK and the Czech Republic, who are unlikely to join the euro in the foreseeable future, or try to obtain a limited influence by gaining a position somewhat more at the center or 'inside, though still outside'. The result in terms of political influence must, however, when art. 12 is analysed, be seen as very meagre. This, of course, also reflects the fact that Sweden's influence, in legal terms, on the shaping of the 'ever more detailed economic governance regime for euro area Member States' has been absolutely non existent.

Monetary policy

Question 11

Primary and secondary objective of the ECB

A system of hierarchy of objectives for the ECB is set out in Article 127 TFEU. The primary objective is to achieve price stability and its secondary responsibility is to support the general economic policies of the Union. These policies should be pursued with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 TEU. Furthermore, the ECB should inter alia conduct foreign-exchange operations, hold and manage the official foreign reserves of the Member States, and promote the smooth operation of payment systems. The Lisbon Treaty does not set any limitations, nor provide any guidelines, which the ECB shall follow to achieve these objectives. Thus, it could be said that the ECB is its own master on how to achieve the goals set out in Article 127 TFEU.

During the financial and fiscal crisis, apart from safeguarding the euro, the monetary measures adopted by the ECB also helped to support the general economic policies in the Union. It also guaranteed the smooth functioning of the payment system by adopting various monetary measures to ensure the availability of sufficient liquidity in the banking market.

Prohibition of monetary financing (Article 123 TFEU & 7th recital of the preamble of Council Regulation No. 3603/93 of 13 December 1993, Article 18.1 (or Article 21?) Statute ESCB and ECB)

Article 123 TFEU prohibits ECB to provide credit facilities or to buy government debts directly from a Member State or any of it constituents within the euro zone. The aim of the Council Regulation 3603/93 is to provide clarification of the Treaty provision prohibiting such monetary financing. It explains what constitutes public undertaking, overdraft facilities, what kind of transactions that are not to be considered a credit facility, etc. The ECB adopted appropriate measures to generate liquidity in the market without breaching Article 123 TFEU.

Statutory independence of the ECB

When the ECB carries out its statutory duty, it should act in complete independence. It should neither take instructions from the Member States, nor any of the EU institutions. The current legal status of the ECB should remain intact.

ECB monetary policy measures during the crisis (e.g. rules on collateral, long-term refinance operations, Securities Market Programme, Outright Monetary Transactions)

Whenever the euro comes under severe pressure, the ECB as its guardian has a constitutional duty to protect it. The ECB was thus in the front line invoking a mixture of monetary weapons to combat the euro crisis. In times of cyclical economic slowdowns, the standard policy measures adopted by central banks is to lighten the monetary policy to make capital cheaper and easily accessible.

During the fiscal crisis, the ECB employed both standard and non-standard monetary policies. It reduced the cost of borrowing to the barest minimum, but that did not help the cost of borrowing in some indebted euro countries. The ECB thus invoked non-standard measures to expedite the financing of the market. It launched the Outright Monetary Transactions (OMT) and Securities Markets Programme, which are designed to handle sovereign bond purchases in the secondary market from euro zone member

states.[15] The ECB would buy sovereign bonds of one to three year maturity, provided the issuing country had agreed to a fiscal adjustment program with the ESM. Even though the adoption of such measures is uncommon and not free from controversy,[16] the spirit of invoking them was in further fulfilment of the ECB's mandate to protect the euro. In fact, soon after the ECB declared that it would intervene to buy unlimited quantities of sovereign bonds from ailing euro-zone member states in order to hold down their borrowing costs, stability returned to the market. The legality of such emergency measures, if invoked in an emergency and to be in operation for a limited period of time, will not be incompatible with the Treaty.

The potential risk involved in this program is that with excess liquidity in the market, it could also ignite inflation in the euro zone. Another risk is what would happen if a recipient country fails to comply with its fiscal adjustment commitments under the OMT program. A related issue is what might happen in the case of debt restructuring, the so-called 'haircut'. In case creditors are forced to write-off a portion of their sovereign bond holdings, the question arises whether the ECB would also be forced to forgive some of its debt holdings to the benefit of the member state involved. That would be a case of monetary state financing, which is strictly prohibited by Article 123 TFEU.

Another concern raised by the OMT program is whether ECB is directly or indirectly encroaching into the minefield of fiscal policy, which is jealously guarded by the Member States. Such an expansive monetary policy, if stretched too far, may risk the ECB being drawn into the field of fiscal policy.

Legal requirements for providing emergency liquidity

A monetary mechanism to tackle a financial crisis is to provide Emergency Liquidity Assistance (ELA) by national central banks. The aim of such financial support is to ease a financial institution's liquidity problems and to prevent any potential systemic effects. ELA is provided to individual banks only in exceptional circumstances and on a temporary basis. In the euro zone con-

15. Speech by Benoît Cœuré, Member of the Executive Board of the ECB, at the conference 'The ECB and its OMT programme', organised by Centre for Economic Policy Research, German Institute for Economic Research and KfW Bankengruppe Berlin, 2 September 2013.
16. The President of the Bundesbank, the only member of the Governing Council of the ECB voted against the OMT program.

text, it is the competent national central bank that takes the decision to provide ELA to a bank operating within its jurisdiction.

There is no uniform legal basis among the member states for the provision of such financial assistance. In some member states there are various statutes which may also include a reference to the duties of the central bank towards preserving financial stability.[17] In countries like Sweden there is an explicit statutory reference to the ELA.[18]

It is better to have a harmonised legal framework to provide ELA within the euro zone. The ECB and the national central banks within the euro zone are mandated to ensure the smooth and efficient operation of the payment system. In pursuance of this objective, the ECB should be competent to adopt a legal act in terms of Article 132 TFEU to harmonise a legal framework for the provision of ELA.

Question 12

European Commission proposal for a single supervisory mechanism for banks (Banking Union) and namely the proposals for conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

Council Directive 2006/48/EC relating to credit institutions introduced the home country control system whereby the regulators which granted authorisation shall supervise their operations across the EU.[19] The inadequacies in the home country control system were exposed during the global financial crisis, but no major remedial measures were adopted to rectify the supervisory deficiency, except to create the European Banking Authority with limited functions.

Even the fiscal crisis exposed the shortcomings of the home country control system of supervision of financial institutions. The EU therefore decided to launch a Banking Union especially for the euro countries, and the key

17. See for example, Belgium, Finland, and Ireland.
18. Sveriges Riksbank Act, Chapter 6, art. 8: 'In exceptional circumstances, the Riksbank may, with the aim of supporting liquidity, grant credits or provide guarantees on special terms to banking institutions and Swedish companies subject to the supervision of the Financial Supervisory Authority'.
19. Sideek M Seyad, 'Limitations to Free Movement of Banking Services' (1997) 12 J.I.B.L. 67-73.

component of this program is to confer on ECB the competence on prudential supervision of the banking market.[20]

In one of my articles published in 2001, I strongly advocated the need to establish a Single Regulator for the European banking market and supported my argument by highlighting the shortcomings in the home country control system.[21] I also argued that such supervisory power could be conferred on an independent body such as the ECB. The draft Regulation conferring competence on the ECB as the Single Supervisory Mechanism should potentially remove some of the shortcomings in the home country control system.

Scope of Article 127(6) TFEU

Apart from maintaining price stability, the ECB also has several other secondary tasks such as to promote the smooth operation of payment systems, contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions, and stability of the financial system.

Article 127 also declares that the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 TEU. The objectives of Article 3 are far and wide, and in the context of prudential supervision, the reference to the establishment of an internal market and EMU is significant.

Constraints in relation to Member States outside the euro area

The primary task of the ECB is price stability. All other functions delegated to the ECB in terms of Article 127 TFEU are secondary in nature. In pursuing its monetary policy, the primary consideration for the ECB is to ensure the stability of the euro. As a result, there is always a risk that the monetary policy pursued by the ECB at times may not be in the best interest of the economies lying outside the euro zone. However, in practice most of the national central banks in the non-euro countries often follow the monetary policies pursued by the ECB as closely as possible.

20. Sideek M. Seyad 'The impact of the proposed Banking Union on the unity and integrity of the EU's single market' (2013) J.I.B.L.R. 49-58.
21. Sideek M. Seyad 'A Single Regulator for the EC Financial Market' (2001) 16 Journal of International Banking Law 203-212.

Compatibility of different tasks and objectives of the ECB (monetary policy, macro, and micro prudential)

The tasks and the objectives to be assigned on the ECB by the proposed Regulation should not pose any major issue of compatibility. The ECB is mandated not only to pursue an independent monetary policy, but also to ensure that such policies will promote the smooth operation of the payment system within the EU's financial market and objectives of the internal market. Banking Union should contribute to ensure both monetary and financial stability within the euro zone.

Potential for conflicts of interest and other risks attached to a pooling of competencies

The primary task of the ECB is to run an efficient monetary policy geared towards price stability. The proposed new competence which the ECB will acquire in the field of prudential supervision, though based on the Treaty itself, will be delegated by way of a secondary legal act. In terms of legal hierarchy primary law supersedes secondary law. As such, the function of prudential supervision will be subordinated to the task assigned to the ECB in the field of monetary policy. If this contradiction is to be resolved, Article 127 TFEU needs to be amended to elevate the role of prudential supervision as another primary task of the ECB.

The Relationship between the ECB and national central banks

The relationship between the ECB and national central banks had been clearly defined and demarcated with the establishment of EMU. Within the euro zone the national central banks execute the monetary policy objectives and decisions of the ECB. There are various mechanisms put in place to ensure close cooperation and smooth relations between the ECB and national central banks. As far as the relations between the ECB and national central banks outside the euro zone is concerned, there is regular dialogue and consultation within the framework of the General Council of the ESCB.

Lessons to be learned from competence allocation in other policy fields (e.g. EU competition law)

The Member States of the EU have adopted their national competition rules to be in harmony with their EU counterpart. It is not the case in the field of

monetary policy where ECB has the sole competence and the role of the national central banks within the euro zone is merely to execute it. If they fail to do so, the ECB has the legal competence to adopt various legal acts to require compliance from the national central banks and if they continue to be in non-compliance, ECB could bring them before the Court of Justice of the EU (CJEU). On the other hand, the national central banks located outside the euro zone are not legally bound by the monetary policies of the ECB.

The Union law does not allocate, nor recognise any kind of independent monetary policy competence on national central banks within the euro zone, and to that extent the issue of competence allocation is purely of academic interest. A single currency needs to have a single monetary policy and such a currency cannot survive if there are different and conflicting monetary policies within the euro zone.

Accountability issues

The amending Proposal for the draft Regulation on SSM has included some provisions to make the ECB more accountable. The Chair of the Supervisory Board of the ECB is required to submit an annual report to the European Parliament and the Council. He or she may be called upon by the relevant Committees of the European Parliament to answer its questions orally or in writing. The ECB should also submit an annual report, even to national parliaments of the participating member state.

Currently, the decision making by ECB lacks transparency. If ECB is to enhance its trust and credibility, it should publish all its minutes after its meetings are made accessible to the public, similar to the proceedings in the Council when it deliberates on law making under the ordinary legislative procedure.

Question 13

Single or multiple objectives (consider e.g. Article 2A of the Federal Reserve Act)

With the allocation of the proposed competence in the field of prudential supervision, it could become necessary to review whether the ECB should continue to have as its primary objective the stability of the euro, or to have a dual objective including the financial stability of the euro zone. During the fiscal crisis, the monetary system functioned normally within the euro zone, but the financial system came under severe and tremendous pressure. It was to

counter such financial instability developing within the euro zone the idea of a Banking Union was mooted. To that extent one may argue that ECB should be conferred dual primary objectives, namely the stability of the euro and the stability of the financial system.

In the United States, the Congress has delegated responsibility for monetary policy to the Federal Reserve. At the same time, the Congress also retains competence to ensure that the Federal Reserve fully adheres to its statutory mandate. Section 2A of the Federal Reserve Act requires Fed to conduct open market operations by setting an interest rate target to fulfil its mandate of 'maximum employment, stable prices, and moderate long-term interest rates'. The Act entrust overall responsibility on the Fed in relation to monetary policy, to ensure financial stability through the lender of last resort function, supervision of bank holding companies, and provide payment system services to financial firms as well as the government. The overall tasks of the ECB as set out in Article 127 TFEU are not very different from those assigned to the Federal Reserve. The difference is the prioritisation of the tasks of ECB under EU law giving greater prominence to price stability.

The Role of ECB as single monetary policy authority in the euro area

If there is to be further enhancement of ECB's competence in the field of monetary policy, it should only be followed by further coordination or harmonization of the fiscal policies within the euro zone. There are limits to the competence of ECB to protect and preserve the stability of the euro as evidenced during the euro crisis. So long as fiscal competence remains at the national level, there is not much that could be done to further strengthen the role of ECB in the field of monetary policy.

Role of ECB in macro- and micro-prudential supervision

Since the economies of all Member States of the EU are closely integrated, financial or monetary disturbances developing within or outside the euro zone affects each other. The victims of such disturbances are the financial institutions, their customers and the market as they operate beyond the artificial borders of euro and non-euro regions.

There should be a credible mechanism whereby both macro and micro prudential supervision are subject to similar rules and procedures, and not subject to unilateral, conflicting policies. A solution in this context is to confer full competence on ECB to regulate and supervise the entire financial market and in doing so, it should be done in a manner whereby all Member

States of the EU should be equally represented such as in the Supervisory Board envisaged in the draft Regulation on SSM. The original proposal makes a distinction between participating and non-participating countries, designating only the euro countries as participating countries and excluding non-euro statees even if they opt-in to the Regulation. This situation had been changed to some extent by the amending Proposal to include even non-euro countries as participating countries if they enter into a special agreement with ECB. Such distinction or discrimination should be completely removed if the overall stability of the EU's financial system is to be assured.

Lender of last resort function

In times of serious economic and financial crisis, the interpretation and application of the rules and regulations are done in a more flexible manner. The creation of ESM as an emergency bail-out mechanism is a case in point, even though its legal basis is disputable. The purchases of sovereign bonds in the secondary market by ECB also raise legal issues of its compatibility with Article 123 TFEU.

If ECB is to be given express competence as lender of last resort to euro zone sovereigns through sovereign debt purchases in the primary and secondary markets, a Treaty amendment would become inevitable. Article 123 TFEU needs to be repealed or redefined as it forbids direct funding of the euro zone sovereigns by the ECB and the national central banks of the euro zone. In order to prevent any abuse of the intervention system, any losses arising out of such intervention should be jointly guaranteed by the member states of the euro zone. Not only the ECB, but also the euro member states should agree to a 'hair cut'.

The US model could be useful in the EU context. The Fed acts as lender of last resort as the relevant Statute specifically gives it the responsibility to ensure the sustainability and solvency of the US financial system as a whole. The Fed is, however, not authorised to act as lender of last resort to individual financial institutions. After the 2008 global financial crisis, which had its origin in the US, the Fed for example purchased US Treasury and mortgage-related securities to calm down the market.

Question 14

In the very first version of the Treaty on Stability, Coordination, and Governance, Member States were required to make room in their constitutions for the new rules, in case they did not already have such constitutional require-

ments. This posed no particular problem for Sweden, who already had such rules both in chapter 9 of the Instrument of Government and in special Budgetary Laws.

However, in the final version of the treaty text – in particular art. 3 sect. 2 – constitutional reform is no longer required, though of course possible. But this will now not be for the Court of Justice to supervise. Nevertheless, the ECJ can, according to art. 8 of the new treaty, at the request of one or more ratifying states, supervise that adequate and sufficient measures related to the budgetary process have been enacted in a certain state. The court's judgment is binding and a state that is found violating its treaty obligations must correct its error within a certain period, which will be determined by the court. Should the concerned state fail also in this respect, fines could be imposed according to art. 8 sect. 2.[22] Still, it must be observed that this supervision is focused on the formal aspects of observing the new rules and enacting new rules in the national legal order, when necessary; the 'material' control of whether the economic and financial requirements are met will still be carried out mainly by the EU Commission.

It may be questioned whether the possibility to impose fines on states who are already, by definition, in a state of economic crisis is really a welcome move or the wise way forward in a difficult situation. Still, although fines could already be imposed on failing states according to art. 260 TFEU, this new competence of the Court should be observed. It is, of course, too early to say how often it will be used or what it may lead to, but the fact that it has occurred through an international treaty and not through changes within EU law is slightly troublesome from a formal and principled point of view.

As far as general 'open' or single market cases are concerned, it is on the other hand doubtful that the new euro rules will bring about any specific change in the role of the Court of Justice.

Open question

Question 15

N/A

22. This new competence of the court is to be seen as a special treaty expanding its jurisdiction; see art. 8 sect. 3 as well as art. 273 of TFEU.

SWITZERLAND

Seraina Neva Grünewald[1]

Einleitung

Die Schweiz ist weder Mitglied der Europäischen Union (EU) noch gehört sie dem Europäischen Wirtschaftsraum an. Die Beziehungen der Schweiz zur EU werden durch ein Vertragswerk von bilateralen Abkommen geregelt. Darüber hinaus verfolgt die Schweiz eine Politik des »autonomen Nachvollzugs«, indem sie rechtliche Entwicklungen innerhalb der EU im nationalen Recht nachbildet, um Differenzen im Interesse des wirtschaftlichen Austauschs möglichst gering zu halten. Diese Tendenz lässt sich beispielsweise im Bereich der Finanzmarktpolitik beobachten (z.B. AIFMD, MiFID).

Die Wirtschafts- und Währungspolitik werden demgegenüber traditionellerweise unmittelbar mit der Souveränität eines Staates in Verbindung gebracht. Entsprechend gering ist bisher in diesen Bereichen der direkte Einfluss des EU-Rechts auf die Schweiz geblieben.[2] Ziel des vorliegenden Berichts ist es deshalb, die konstitutionellen und institutionellen Strukturen der Schweizer Wirtschafts- und Währungspolitik abzubilden und die kriseninduzierten Herausforderungen und Entwicklungen zu erläutern. Dabei stützt sich der Bericht – soweit möglich – auf die teilweise parallelen bzw. ähnlichen Fragestellungen in der EU.

Die Grundstrukturen der Schweizer Wirtschafts- und Währungspolitik lassen sich insgesamt als gefestigt bezeichnen und haben sich in der Krise bewährt. Dank der guten Verfassung seines Finanzhaushalts bei Ausbruch der Krise blieb der Bund handlungsfähig. Eine Schuldenkrise liess sich trotz staatlicher Intervention zugunsten der Grossbank UBS sowie konjunktureller Stabilisierungsmassnahmen vermeiden. Entsprechend hat die Finanz- und Wirtschaftskrise in der Schweiz zu keinen grösseren institutionellen Veränderungen oder rechtlichen Reformen in der Budgetpolitik geführt.

Mit ihren föderalen Strukturen kann die Schweiz dem neu entstehenden System der wirtschaftspolitischen Steuerung innerhalb der EU bzw. des Euroraums gewissermassen als Anschauungsbeispiel dienen. Im Bereich der

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2. Vgl. *Umberto Schwarz*, Die Autonomie der Geldpolitik und der Schweizer Franken, in: Schweizerische Nationalbank (Hrsg.), Die Schweizerische Nationalbank 1907-2007, Zürich: Neue Zürcher Zeitung, 2007, 291-302, 299.

Währungspolitik lassen sich interessante Parallelen, aber auch Unterschiede, zwischen den Mandaten der Europäischen Zentralbank (EZB) und der Schweizerischen Nationalbank (SNB) erkennen. Die Unterschiede werden mit der Errichtung des Einheitlichen Aufsichtsmechanismus zunehmen. So erfüllt die SNB zwar ebenfalls makroprudentielle Aufgaben, die mikroprudentielle Aufsicht über Finanzintermediäre obliegt aber seit jeher ausschliesslich der separaten Finanzmarktaufsichtsbehörde (FINMA). Zu den grössten währungspolitischen Herausforderungen der letzten Jahre gehören zweifelsohne die beispiellose Unterstützungsaktion zugunsten der angeschlagenen UBS sowie die massiven Wechselkursinterventionen zur Abfederung der »Flucht in den Schweizer Franken«. Beide sollen im Lichte des gesetzlichen Auftrags der SNB kurz erläutert werden.

Wirtschaftspolitik

Horizontale und vertikale Kompetenzverteilung: Gewaltenteilung, Föderalismus und Finanzausgleich (6. Frage)

Die Schweizer Verfassung überträgt die *Finanz- und Kredithoheit* auf Stufe Bundesstaat dem Parlament (der »Bundesversammlung«).[3] Die Bundesversammlung ist somit zuständig für die Festsetzung des jährlichen Voranschlages und für die Abnahme der Staatsrechnung. Sie fällt Kreditbeschlüsse[4] und übt – durch ihre Finanzkommissionen – die Oberaufsicht über den Finanzhaushalt aus.[5] Der Regierung (dem »Bundesrat«) kommen vorbereitende und ausführende Funktionen zu. Der Bundesrat erarbeitet den Finanzplan, entwirft den Voranschlag und erstellt die Staatsrechnung. Zudem sorgt er für eine ordnungsgemässe Haushaltsführung.[6]

Beide Räte der Bundesversammlung müssen Beschlüsse übereinstimmend fällen;[7] Ständerat (Kantonsvertretung) und Nationalrat (Volksvertretung) haben somit grundsätzlich gleiches Gewicht. Bestehen Differenzen zwischen den Räten, gehen die abweichenden Beschlüsse des einen Rates zur Beratung

3. Art. 167 Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, SR 101 (»BV«).
4. Art. 25 Bundesgesetz über die Bundesversammlung (Parlamentsgesetz, ParlG) vom 13. Dezember 2002, SR 171.10.
5. Art. 50 Abs. 1 i.V.m. Art. 26 Abs. 2 ParlG.
6. Art. 183 BV.
7. Art. 83 Abs. 1 ParlG.

an den anderen Rat zurück.[8] Erzielen die Räte nach drei Detailberatungen noch keine Einigung, wird zur Erarbeitung einer Verständigungslösung eine Einigungskonferenz eingesetzt.[9] Die Ablehnung des Einigungsvorschlags durch einen Rat führt zur Abschreibung des Geschäfts.[10] Weil Voranschlag und Nachtragskredite nicht einfach abgeschrieben werden können, kommt eine spezielle Differenzregelung zum Tragen, wonach der Beschluss der dritten Beratung, der den tieferen Betrag vorsieht, als angenommen gilt.[11]

Im Rahmen des föderalen Staatsaufbaus der Schweiz kommt den einzelnen Gliedstaaten – Kantonen und Gemeinden – weitreichende *Finanzautonomie* (inkl. Steuerhoheit[12]) zu. Die Zuständigkeit für eine staatliche Aufgabe und deren Finanzierung fällt im Prinzip jeweils entweder nur dem Bund *oder* den Kantonen zu. Die Aufgabenzuteilung folgt – ähnlich wie in der EU – dem Prinzip der *Subsidiarität*[13] sowie den Prinzipien der *fiskalischen Äquivalenz und Kongruenz*, d.h. der Deckungsgleichheit von Kosten-, Nutzen- und Entscheidungsträgern.[14] Die Zusammenarbeit von und Lastenverteilung zwischen Bund und Kantonen in bestimmten Aufgabenbereichen werden heute vermehrt in Programmvereinbarungen geregelt.[15] Die Kantone wiederum einigen sich über den gegenseitigen Bezug bzw. die gemeinsame Bereitstellung von staatlichen Leistungen in interkantonalen Rahmenvereinbarungen. In neun abschliessend aufgezählten Bereichen kann der Bund, auf Antrag anderer Kantone, nicht kooperationswillige Kantone zur Zusammenarbeit und Mitfinanzierung zwingen.[16]

Ein System des *Finanzausgleichs* trägt den Unterschieden in der finanziellen Leistungsfähigkeit der Kantone Rechnung. Anhand eines Indexes der kantonalen Ressourcen- und Steuerpotenziale, welcher den Steuerwettbewerb

8. Art. 89 Abs. 1 ParlG.
9. Art. 91 Abs. 1 ParlG.
10. Art. 93 Abs. 2 ParlG.
11. Art. 94 ParlG.
12. Alle drei Ebenen erheben Einkommens- und Gewinnsteuern, während andere Steuerarten nur vom Bund (z.B. Stempelabgaben, Mehrwertsteuer) bzw. durch Kanton und Gemeinden (z.B. Grundstückgewinnsteuer) erhoben werden.
13. Vgl. Art. 5a und 43a Abs. 1 BV.
14. Vgl. Art. 43a Abs. 2 BV. Dazu auch *Gérard Wettstein*, Die Neugestaltung des Finanzausgleichs und der Aufgaben zwischen Bund und Kantonen – eine Auslegeordnung, Die Volkswirtschaft, Nr. 12, 2001, 8-13, 9.
15. Vgl. Art. 46 Abs. 2 BV.
16. Art. 48a BV; Art. 10 ff. Bundesgesetz über den Finanz- und Lastenausgleich (FiLaG) vom 3. Oktober 2003, SR 613.2. Dazu gehören etwa das Hochschulwesen sowie die Abfall- und Abwasserbewirtschaftung.

unberührt lässt, werden die 26 Kantone in ressourcenstarke bzw. -schwache Kantone eingeteilt. Ressourcenschwache Kantone erhalten vom Bund (vertikaler Ressourcenausgleich) und von den ressourcenstarken Kantonen (horizontaler Ressourcenausgleich) finanzielle Mittel zur freien Verfügung.[17] Unverschuldete und unbeeinflussbare Lasten der Kantone, die sich aus den geografisch-topografischen Gegebenheiten (vorwiegend periphere Kantone) und der soziodemographischen Entwicklung (vorwiegend urbane Kantone) ergeben, werden durch den vom Bund finanzierten Lastenausgleich abgegolten.[18] Während der Ressourcenausgleich zu einer eigentlichen Umverteilung von finanziellen Mitteln führt, soll der Lastenausgleich spezifische Sonderlasten entschädigen.[19]

Causa UBS: Ein Test der wirtschaftspolitischen Steuerung und des Haushaltsprozesses in Krisensituationen (6. Frage)

Die Finanzkrise hat auch in der Schweiz die wirtschaftspolitische Steuerung und geltenden Haushaltsprozesse einem Stresstest unterzogen. Aufgrund der sich verschärfenden Exponiertheit der Grossbank UBS in illiquiden Aktiven und des damit verbundenen Vertrauensverlustes schnürten der Bundesrat, die SNB und die damalige Bankenaufsichtsbehörde (heute FINMA) in Oktober 2008 ein Massnahmenpaket zur Stabilisierung der Bank. Die aufeinander abgestimmten Massnahmen beinhalteten einerseits die Entlastung der UBS-Bilanz von illiquiden Aktiven[20] und andererseits die Stärkung der Eigenmittelbasis der Bank in der Höhe von CHF 6 Mrd. durch die Zeichnung einer Pflichtwandelanleihe durch den Bund. Für Letztere wurden Couponzahlungen von 12,5 % p.a. vereinbart.[21]

Eine formalgesetzliche Grundlage, welche den Bundesrat ermächtigt hätte, Beteiligungsrechte an einer Bank zu erwerben, bestand allerdings nicht.[22] Nach Ansicht des Bundesrates konnte eine solche aufgrund der Zeitnot auch

17. Vgl. Art. 3 ff. FiLaG.
18. Art. 7 ff. FiLaG.
19. Vgl. Eidgenössische Finanzverwaltung, Grundlagen der Haushaltsführung des Bundes, Januar 2012, 39.
20. Vgl. dazu weiter unten (11. Frage).
21. Zu den Modalitäten der Pflichtwandelanleihe im Einzelnen vgl. *Rolf Sethe*, Ein Indianer kennt keinen Schmerz – Reaktionen der Schweiz auf Finanzmarktkrise und Steuerstreit, ZBB 2011, 106-129, 112 f. (Abbildung 4).
22. Bei der Rekapitalisierung der Crossair infolge des Swissair-Groundings im Jahre 2001/2002 konnte sich der Bund auf eine Bestimmung des Luftfahrtgesetzes berufen, für welche ein Äquivalent im Bankengesetz fehlt.

nicht rechtzeitig im Rahmen des ordentlichen oder dringlichen parlamentarischen Gesetzgebungsverfahrens geschaffen werden.[23] Der Bundesrat stützte die Massnahme deshalb direkt auf seine in der Verfassung verankerte Ermächtigung, im Polizeinotstand direkt und sofort zum Schutz vor Störungen der öffentlichen Ordnung oder der äusseren oder inneren Sicherheit des Landes zu intervenieren.[24] Mit einer Polizeinotverfügung vom 15. Oktober 2008[25] schuf er die Rechtsgrundlage für die Zeichnung der Pflichtwandelanleihe und den entsprechenden Kreditbeschluss.[26]

Die Liberierung der Pflichtwandelanleihe war für den Bundeshaushalt mit Ausgaben verbunden, welche einer Bewilligung durch das Parlament bedurften. Weil die Massnahme keinen Aufschub duldete, kam anstelle des ordentlichen Nachtragskreditverfahrens ein *kreditrechtliches Dringlichkeitsverfahren*[27] zum Tragen. Immerhin konnte aber vorgängig die Zustimmung der parlamentarischen Finanzdelegation zum Kreditbeschluss des Bundesrates eingeholt werden.[28] Die Bundesversammlung erteilte dem Vorschuss am 15. Dezember 2008 schliesslich die erforderliche nachträgliche Genehmigung.[29]

Nur etwas mehr als acht Monate nach der Zeichnung der Pflichtwandelanleihe gab der Bund bekannt, sein Wandelrecht auszuüben und die in der Folge erhaltenen UBS-Aktien zu veräussern.[30] Der Verkaufserlös betrug knapp CHF 5,5 Mrd.[31] Gleichzeitig verkaufte der Bund die aufgelaufenen und noch ausstehenden Couponzahlungen der Pflichtwandelanleihe gegen eine Barabgeltung von rund CHF 1,8 Mrd. an die UBS zurück. Ignoriert man die durch die Anreizverzerrung entstehenden gesamtwirtschaftlichen Kosten,

23. Vgl. Botschaft zu einem Massnahmenpaket zur Stärkung des schweizerischen Finanzsystems vom 5. November 2008, BBl 2008 8943 ff., 8968.
24. Art. 184 Abs. 3 und Art. 185 Abs. 3 BV.
25. Verordnung über die Rekapitalisierung der UBS AG vom 15. Oktober 2008, AS 2008 4741 f.
26. Zur Problematik der Anrufung von »Notrecht« zum Erwerb der UBS-Beteiligung *Andreas Kley*, Die UBS-Rettung im historischen Kontext des Notrechts, ZSR I 2011, 123-138.
27. Art. 34 Bundesgesetz über den eidgenössischen Finanzhaushalt (Finanzhaushaltgesetz, FHG) vom 7. Oktober 2005, SR 611.0.
28. Vgl. Botschaft UBS (Fn 23), 8970. Es handelte sich also um einen »gewöhnlichen Vorschuss« gem. Art. 34 Abs. 1 FHG.
29. Vgl. Art. 34 Abs. 2 FHG. Bundesbeschluss über einen Kredit für die Rekapitalisierung der UBS AG vom 15. Dezember 2008, BBl 2009 439 f.
30. Eidgenössisches Finanzdepartement, Bund beschliesst sofortigen und umfassenden Abbau des UBS-Engagements, Medienmitteilung, 19. August 2009, <http://www.efd.admin.ch/00468/index.html?lang=de&msg-id=28519>.
31. Vgl. *Sethe* (Fn 21), 114.

resultierte für den Bund aus seiner notrechtlichen Intervention ein Gewinn von CHF 1,24 Mrd.

Demokratische Legitimität und Rechenschaftspflicht (7. Frage)

Die Finanz- und Kredithoheit des Parlaments stellt Hauptpfeiler zur Sicherung der demokratischen Legitimität und Rechenschaftspflicht in der Wirtschaftspolitik dar. Im Rahmen der Ausgabenbremse bedingen neue nicht gebundene Ausgaben ab einer bestimmten Höhe zwingend die Zustimmung der Bundesversammlung. Die Zivilgesellschaft kann durch ihr Initiativrecht direkten Einfluss auf die wirtschaftspolitische Steuerung nehmen. Im Gegensatz zum Bund verfügen alle Kantone sowie viele Gemeinden zudem über ein fakultatives und/oder obligatorisches *Finanzreferendum*. Dieses ermöglicht bzw. bedingt bei neuen Ausgaben der öffentlichen Hand einen Volksentscheid, sofern die gesetzlichen Bedingungen bezüglich Abgabenhöhe, -art und/oder -dauer erfüllt sind.

Rechtsinstrumente zur Defizit- und Schuldenbegrenzung (8. Frage)

Die Schweiz ist als Drittstat freilich nicht an die Verpflichtungen aufgrund des Vertrags über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion gebunden, sieht aber im nationalen Recht ähnliche Bestimmungen zur Defizit- und Schuldenbegrenzung vor. Um einen mittelfristig ausgeglichenen Bundeshaushalt zu sichern, limitiert die Schweizer *Schuldenbremse*[32] die Ausgaben der öffentlichen Hand *über einen Konjunkturzyklus hinweg* auf die Höhe der Einnahmen.[33] Entsprechend setzt sie den Ausgabenhöchstbetrag gestützt auf die um einen Konjunkturfaktor korrigierten (erwarteten) Einnahmen antizyklisch fest. Der Konjunkturfaktor bildet die jeweils aktuelle Konjunkturlage ab und entspricht dem Verhältnis von trendmässigem und effektivem Bruttoinlandprodukt (real) im jeweiligen Rechnungsjahr.[34] Im gesamtwirtschaftlichen Aufschwung muss also ein konjunktureller Überschuss erwirtschaftet werden, damit im Abschwung ein konjunkturelles

32. Die Schuldenbremse gilt nur für den Bundeshaushalt. Die Mehrzahl der in ihrer Finanzpolitik autonomen Kantone kennt jedoch eigene Ausprägungen einer Defizit-, Verschuldungs- oder Ausgabenbegrenzung; Eidgenössische Finanzverwaltung (Fn 19), 32.
33. Art. 126 BV; Art. 13 ff. FHG.
34. Art. 13 Abs. 3 FHG.

Defizit toleriert werden kann.[35] Dank der Schuldenbremse hat die Schweiz die in den finanziell starken Jahren vor 2009 erwirtschafteten Überschüsse zum Schuldenabbau verwendet und konnte dadurch mit einem gesunden Finanzhaushalt in die Krisenjahre eintreten.[36]

Um Transparenz zu schaffen und eine Kontrolle der Regelkonformität zu ermöglichen, werden Über- oder Unterschreitungen des Ausgabenhöchstbetrags statistisch auf einem Ausgleichskonto ausserhalb der Staatsrechnung erfasst.[37] Fehlbeträge des Ausgleichskontos müssen in die Berechnung der Höchstbeträge der Folgejahre einfliessen.[38] Überschreitet ein Fehlbetrag 6 % der im vergangenen Rechnungsjahr getätigten Gesamtausgaben, müssen Bundesrat und Parlament diesen verbindlich innert der drei folgenden Rechnungsjahre unter die 6 %-Schwelle zurückführen.[39]

Begrenzte gesetzliche Ausnahmeregelungen stellen die staatliche Handlungsfähigkeit im Falle aussergewöhnlicher und nicht steuerbarer Situationen sicher. Bei ausserordentlichem Zahlungsbedarf[40] kann die Bundesversammlung mit absolutem Mehr[41] den Höchstbetrag der Gesamtausgaben in angemessenem Umfang erhöhen. Die Mehrausgaben sind jedoch in den Folgejahren durch ausserordentliche Einnahmen bzw. Unterschreitungen des Ausgabenhöchstbetrags zu kompensieren.[42] Damit die Beteiligung des Bundes an der Intervention zur Stabilisierung der Grossbank UBS finanziert werden konnte, musste eine ausserordentliche Erhöhung der Gesamtausgaben beschlossen werden.[43] Die Schuldenbremse hat sich somit auch während der Krise bewährt un sich als flexibles und effektives Instrument erwiesen.

Das Schweizer Recht kennt kein verbindliches Maximalverhältnis zwischen dem gesamtstaatlichen Schuldenstand und Bruttoinlandsprodukt,

35. Eidgenössische Finanzverwaltung (Fn 19), 32.
36. Vgl. Die Schuldenbremse der Bundes: Erfahrungen und Perspektiven, Bericht der Bunderrates, 29. November 2013, 27 f., 73; International Monetary Fund, Cross-Cutting Themes in Economies with Large Banking Systems, 16 April 2010, 13 (»significant structural fiscal surpluses«), 20.
37. Art. 16 Abs. 2 FHG.
38. Art. 17 Abs. 1 FHG.
39. Art. 17 Abs. 2 FHG.
40. Dazu gehören neben ausserordentlichen und vom Bund nicht steuerbaren Entwicklungen auch Anpassungen am Rechnungsmodell sowie verbuchungsbedingte Zahlungsspitzen (Art. 15 Abs. 1 FHG).
41. Die Mehrheit der Mitglieder beider Räte muss der Erhöhung zustimmen (Art. 126 Abs. 3 i.V.m. Art. 159 Abs. 3 lit. c BV).
42. Vgl. Art. 17a ff. FHG.
43. Vgl. Botschaft UBS (Fn 23), 8981 f. Mehr dazu weiter oben (6. Frage).

wie es im Vertrag über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion vorgesehen ist. Die Schuldenbremse reduziert die Möglichkeit der Verschuldungsfinanzierung aber auf *konjunkturelle* Defizite und führt so zu einer Stabilisierung der nominellen Verschuldung. Mit der sog. *Ausgabenbremse* steht ein weiteres Instrument der Ausgabensteuerung zur Verfügung, dem allerdings v.a. general-präventive Wirkung zukommt.[44] Die Ausgabenbremse schreibt vor, dass neue ungebundene Ausgaben von mehr als CHF 20 Mio. (einmalig) bzw. CHF 2 Mio. (wiederkehrend) der Zustimmung beider parlamentarischen Räte bedürfen.[45]

Disziplinierend wirkt zudem, dass die Möglichkeit, Ungleichgewichte im Bundeshaushalt mit Steuererhöhungen zu finanzieren, nur in engen Grenzen besteht. Die Höchstsätze der direkten Bundessteuer (Einkommens- und Gewinnsteuer) und der Mehrwertsteuer – die beiden Haupteinnahmequellen auf Bundesebene – sind in der Verfassung verankert.[46] Deren Anhebung bedarf somit immer der Zustimmung durch das Volk *und* die Kantone. Die Befugnis des Bundes zur Erhebung der direkten Bundessteuer und der Mehrwertsteuer ist zudem stets befristet und muss regelmässig von Volk und Kantonen erneuert werden.[47]

Währungspolitik

Gesetzlicher Auftrag der Schweizerischen Nationalbank (11. Frage)

Die SNB führt als unabhängige Zentralbank die auf Bundesebene zentralisierte Geld- und Währungspolitik. Dabei verfolgt sie die Gesamtinteressen des Landes.[48] Wie die EZB gewährleistet sie als *vorrangiges Ziel* die *Preisstabilität*.[49] Dabei hat sie der konjunkturellen Entwicklung Rechnung zu

44. Eidgenössische Finanzverwaltung (Fn 19), 95.
45. Art. 159 Abs. 3 lit. b BV.
46. Art. 128 Abs. 1 und Art. 130 Abs. 1-3 BV.
47. Vgl. Art. 196 Ziff. 13 und 14 BV.
48. Art. 99 Abs. 1 und 2 BV. Die Schweiz und das Fürstentum Liechtenstein bilden einen gemeinsamen Wirtschafts- und Währungsraum. Die SNB führt ihre Geldpolitik für beide Länder.
49. Art. 5 Abs. 1 Bundesgesetz über die Schweizerische Nationalbank (Nationalbankgesetz, NBG) vom 3. Oktober 2003, SR 951.11. Preisstabilität wird ähnlich definiert wie im Euroraum; sie soll einem Anstieg der Konsumentenpreise um weniger als 2 % pro Jahr gleichkommen, wobei ein anhaltender Rückgang des Preisniveaus (Deflati-

tragen; bei echten Zielkonflikten mit der Preisstabilität geht Letztere allerdings vor.[50] Die Verpflichtung auf das Gesamtinteresse des Landes wird dahingehend verstanden, dass die SNB ihre Geld- und Währungspolitik auf die Bedürfnisse der Volkswirtschaft als Ganzes ausrichtet, ohne einzelne Regionen oder Branchen zu begünstigen.[51]

Im Rahmen ihres geld- und währungspolitischen Auftrags erfüllt die SNB eine Reihe von »Kernaufgaben«: (1) Versorgung des Franken-Geldmarktes mit Liquidität, (2) Gewährleistung der Bargeldversorgung, (3) Erleichterung und Sicherung des Funktionierens bargeldloser Zahlungssysteme, (4) Verwaltung der Währungsreserven und (5) Beitrag zur Stabilität des Finanzsystems.[52] Als »Sonder- bzw. Nebenaufgabe« wirkt die SNB, in Zusammenarbeit mit dem Bundesrat, bei der internationalen Währungskooperation mit und erbringt dem Bund Bankdienstleistungen.[53] Den Umfang und die Art dieser Bankdienstleistungen – mit Ausnahme der Kreditgewährung –[54] handeln Bund und SNB als gleichwertige Partner aus, und die SNB wird vom Bund dafür marktkonform oder zumindest kostendeckend entschädigt. Die unentgeltliche Dienstleistungserbringung muss hingegen durch einen unmittelbaren Nutzen für die Geld- und Währungspolitik begründet sein.[55] Seit der Revision des NBG im Jahre 2002 ist die SNB nicht mehr gezwungen, Bundesaufträge im Bankgeschäft bedingungslos auszuführen. Allerdings darf sie dem Bund ihre Bankdienstleistungen nicht grundsätzlich oder ohne sachliche Begründung verweigern, sondern muss sie erbringen, wenn dieser anderswo keinen gleichwertigen Ersatz findet.[56]

Das Verbot der Kreditgewährung an den Bund bildet einen zentralen Bestandteil der *finanziellen* Unabhängigkeit der SNB. Darüber hinaus verfügt die SNB über Budgetautonomie sowie *institutionelle* Unabhängigkeit, welche sich aus der Organisation der Nationalbank als spezialgesetzliche Aktienge-

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on) das Ziel ebenfalls verfehlen würde. Als Hauptindikator für geldpolitische Entscheide dient der SNB eine mittelfristige Inflationsprognose.

50. Vgl. Botschaft über die Revision des Nationalbankgesetzes vom 26. Juni 2002, BBl 2002 6097, 6181 f.
51. Vgl. Botschaft Revision NBG (Fn 50), 6180.
52. Art. 5 Abs. 2 NBG.
53. Art. 5 Abs. 3 und 4 NBG.
54. Vgl. Art. 11 Abs. 2 NBG; Botschaft Revision NBG (Fn 50), 6145 f.
55. Vgl. Botschaft Revision NBG (Fn 50), 6144.
56. Botschaft Revision NBG (Fn 50), 6145. Vgl. auch *Hans-Christoph Kesselring*, Die Bereinigung der Nebengeschäfte, in: Schweizerische Nationalbank (Hrsg.), Die Schweizerische Nationalbank 1907-2007, Zürich: Neue Zürcher Zeitung, 2007, 576-589, 585 m.H.

sellschaft ergeben. Wie die EZB verfügt die SNB über *funktionelle* Unabhängigkeit im Zusammenhang mit ihrem geldpolitischen Kernauftrag, indem sie diesen frei von Weisungen der Regierung oder des Parlaments erfüllt.[57] In Anlehnung an das ESZB-Statut wird die *personelle* Unabhängigkeit der SNB als vierte Säule ihrer Unabhängigkeit dadurch gewährleistet, dass Mitglieder des Bankrats und Direktoriums auf eine feste Amtszeit ernannt sind und nur dann abberufen werden können, wenn sie die Voraussetzungen für die Ausübung des Amtes nicht mehr erfüllen oder eine schwere Verfehlung begangen haben.[58] Gegenstück zur weitreichenden Unabhängigkeit der SNB bildet die Rechenschafts- und Informationspflicht gegenüber Bundesrat, Parlament und Öffentlichkeit.[59] Auch diese ist stark an das europäische Recht angelehnt.

Bei der Festlegung des Instrumentariums der SNB hat sich der Schweizer Gesetzgeber in der Gesetzesnovelle von 2002 unmittelbar an der offenen Formulierung im ESZB-Statut orientiert.[60] Entsprechend stimmt der Geschäftskreis der SNB qualitativ mit demjenigen des ESZB überein. Er räumt der SNB weitgehendes Ermessen in Bezug auf ihre geldpolitische Strategie sowie die zu deren Umsetzung verwendeten Instrumente ein.

Hingegen sieht das Gesetz klare Regeln bezüglich der Gewinnermittlung und -verteilung der SNB vor:[61] Die SNB bildet Rückstellungen, die es erlauben, die Währungsreserven auf der geld- und währungspolitisch erforderlichen Höhe zu halten. Sie orientiert sich dabei an der Entwicklung der schweizerischen Volkswirtschaft, entscheidet aber in eigener Kompetenz. Vom Bilanzgewinn wird eine Dividende von höchstens 6 % des Aktienkapitals ausgerichtet. Der verbleibende Gewinn fällt zu einem Drittel an den Bund und zu zwei Dritteln an die Kantone.[62] Um die Planbarkeit der jährlichen Ausschüttungen an Bund und Kantone zu erhöhen, vereinbaren das Eidgenössische Finanzdepartement und die SNB für einen bestimmten Zeitraum deren Höhe. Zurzeit beträgt die jährliche Ausschüttung an Bund

57. Art. 6 NBG.
58. Art. 39 Abs. 3 und 4, Art. 41 Abs. 3, Art. 43 Abs. 2 und Art. 45 Abs. 1 NBG. Zum Ganzen *Hans Kuhn*, Totalrevision des Nationalbankgesetzes, in: Schweizerische Nationalbank (Hrsg.), Die Schweizerische Nationalbank 1907-2007, Zürich: Neue Zürcher Zeitung, 2007, 335-350, 540 f.
59. Art. 5 ff. NBG.
60. Vgl. Botschaft Revision NBG (Fn 50), 6134 (»Das ESZB-Statut kann als Standard für die Formulierung der Rechtsgeschäfte einer Zentralbank bezeichnet werden.«), 6290.
61. Art. 30 und 31 NBG.
62. Art. 99 Abs. 4 BV verankert den Anspruch der Kantone auf mindestens zwei Drittel des Reingewinns der SNB in der Verfassung.

und Kantone CHF 1 Mrd., wenn die Ausschüttungsreserve nach Gewinnverwendung nicht negativ wird.[63] Der Verteilschlüssel unter den Kantonen richtet sich nach deren Wohnbevölkerung.[64]

Causa UBS: Die SNB als Kreditgeber letzter Instanz (11. Frage)

Am 16. Oktober 2008 gab die SNB bekannt, dass sie die Übertragung eines Portfolios illiquider Wertpapiere, Darlehen und Derivate von der damals angeschlagenen Grossbank UBS an eine Zweckgesellschaft (Stabilisierungsfonds oder »StabFund«) in der Höhe von maximal USD 60 Mrd. finanzieren würde. Von Dezember 2008 bis April 2009 wurden schliesslich Vermögenswerte in Gesamtwert von USD 38,7 Mrd. auf den StabFund übertragen. Die Massnahme erfolgte im Rahmen eines Massnahmenpakets des Bundes zur Stärkung des Schweizer Finanzsystems.[65] Die Rahmenbedingungen der Transaktion gestalteten sich wie folgt:[66]

- Die UBS brachte Eigenkapital in der Höhe von 10 % des zu übertragenden Portfolios bzw. USD 3,9 Mrd. in den StabFund ein, welchen sie anschliessend für den symbolischen Betrag von CHF 1, aber gegen ein Rückkaufsrecht unter gewissen Bedingungen, an die SNB übertrug.
- Die SNB finanzierte den verbleibenden Portfoliowert mittels eines Darlehens von USD 25,8 Mrd., gesichert durch das Gesamtportfolio und gegen einen Zins von USD-Libor + 250 bp.[67]
- Der Wert des Portfolios wurde gestützt auf den Buchwert der UBS bestimmt und von einem unabhängigen Schätzer überprüft. Wich die

63. Vereinbarung zwischen dem Eidgenössischen Finanzdepartement und der Schweizerischen Nationalbank über die Gewinnausschüttung der Schweizerischen Nationalbank vom 21. November 2011.
64. Art. 31 Abs. 3 NBG. Aufgrund des drartischen Rückgangs des Goldpreises, welcher das Ergebnis der SNB belartete, konnte diese fÿr 2013 erstmals seit ihrer Gründung keine Ausselüttung an bund und Cantoen leissten.
65. Vgl. dazu weiter oben (6. Frage). Zum Ganzen *Luc Thévenoz*, The Rescue of UBS, in: Mario Giovanoli and Diego Devos (Hrsg.), International Monetary and Financial Law – The Global Crisis, New York: Oxford University Press, 2010, 378-391, Ziff. 18.16 ff.
66. Vgl. Schweizerische Nationalbank, Gutachten zur notenbankrechtlichen Zulässigkeit der Beteiligung der Schweizerischen Nationalbank am Massnahmenpaket zur Stärkung des Finanzsystems (»UBS-Transaktion«), 13. Oktober 2008, 3 f.
67. Gewisse übernommene Eventualverbindlichkeiten bedurften laut Angaben der SNB keiner unmittelbaren Finanzierung.

Schätzung vom Buchwert ab, erfolgte die Übertragung gestützt auf den jeweils tieferen Wert.
– Die Verwaltung des Portfolios erfolgte durch die UBS, überwacht durch ein Gremium, in welchem die SNB die Mehrheit stellte.

Obwohl die Eidgenössische Finanzmarktaufsicht (FINMA) die regulatorische Solvenz der UBS bestätigt hatte, verband die SNB ihre Mitwirkung an der Transaktion mit der Bedingung, dass die UBS vorgängig Kapital in der Höhe von mindestens CHF 6 Mrd. aufnahm. Weil ihr dies auf dem Markt nicht möglich war, stellte der Bund den Betrag zur Verfügung.

Der »kreative Einsatz der Liquiditätshilfe«[68] durch die SNB hat den gewünschten Erfolg der Stabilisierung der UBS erzielt und der SNB – obwohl nie als eigenständiges Ziel verfolgt – einen ausserordentlichen finanziellen Gewinn eingebracht. Am 15. August 2013 tilgte der StabFund das ihm von der SNB gewährte Darlehen vollständig.[69] Damit stand der UBS die Option offen, den StabFund von der SNB zurückzukaufen, welche sie am 7. November 2013 denn auch ausübte.[70] Der Kaufpreis belief sich, dem vertraglich festgelegten Anteil der SNB am Eigenkapital des StabFund per Ende September 2013 entsprechend, auf USD 3,762 Mrd. Darüber hinaus erzielte die SNB Zinseinnahmen von gesamthaft USD 1,6 Mrd. über die Laufzeit des Darlehens.

Trotz einer weitgehend positiven Beurteilung der Intervention durch die SNB[71] stellt sich die Frage nach den rechtlichen Grundlagen.[72] Wie viele EU-Mitgliedstaaten und die EU selbst verzichtete auch die Schweiz auf eine ausdrückliche gesetzliche Regelung der Funktion der Notenbank als *Kreditgeber letzter Instanz*, um die Voraussehbarkeit der Notkreditvergabe einzuschränken.[73] Es gilt aber als allgemein anerkannt, dass die Aufgabenzu-

68. *Hans Geiger*, Expertengutachten über das Verhalten der Finanzmarktaufsicht in der Finanzkrise, 31. Dezember 2009, 11.
69. Schweizerische Nationalbank, SNB StabFund tilgt Darlehen der Schweizerischen Nationalbank, Medienmitteilung, 16. August 2013, <http://www.snb.ch/de/mmr/reference/pre_20130816/source/pre_20130816.de.pdf>.
70. Schweizerische Nationalbank, UBS kauft den StabFund von der SNB, Medienmitteilung, 8. November 2013, <http://www.snb.ch/de/mmr/reference/pre_20131108/source/pre_20131108.de.pdf>.
71. Vgl. z.B. International Monetary Fund (Fn 36), 17, 18 (»swift and well-designed resolution of UBS's problem assets«).
72. Die SNB selbst liess die Transaktion vorgängig durch ihren Rechtsdienst beurteilen. Das Ergebnis ist öffentlich zugänglich: vgl. Gutachten UBS-Transaktion (Fn 66).
73. Botschaft Revision NBG (Fn 50), 6187. Vgl. auch *Christine Kaufmann*, SNB und FINMA in neuen Rollen?, SZW 2009, 418-427, 422 f.

weisung an die SNB im Bereich der Liquiditätsversorgung[74] und der Finanzstabilität[75] ein Eingreifen bei ausserordentlichen Liquiditätsengpässen einer Bank mitumfasst.[76] Die SNB selbst – im Einklang mit dem klassischen Lender-of-last-resort Konzept – macht ausserordentliche Liquiditätshilfe von den folgenden kumulativen Voraussetzungen abhängig:[77]

- *Systemrelevanz*: Die kreditersuchende Bank oder Bankengruppe ist für die Stabilität des Finanzsystems von Bedeutung.
- *Solvenz*: Die kreditersuchende Bank oder Bankengruppe ist gemäss Stellungnahme der FINMA solvent.
- *Ausreichende Sicherheiten*: Die Liquiditätshilfe ist jederzeit vollständig durch Sicherheiten gedeckt, die der SNB unter den gegebenen Umständen als ausreichend erscheinen.

Zumal in den Richtlinien der SNB über das gelpolitische Instrumentarium enthalten, welche das Direktorium gestützt auf Art. 9 Abs. 2 NBG erlassen hat,[78] entfalten diese Voraussetzungen zwar keine unmittelbare rechtliche Bindungswirkung. Immerhin hat sich die SNB damit aber »eine gewisse Selbstbindung auferlegt«.[79] Die Voraussetzungen der Solvenz und der ausreichenden Sicherheiten lassen sich zudem bereits dem Gesetz entnehmen. Die Gewährung von Darlehen an *insolvente* Banken gilt seit jeher als Verstoss gegen den gesetzlichen Auftrag der SNB.[80] Die Stützung von Banken mit fraglicher Solvenz kann sich nur auf die allgemeine wirtschaftspolitische Zuständigkeit des Bundes stützen.[81] Solvenzhilfen seitens der SNB würden

74. Art. 5 Abs. 2 lit. a NBG.
75. Art. 5 Abs. 2 lit. e NBG.
76. Vgl. Botschaft Revision NBG (Fn 50), 6184, 6186 f.
77. Ziff. 6 Richtlinien der Schweizerischen Nationalbank (SNB) über das geldpolitische Instrumentarium vom 25. März 2004 (Stand am 1. Januar 2013).
78. Das Direktorium definiert darin die allgemeinen Bedingungen, zu welchen die SNB Geschäfte mit Finanzmarktteilnehmern abschliesst.
79. Gutachten UBS-Transaktion (Fn 66), 5. Gem. Ziff. 1 der Richtlinien über das geldpolitische Instrumentarium (Fn 77) kann die SNB »bei Bedarf jederzeit und ohne Vorankündigung von diesen Richtlinien abweichen«.
80. Dazu Botschaft Revision NBG (Fn 50), 6187: »Von der Rolle der SNB als »Lender of last resort« abzugrenzen ist demgegenüber die Rettung einzelner, insolvent gewordener Finanzinstitute. Dies ist nicht Sache der Notenbank«.
81. *Daniel Heller/Hans Kuhn*, Die Nationalbank als Lender of Last Resort, in: Schweizerische Nationalbank (Hrsg.), Die Schweizerische Nationalbank 1907-2007, Zürich: Neue Zürcher Zeitung, 2007, 433-439, 438, unter Verweis auf Art. 100 und 103 BV.

folglich das Verbot der Kreditgewährung an den Bund verletzen.[82] Letzteres bildet das Äquivalent zum europäischen Verbot von Kreditfazilitäten und untersagt der SNB die Gewährung von Krediten und Überziehungsfazilitäten an den Bund, mit Ausnahme von Kontoüberziehungen im Tagesverlauf gegen ausreichende Sicherheiten, sowie den Erwerb staatlicher Schuldtitel aus Emissionen. Art. 9 Abs. 1 lit. e NBG sieht vor, dass Finanzmarktteilnehmer für Kredite von der SNB ausreichende Sicherheiten leisten müssen. In Bezug darauf, welche Sicherheiten als *ausreichend* zu gelten haben, räumt die Bestimmung der SNB allerdings einen »weitreichenden Ermessensspielraum« ein.[83]

Auch wenn es sich bei der Transaktion nicht um klassische Liquiditätshilfe (d.h. ein direktes Darlehen) gehandelt hat, sondern um Hilfe zur Verbesserung der Liquiditätssituation der UBS, welche illiquide Vermögenswerte *endgültig* aus ihrer Bilanz entfernen konnte, scheinen die gesetzlichen Voraussetzungen erfüllt.[84] Dass die UBS als systemrelevante Bank zu qualifizieren ist, lässt sich kaum in Abrede stellen.[85] Die regulatorische Solvenz der Bank im Zeitpunkt der Transaktion wurde von der FINMA bestätigt. Mit der von der SNB zusätzlich verlangten Rekapitalisierung in der Höhe von CHF 6 Mrd. durfte die Solvenz der UBS – die schwierige Abgrenzung von Illiquidität und Insolvenz berücksichtigend – als im Sinne des Gesetzes erstellt gelten. Die Anforderungen an die zu bestellenden Sicherheiten wiederum gehen im Rahmen ausserordentlicher Liquiditätshilfe naturgemäss weniger weit als bei regulären geldpolitischen Operationen; insbesondere müssen die Sicherheiten weder liquide noch marktfähig sein.[86] Für das von der SNB gewährte Darlehen wurde ein Sicherungsrecht an sämtlichen übertragenen Vermögenswerten bestellt. Mit der StabFund-Eigenkapitaleinlage durch die UBS hat sich die SNB zudem eine Art »Haircut« von 10 % zur Absicherung von Verlusten auf den übernommenen Wertpapieren ausbedungen.[87] Der Preisbestimmungsmechanismus, wonach die Wertpapiere zum jeweils tieferen Wert aus

82. Art. 11 Abs. 2 NBG.
83. Botschaft Revision NBG (Fn 50), 6199.
84. Vgl. auch Gutachten UBS-Transaktion (Fn 66), 5 f.
85. Das Financial Stability Board stuft die UBS seit 2011 offiziell als global systemrelevante Bank ein; vgl. für das Jahr 2013 Financial Stability Board, 2013 update of group of global systemically important banks (G-SIBs), 11 November 2013, 3. Vgl. auch Botschaft zur Änderung des Bankengesetzes (Stärkung der Stabilität im Finanzsektor; *too big to fail*) vom 20. April 2011, BBl 2011 4717 ff., 4746 (»die Credit Suisse und die UBS [sind] klar systemrelevant«).
86. *Heller/Kuhn* (Fn 81), 438.
87. Vgl. auch Gutachten UBS-Transaktion (Fn 66), 9.

Buchwert bzw. unabhängiger Bewertung übernommen wurden, verstärkte diesen Haircut zusätzlich. Ein Warrant der SNB auf maximal 100 Mio. UBS-Aktien im Falle eines Verlustes nach vollständiger Liquidation der Aktiven diente als subsidiäre Absicherung. Angesichts des weiten Ermessens der SNB darf angenommen werden, dass mit den vereinbarten Konditionen insgesamt ausreichende Sicherheiten zur Verfügung standen.

Der Vollständigkeit halber sei darauf hingewiesen, dass das Gesetz der SNB auch erlaubt, zur Erfüllung ihrer Aufgaben (inkl. ihres Beitrags zur Finanzstabilität) auf den Finanzmärkten auf Schweizerfranken oder Fremdwährungen lautende Aktiven zu kaufen und verkaufen sowie entsprechende Darlehensgeschäfte zu tätigen.[88] Soweit es der Erfüllung ihrer Aufgaben dient, kann sich die SNB ausserdem auf eigene Rechnung am Kapital von Gesellschaften oder anderen juristischen Personen beteiligen und Mitgliedschaftsrechte an solchen erwerben.[89] Der Erwerb des StabFund durch die SNB war also auch in diesem Sinne vom Gesetz gedeckt.

Euro-Mindestkurs: Erweiterung des Aufgabenkatalogs? (11. und 13. Frage)

Zur Bekämpfung der Finanz- und Wirtschaftskrise hat die SNB die Zinsen faktisch auf null gesenkt und einen Mindestkurs gegenüber dem Euro von CHF 1.20 pro Euro eingeführt.[90] Dabei handelt es sich nicht um die erste Wechselkursuntergrenze in der Geschichte der SNB. Im Oktober 1978 legte die SNB eine Untergrenze von 80 Rappen je D-Mark fest, um einen Kursanstieg des Frankens gegenüber der D-Mark temporär zu kontrollieren.[91] Gemäss SNB dient der Euro-Franken-Mindestkurs im gegenwärtigen Umfeld, in dem die kurzfristigen Zinsen praktisch bei null liegen, zur Vermeidung einer unerwünschten Verschärfung der monetären Rahmenbedingungen bei einem plötzlichen Aufwertungsdruck auf den Franken.[92] Zwar wird die von der SNB verfolgte Politik in der Schweiz gemeinhin als Erfolg

88. Art. 9 Abs. 1 lit. c NBG.
89. Art. 12 NBG.
90. Schweizerische Nationalbank, Nationalbank legt Mindestkurs von 1.20 Franken pro Euro fest, Medienmitteilung, 6. September 2011, <http://www.snb.ch/de/ mmr/reference/pre_20110906/source>. Der Mindestkurs gilt seit dem 6. September 2011 bis auf Weiteres.
91. Vgl. *Schwarz* (Fn 2), 291.
92. Vgl. etwa Schweizerische Nationalbank, Geldpolitische Lagebeurteilung vom 20. Juni 2013, Medienmitteilung, 20. Juni 2013, http://www.snb.ch/de/ mmr/reference /pre_20130620_1/source/pre_20130620_1.de.pdf>, 1.

im Kampf gegen die Überbewertung des Frankens gewertet, sie hat aber – erwartungsgemäss – zu einer massiven Aufblähung der Bilanz der Notenbank und einer erhöhten Abhängigkeit von der Tiefzinspolitik der EZB geführt. Auf der Passivseite der Bilanz nahmen die Sichteinlagen zu, während auf der Aktivseite die Devisenanlagen anstiegen.

Nach einer parlamentarischen Initiative hätte die SNB gesetzlich verpflichtet werden sollen, zusätzlich zu ihren bisherigen Aufgaben eine in Bezug auf die Währungen der wichtigsten Handelspartner der Schweiz (insbesondere folglich dem Euro) an der Kaufkraftparität orientierte Wechselkurspolitik zu verfolgen.[93] Die Mehrheit im Parlament war jedoch der Ansicht, dass ein zusätzliches Wechselkursziel die autonome und auf die Preisstabilität ausgerichtete Geldpolitik der SNB – d.h. ihre primäre Aufgabe – gefährden würde. Das Parlament hat damit die ein-Ziel-Politik des Schweizer Währungsrechts einmal mehr bestätigt.

Finanzaufsicht auf Mikro- und Makroebene: Die Rolle der Nationalbank (12. Frage)

Wie viele Zentralbanken im der EU und selbst die EZB hat sich auch die SNB im Nachgang der Krise einer verstärkten Ausrichtung auf Aufgaben zur Gewährleistung der *Finanzstabilität* nicht entziehen können. Dem Auftrag des ESZB folgend soll die SNB laut Gesetz zur Stabilität des Finanzsystems »beitragen«.[94] Sie hat diese Aufgabe bereits vor Ausbruch der Krise dadurch erfüllt, dass sie Gefahrenquellen für das Finanzsystem analysiert und allfälligen Handlungsbedarf identifiziert.[95] Zudem überwacht die SNB die systemisch bedeutsamen Zahlungs- und Effektenabwicklungssysteme.[96] Anders als im Rahmen des Einheitlichen Aufsichtsmechanismus fällt die Aufsicht über *Einzel*institute aus sämtlichen Finanzsektoren (Banken, Versicherungen, Wertpapiere/Märkte) hingegen in die ausschlichessliche Zuständigkeit einer separaten Behörde, der FINMA.

93. Parlamentarische Initiative Leutenegger Oberholzer Susanne, Wechselkurspolitik der SNB, Amtl. Bull. NR (2013), S. 61 ff.
94. Art. 5 Abs. 2 lit. e NBG.
95. Die SNB publiziert die Ergebnisse ihrer Analyse u.a. im jährlich erscheinenden Bericht zur Finanzstabilität.
96. Art. 19 ff. NBG. Ausführlich dazu *Andy Sturm*, Die Überwachung von Zahlungssystemen, in: Schweizerische Nationalbank (Hrsg.), Die Schweizerische Nationalbank 1907-2007, Zürich: Neue Zürcher Zeitung, 2007, 339-447.

Mit Ausnahme der direkt ausgeübten Aufsicht über systemrelevante Finanzmarktinfrastrukturen waren die der SNB zur Verfügung stehenden Instrumente im Bereich der Finanzstabilität weitgehend auf Empfehlungen beschränkt. Seit dem 1. März 2012 umfasst der gesetzliche Auftrag der SNB die Pflicht, die in der Schweiz systemrelevanten Banken und deren systemrelevanten Funktionen zu identifizieren und *durch Verfügung* zu bezeichnen.[97] Nachdem die SNB bereits im November 2012 die beiden Grossbanken UBS und Credit Suisse als systemrelevante Institute eingestuft hatte,[98] stellte sie mit Verfügung vom 1. November 2013 auch die Systemrelevanz der Zürcher Kantonalbank als Finanzgruppe fest.[99] Die Qualifikation als systemrelevante Bank erhöht die regulatorischen Anforderungen an Kapital- und Liquiditätspuffer und bedingt die Ausarbeitung einer Notfallplanung, welche die Weiterführung systemrelevanter Funktionen im Fall drohender Insolvenz sicherstellen soll.[100] Sie ist damit wesentliche Voraussetzung einer effektiven Krisenprävention und bekämpfung.

Als makroprudentielle Aufseherin ist die SNB zudem beauftragt, die Widerstandsfähigkeit des Bankensektors gegenüber den Risiken eines übermässigen Kreditwachstums laufend zu überprüfen und nötigenfalls Massnahmen zu deren Stärkung oder zur Verhinderung eines übermässigen Kreditwachstums vorzuschlagen. Konkret kann die SNB zu diesem Zweck – nach Anhörung der FINMA – dem Bundesrat beantragen, die Banken zu verpflichten, in Form von hartem Kernkapital einen *antizyklischen Puffer* von maximal 2,5 % der gewichteten Positionen in der Schweiz zu halten.[101] Der antizyklische Puffer kann auf bestimmte Kreditpositionen beschränkt werden. Nachdem wachsende Kredite und Immobilienpreise zu Ungleichgewichten am Hypothekar- und Immobilienmarkt für Wohnliegenschaften geführt

97. Art. 8 Abs. 3 Bundesgesetz über die Banken und Sparkassen (Bankengesetz, BankG) vom 8. November 1934, SR 952.0.
98. Schweizerische Nationalbank, Verfügungen der Schweizerischen Nationalbank betreffend Systemrelevanz, Medienmitteilung, 20. Dezember 2012, <http://www.snb.ch/de/mmr/reference/pre_20121220/source/pre_20121220.de.pdf>.
99. Schweizerische Nationalbank, Verfügung der Schweizerischen Nationalbank betreffend Systemrelevanz, Medienmitteilung, 11. November 2013, <http://www.snb.ch/de/mmr/reference/pre_20131111/source/pre_20131111.de.pdf>.
100. Art. 9 BankG; Art. 21-21c Verordnung über die Banken und Sparkassen (Bankenverordnung, BankV) vom 17. Mai 1972, SR 952.02. Die FINMA verfügt die jeweils geltenden Anforderungen individuell für jede systemrelevante Bank; vgl. Art. 10 Abs. 1 BankG.
101. Art. 44 Verordnung über die Eigenmittel und Risikoverteilung für Banken und Effektenhändler (Eigenmittelverordnung, ERV) vom 1. Juni 2012, SR 952.03.

hatten und für die Stabilität des Bankensystems zur Gefährdung wurden, sah sich die SNB veranlasst, dem Bundesrat einen entsprechenden Antrag zu stellen. Mit Entscheid vom 13. März 2013 folgte der Bundesrat dem Antrag und verfügte die Aktivierung eines antizyklischen Kapitalpuffers in der Höhe von 1 % der direkt oder indirekt durch eine Wohnliegenschaft im Inland grundpfandgesicherten risikogewichteten Positionen. Seit dem 30. September 2013 sind die Schweizer Banken somit – über die regulären Eigenmittelanforderungen hinaus –[102] bis auf Weiteres zur Haltung des Puffers verpflichtet.[103] Per 30. Juni 2013 beträgt der antizyklische Kapitalpuffer gar 20 %

Im Bereich der Finanzstabilität arbeitet die SNB eng mit der FINMA zusammen. Die Abgrenzung der Aufgaben folgt im Grundsatz der herkömmlichen Unterscheidung von mikro- und makroprudentieller Aufsicht und ist in einem Memorandum of Understanding (MoU) geregelt.[104] Danach verfolgt die SNB die Entwicklungen im Bankensektor »aus der Perspektive des Gesamtsystems«, während der FINMA die Aufsicht »aus der Perspektive der Einzelinstitute und Finanzgruppen« obliegt.[105] Die Behörden gewährleisten einen regelmässigen Informations- und Meinungsaustausch in verschiedenen Steuerungsgremien in Bezug auf gemeinsame Interessensgebiete, namentlich systemrelevante Banken und das Bankensystem insgesamt, prudentielle Regulierungen (sofern die Finanzstabilität betreffend) sowie Krisenvorsorge und -management.[106]

Angesichts des auf die Makroebene beschränkten Profils der SNB stellt sich die Frage der Vereinbarkeit verschiedener Aufgaben vergleichsweise weniger als für die EZB unter dem neuen Einheitlichen Aufsichtsmechanismus. Das Konfliktpotenzial reduziert sich auf die klassischen Zusammenhänge zwischen einer Geldpolitik mit dem vorrangigen Ziel der Preisstabilität und dem Beitrag der Zentralbank zur Finanzstabilität. Während eine auf Preisstabilität ausgerichtete Geldpolitik längerfristig auch der Finanzstabilität zudient und umgekehrt, kann es – namentlich bei einer durch ausserordent-

102. Vgl. Art. 132 ERV.
103. Anhang 7 ERV; vgl. auch Schweizerische Nationalbank, Antizyklischer Kapitalpuffer: Antrag der Schweizerischen Nationalbank und Entscheid des Bundesrates, Medienmitteilung, 13. Februar 2013, <http://www.snb.ch/de/mmr/reference/pre_20130213/source/pre_20130213.de.pdf>.
104. Memorandum of Understanding im Bereich Finanzstabilität zwischen der Eidgenössischen Finanzmarktaufsicht FINMA und der Schweizerischen Nationalbank SNB, 23. Februar 2010.
105. Ziff. 2 Abs. 2 und 5 MoU (Fn 104).
106. Vgl. Ziff. 3 Abs. 1 und Ziff. 4 MoU (Fn 104).

liche Liquiditätsengpässe induzierten zusätzlichen Geldschöpfung – kurzfristig zu Zielkonflikten kommen.

Gerichtliche Überprüfung der Geldpolitik? (14. Frage)

Entscheide der SNB im Bereich ihrer geld- und währungspolitischen Befugnisse sind nur dann einer gerichtlichen Überprüfung zugänglich, wenn sie sich hoheitlich an den Einzelnen richten und dadurch eine konkrete verwaltungsrechtliche Rechtsbeziehung in verbindlicher und erzwingbarer Weise regeln.[107] Solche Entscheide sind als Verfügungen zu erlassen, gegen die betroffene Finanzmarktteilnehmer – sofern sie die allgemein geltenden Voraussetzungen der Beschwerdelegitimation erfüllen – beim Bundesverwaltungsgericht Beschwerde führen können.[108] Dies betrifft Entscheide im Zusammenhang mit der Auskunftspflicht zur statistischen Datenerhebung,[109] Mindestreservenpflicht,[110] Überwachung von systemrelevanten Zahlungs- und Effektenabwicklungssystemen,[111] Bezeichnung als systemrelevante Bank[112] sowie Verhängung verwaltungsrechtlicher Sanktionen.[113]

Zur Wahrung der Unabhängigkeit der SNB hat das Bundesgericht die Behördenbeschwerde des Bundes gegen Verfügungen der SNB seit jeher ausgeschlossen.[114] Bei Streitigkeiten zwischen Bund und Kantonen betreffend die Vereinbarung über die Gewinnausschüttung der SNB[115] steht einzig der Rechtsbehelf der Klage an das Bundesgericht offen.[116] Offenmarkttransaktionen, sowie andere privatrechtliche Rechtsverhältnisse zwischen der Nationalbank und Dritten, wiederum unterstehen der Zivilgerichtsbarkeit.[117] Die Zivilgerichte sind immer dann zuständig, »wenn die SNB nicht autoritativ auftritt, sondern wie eine Geschäftsbank privatrechtlich handelt«.[118]

107. Botschaft Revision NBG (Fn 50), 6269 m.H. auf die bundesgerichtliche Rechtsprechung.
108. Art. 53 Abs. 1 lit. a i.V.m. Art. 52 Abs. 1 NBG.
109. Art. 15 und 22 NBG.
110. Art. 18 und 22 NBG.
111. Art. 20 NBG.
112. Art. 8 BankG.
113. Art. 23 NBG.
114. Vgl. BGE 101 Ib 336, E. 1. und BGE 105 Ib 348, E. 3 und 4.
115. Art. 31 Abs. 2 NBG. Vgl. zur Gewinnausschüttung weiter oben (11. Frage).
116. Art. 53 Abs. 2 NBG.
117. Art. 54 NBG.
118. Botschaft Revision NBG (Fn 50), 6272.

THE UNITED KINGDOM

Piet Eeckhout and Michael Waibel[1]

Introduction

There is a range of complex factors which affect the writing of a national report, from the UK perspective, on EMU governance questions.

The first set of factors concerns the inherent complexity of the EU response to the financial crisis. A broad mixture of legal instruments have been employed, partly on the basis of the EU Treaties, but also partly outside the strict EU law framework. Those instruments involve the EU institutions, the Member States, but also novel institutions and bodies, such as the EFSF and the ESM. It is, indeed, trite, and amply described in the Questionnaire and in the literature, that the EU's current economic and monetary governance system is a result of a lot of ad hoc *bricolage*.[2]

A second layer of complexity is a function of the UK's very special position vis-à-vis EMU governance. Here is a Member State with a permanent opt-out from the single currency, with no prospect of ever joining the euro on any perceptible political horizon. It is a Member State which refuses to participate in the construction of a Banking Union, but which depends on its financial services industry for prosperity and has a keen interest in the internal market for such services, and in protecting the City of London as a global financial centre. It is a Member State whose current government subscribes to austerity, but has declined to sign up to the Treaty on Stability, Co-ordination, and Governance (hereafter referred to as the Fiscal Compact). It is a Member State which preaches greater EU flexibility,[3] but dislikes that EMU governance may be shifting towards the Eurozone, with the attendant decision-making confined to the Eurozone Member States. It is a Member State with a

1. Professor Piet Eeckhout, University College London and Dr Michael Waibel, University of Cambridge.
2. Pisany-Ferry, as quoted in J-V Louis and R Lastra, 'European Economic and Monetary Union : History, Trends, Prospects' (2013) 32 Yearbook of European Law 196.
3. See the Prime Minister's speech on Europe, https://www.gov.uk/government/speeches/eu-speech-at-bloomberg.

strong economic interest in a thriving Eurozone, but which stands on the sidelines watching the construction of the Eurozone's governance system.

A third element making the writing of this report more complex is the unsettled nature of the emerging governance system. It is true that, at the start of 2014, many parts of the system have, in political terms, been put in place. But for purposes of a constitutional and institutional assessment, from a legal perspective, the system continues to be in its infancy. Many legal instruments are not yet finalised, others have hardly been implemented as yet, and important case law is no doubt still to come.

In the face of this range of complex factors, the aims of this report are modest. It is not our intention to analyse every conceivable issue regarding the UK's position towards EMU governance. We aim to discuss some of the main issues, with a view to introducing, and occasionally clarifying, the core debates. We do this from an academic perspective – as academics based in the UK, (but not UK nationals!). With that hat on we do not shy away from personally commenting on some of the constitutional and institutional questions which the new system of EMU governance throws up. For a couple of those, the 'UK' perspective is present in the sense that those questions have also been considered by other UK academics. Obviously, we also aim to refer to the 'official' UK government position, where there is one. Yet, we feel that it is equally important to take on board the views expressed in the wider UK political, financial, and indeed academic community.

Our report is guided by the Questionnaire, but does not attempt to cover all the questions and subquestions. Some of them are not strictly relevant for non-Eurozone Member States, others are less interesting from a UK perspective, and still others are, frankly, beyond our current knowledge or expertise. We have instead aimed to produce a readable report, which aims to contribute to the debate on EMU governance in a more selective way – whilst aiming not to do too much injustice to our original remit and to the impressive and comprehensive Questionnaire.

One last introductory point. Prior to tackling the Questions, we thought it would be useful to set out, in a schematic way, the extent of the UK's participation and non-participation in EMU governance. The political headline that the UK is not part of the Eurozone masks a complex of 'ins' and 'outs', some understanding of which is essential for a further analysis of the UK's position.

The 'ins' and 'outs' of the UK's position in EMU governance

- Protocol 15 to the Treaties sets out the extent of the exemptions from which the UK benefits in relation to EMU. It provides that the UK 'shall retain its powers in the field of monetary policy according to national law' (paragraph 3). It further exempts the UK from a number of TFEU provisions on economic and monetary policy. They include inter alia:
  - Art 119(2) TFEU on the single currency and the single monetary policy;
  - Art 126(1) TFEU, according to which the Member States 'shall avoid excessive government deficits' – instead, Protocol 15 provides that the UK '*shall endeavour* to avoid an excessive government deficit' (paragraph 5, emphasis added). The UK is also exempted from the Council's powers in Art 126(9) and (11) in case of failure to put into practice the Council's recommendations on a potential excessive deficit.
  - Artt 127 to 133 TFEU on monetary policy, but with the exception of Art 127(6) concerning the conferral of specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions. This for example means that the UK participated in the adoption of Regulation 1024/2013 on the Single Supervisory Mechanism (SSM), even if it will not be subject to that Regulation as it does not participate in the Banking Union.
  - Art 138 TFEU on external representation of the EU on EMU matters and Art 219 TFEU on external exchangerate agreements etc.
  - Art 121 TFEU, on Council recommendations on broad guidelines of economic policies, 'as regards the adoption of the parts of the broad economic policy guidelines which concern the euro area generally' (paragraph 4).
  - Art 123 TFEU (prohibition of monetary financing), in the sense that the UK may maintain its 'ways and means' facility with the Bank of England (paragraph 10).
- The position of the UK is therefore comparable, but not identical, to that of the Member States 'with a derogation' (Art 139 TFEU) which do not qualify for eurozone membership as yet.
- The special position of the UK is also reflected in the so-called Six-Pack. Not only is the UK not subject to those regulations which only apply to

Eurozone Member States;[4] it is also only partially subject to Directive 2011/85 on requirements for budgetary frameworks of the Member States. The chapter on numerical fiscal rules does not apply to the UK, because, as stated in the preamble, the excessive deficit reference values (3 % deficit, 60 % debt) 'are not directly binding on the United Kingdom' (recital 17). The UK is a non-participating Member State for the purposes of Regulation 1175/2011 on surveillance of budgetary positions and the surveillance and coordination of economic policies; of Regulation 1177/2011 on the excessive deficit procedure; and of Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances. All of this means that the UK is also subject to the European Semester, but in the mildest of ways (non-enforcible Council recommendations).

- The so-called Two-Pack is limited to Eurozone Member States, and therefore does not apply to the UK.
- The UK participated in the decision-making process which led to the creation of the European Financial Stability Mechanism (EFSM), as this was done by means of a regulation adopted on the basis of Article 122(2) TFEU.[5] However, it did not participate in the creation of the European Financial Stability Facility (EFSF – a private company established in Luxembourg), and did not sign up to the Treaty establishing a European Stability Mechanism (ESM). It must be noted, though, that all EU Member States, including the UK, consented to the ESM Treaty referring to and making use of some of the EU institutions (the Commission and the ECB).[6] Of course, the UK also approved the amendment to Article 136 TFEU, introducing a paragraph 3 permitting the Member States to set up (effectively) the ESM.
- The UK did not sign up to the Treaty on Stability, Coordination, and Governance (TSCG, or Fiscal Compact) – joined only by the Czech Republic. In contrast with the ESM Treaty, the UK did not formally agree to the use of the EU institutions for which the Fiscal Compact provides (see further below, under Questions 1 and 2).
- The UK does not, generally, participate in the Banking Union project. However, due to the close interrelationship between EU financial services

4. Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area and Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances.
5. Regulation 407/2010.
6. Council Doc 12114/11, 24 June 2011.

legislation adopted in the internal-market framework and Banking Union, that non-participation is not absolute:

- As mentioned above, Regulation 1024/2013 on the ECB's new role regarding prudential supervision (part of the SSM) is adopted on the basis of Art 127(6) TFEU, with the UK's participation in its adoption – but not in supervision itself.
- Regulation 1022/2013, modifying the tasks and decision-making processes of the European Banking Authority (EBA) is adopted on the basis of Art 114 TFEU, with the participation of the UK. This regulation introduces the so-called double majority rule (majority of Eurozone Council members, and of non-Eurozone Council members), in order to maintain the integrity of the internal market and avoid Eurozone dominance of EBA decision-making.
- The regulation on a Single Resolution Mechanism (SRM) is also intended to be adopted on the basis of Art 114 TFEU, therefore with the participation of the UK in its adoption. The UK will not participate in the single resolution fund, which will be set up by intergovernmental agreement.
- The UK participates in the adoption of the Bank Recovery and Resolution Directive, which is internal-market-based, and will apply to all 28 Member States.
- The UK does not participate in the Euro+ Pact.

Economic policy

EU legal order

Questions 1 and 2

Questions 1 and 2 raise a number of issues concerning the scope of the EU's competences in matters of monetary and economic policy, and the use of a mixed bag of instruments – some EU Treaties-based, others *intergovernmental or even private-law-based. The questions and* subquestions are not limited to inquiring about the particular national perspective of the rapporteurs. We therefore take the opportunity to express a view on how the law has developed in this area, where need be (and possible) with reference to the UK perspective.

We consider that any analysis of the issues raised by these questions needs to start with an analysis of the CJEU's *Pringle* judgment.[7] In that ruling the Court focused on many of these issues, and any attempt to answer the questions has to begin with unpacking the reasoning in *Pringle*. We will look at the Court's construction of the EU's competences in matters of monetary policy and economic policy; at its analysis of the implied powers doctrine, as applied to the ESM; at its interpretation of the no-bailout clause (Art 125 TFEU); at its position on the use of EU institutions outside the framework of the EU Treaties; and at its finding that the ESM is not subject to the EU Charter of Fundamental Rights.

At the outset of our analysis, we should like to state that, with greatest respect to the Court's impressive judicial effort, an alternative approach was conceivable and arguably preferable: one which conceived of the ESM Treaty as affecting, in a number of ways, exclusive EU competences. The Court could have accepted, under such an approach, that the Treaty amendment (Art 136(6) TFEU) duly empowered the Member States to act in areas of exclusive competence. The upshot would have been to conceive of the ESM Treaty as structurally linked to primary EU law, in stronger ways than is the case at present. This would have consequences for e.g. the application of the Charter of Fundamental Rights, and for enabling the EU to develop its monetary and economic policies in a more coherent and enabling, primary-law governed set-up.

Pringle *and the concepts of monetary policy and economic policy*

The Court considered that, if the amendment to Art 136 TFEU were concerned with monetary policy, it would have encroached on the EU's exclusive competence as laid down in Art 3(1)(c) TFEU, and could not have been adopted under the so-called simplified revision procedure (para. 52). That is the starting-point of the Court's analysis of the scope of the EU's monetary policy competences. It means that if the Court had found that the amendment concerned or affected EU monetary policy, the amendment would have been unawful for failure to use the right treaty-amendment procedure.

7. Case C-370/12 *Thomas Pringle v Government of Ireland*, judgment of 27 November 2012, not yet reported. Unfortunately, the UK's submissions to the Court have not been published, nor were we able to obtain them. It is regrettable that at the level of the Court there is no centrally organised access to such documents, which are clearly in the public interest.

The Opinion of Kokott AG shows that an alternative starting-point was conceivable. As she pointed out, even in areas of exclusive competence the Member States may be empowered to act (Art 2(1) TFEU; paras 50-52 of the Opinion). It is difficult to see why such an empowerment could not result from primary law, given that it is accepted that EU legislation may allow the Member States to act in areas of EU exclusive competence. The latter has been the practice in the field of the common commercial policy: in the very long transitional period leading up to a fully uniform commercial policy;[8] and today as regards the maintenance in force, and amendment, of bilateral investment treaties, in the face of the extension of the common commercial policy to foreign direct investment.[9] Therefore, a Treaty empowerment in Part Two of the TFEU, resulting from the amendment to Art 136 TFEU, by definition does not encroach on the EU's exclusive competences, as defined in Part One.

The Court analyses the scope of the EU's monetary policy purely by reference to the primary objective of maintaining price stability. It distinguishes the provision of financial assistance as aiming at the stability of the euro area as a whole, from the price stability objective. It finds – without much reasoning – that the grant of financial assistance to a Member State clearly does not fall within monetary policy. It then points out that such assistance complements the EU's economic policy, which is intended to consolidate macroeconomic stability and the sustainability of public finances. That policy is largely preventive, whereas the stability mechanism envisaged by Art 136(3) TFEU concerns the management of financial crises. Thus, that amendment concerns economic and not monetary policy (paras 54-60).

We are concerned that the Court has interpreted the scope of the EU's monetary policy in an unsatisfactory way. It is hard to see in what way the objective of maintaining price stability determines what is a monetary policy instrument, and what not. Any economic textbook will explain that price stability is determined, not only by monetary policy, but also, for example, by fiscal policy. But of course the Member States' fiscal policies are not thereby within the EU's exclusive competence in matters of monetary policy. Moreover, the objective of the EU's monetary policy is solely defined in terms of price stability, but other nations' monetary policies also aim at other objec-

8. P Eeckhout, The EU Internal Market and International Trade – A Legal Analysis (OUP 1994) chs 5 and 6.
9. Regulation 1219/2012 [2012] OJ L 351/40.

tives, such as maximum employment.[10] That does not however lead to a finding that employment policy is monetary policy.

Instead, the Court could have focused more on the nature of the support which the stability mechanism is intended to provide, and the instruments which are part of monetary policy. The ESM is often described as the EU's own IMF.[11] That certainly suggests a close link with monetary policy. However, it is also clear that the ESM, in the way in which it was set up, does not create money nor is it part of the monetary supply process. This is so because it borrows in capital markets and Member States guarantee such borrowing. It was not given a banking charter, and therefore cannot obtain liquidity from the ECB.[12] This shows that the ESM is not, as such, a monetary institution.

Yet, the amendment to Art 136 TFEU does not define the nature of the financial assistance which the Member States may provide, and the Court did not – rightly – focus on the actual ESM when determining the scope of monetary policy. Further, even if the ESM is not a monetary institution as such, its functions are so closely linked to monetary union that the finding that the Treaty amendment and its implementation are completely outside the scope of EU monetary policy is unpersuasive. Art 136(3) is limited to the eurozone Member States. The stability mechanism is intended 'to safeguard the stability of the euro area as a whole' – indicating that it is aimed at maintaining the very existence of the euro. The nature of the financial assistance under the mechanism is not defined, meaning that a system could be set up which is genuinely monetary. We would therefore argue that the permission to set up a stability mechanism is sufficiently closely linked to EU monetary policy for the EU's exclusive competence in that field to be in issue. As mentioned above, that would not mean that the amendment could not have been passed through the simplified revision procedure. It would, though, mean that the EU's empowerment turns the use which the Member States make of that empowerment into a form of implementation of EU law, with all that this involves in terms of the application of relevant EU law principles. Such an approach would render the ESM Treaty much less intergovernmental than it is conceived at present.

The restrictive interpretation by the Court of the scope of the EU's monetary policy leads to its finding that Art 136(3) TFEU is within the sphere of economic policy. The Court here emphasizes that the EU's role is restricted,

10. See e.g. the US Federal Reserve, see http://www.federalreserve.gov/pf/pdf/pf_2.pdf.
11. See e.g. P De Grauwe, 'Governance of a Fragile Eurozone', 4 May 2011, http://www.ceps.eu/book/governance-fragile-eurozone.
12. We owe this insight to Prof Paul De Grauwe, London School of Economics.

under Artt 2(3) and 5(1) TFEU to adopt coordinating measures (para. 64). It further establishes that no Treaty provision confers on the EU the competence to establish a permanent stability mechanism (paras 64-67). In contrast with the Advocate General, the Court does not dwell on the nature of the EU's competence in matters of economic policy, though it seems to endorse the Advocate General's View according to which the EU's competence is not shared (let alone exclusive), but of a lesser nature: mere coordination (para. 93 of the View). Art 2(3) TFEU appears to confirm this, by speaking about economic-policy coordination separately from the concept of shared competences (Art 2(2) TFEU).

All of this means that the Court's interpretation of the scope of the EU's EMU competences actually provide the Union with very few tools to maintain the stability of the eurozone and to safeguard the monetary union project. That interpretation does not assist in the process of remedying some of the birth defects of EMU. It pushes that process (or accepts that it is pushed) outside the EU law framework. It is true that the Court emphasizes that EU law needs to be respected by the Member States (see e.g. para. 69), but it is nevertheless clear that such respect is more difficult to enforce in the case of intergovernmental agreements. For example, it is not obvious to us that private parties affected by an ESM decision could bring an action in the national courts, given that the ESM has legal personality, and is thereby separate from the Member States.

Implied treaty-making powers

The Court's analysis in *Pringle* of the question whether the ESM Treaty is caught by Art 3(2) TFEU insofar as it may affect EU law rules or alter their scope is short and, frankly, disappointing. Art 3(2) codifies the Court's case law on exclusive implied powers, the terms 'affect' and 'alter their scope' being copied from the seminal *AETR* judgment.[13] There are two basic issues with which the Court was confronted. The first is whether Art 3(2), and the case law on which it is based, extend to the kind of agreements such as the ESM Treaty, i.e. an inter-se agreement between (some of the) Member States, rather than an agreement with a third country. The second is the actual test which such agreements need to pass.

On the first point, the Advocate General pointed out that Art 3(2) TFEU, read together with Art 216(1) TFEU, 'solely governs the exclusive compe-

13. Case 22/70 *Commission v Council* [1972] ECR 263.

tence of the Union for agreements with third countries and international organisations' (para. 98). The Court, by contrast, focuses merely on Art 3(2), which speaks generally about the conclusion of international agreements. However, that does not mean that the Court overlooked the fact that Art 216 refers to 'external' agreements only. At para. 101 the Court states that it follows from Art 3(2) TFEU 'that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope'. The fact that the Court adds the terms 'between themselves' suggests that the Court sought to extend the principle of Art 3(2) TFEU to *inter se* agreements, between some or all the Member States.[14]

From a purely textual perspective, this is a remarkable shortcut. Art 3(2) TFEU defines the EU's exclusive competence to conclude certain international agreements. As such, that competence cannot extend to *inter se* agreements between some or all Member States. Which would be the other contracting party to the agreement with which the EU would be concluding the agreement? The Union cannot conclude agreements with itself. Textually, the application of Art 3(2) would only make sense if that provision stated that *the Member States* are precluded from concluding an international agreement in the situations which it envisages. Instead, the provision speaks of the EU's exclusive competence to conclude international agreements, which can only mean agreements with third parties.

Yet, that does not mean that the Member States are free to conclude any kind of *inter se* agreement. Such an agreement must comply with EU law, and must – it could be argued – not 'affect' EU law or 'alter its scope'. But that is an argument which must be articulated, as to the principle's legal basis, its scope, whether it is coterminous with the principle applying to 'external agreements', etc.

The basic rationale for the *AETR* principle is clear. If the Member States were capable of concluding an international agreement which 'affects' EU law, there is a risk to the uniform and consistent application of EU law.[15] That risk is not eliminated by the simple operation of direct effect and primacy, which ensure that EU law is complied with. The Member State which has concluded an agreement in breach of the *AETR* principle may find itself in a difficult position on the international plane, and may be subject to conflicting obligations (EU law obligations conflicting with international law obliga-

14. Contra B de Witte and T Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order : *Pringle*' (2013) 50 CMLRev 805, 834.

15. Opinion 1/03 re Lugano Convention [2006] ECR I-1145, para. 128.

tions). That particular rationale for the *AETR* principle is not present in the case of *inter se* agreements: as the parties to such agreements are EU Member States only, there is no third party which is not bound by EU law, and which could require compliance with the commitments entered into.

However, that does not mean that there are no other reasons for extending the *AETR* principle to *inter se* agreements. Clearly, the uniformity and consistency of EU law are not aided by an agreement between the Member States which, in its subject-matter, is too proximate to EU law norms, be they located in the founding Treaties or in EU legislation.

There is no space here to examine to what extent the pre-emption principle of *AETR* ought to be applied to *inter se* agreements. If the Court simply extended *AETR* to such agreements, as it appears to have done in *Pringle* by not in any way qualifying the Art 3(2) TFEU principle, then its application of that principle was most cursory and not in line with the implied-powers case law. The latter casts the net widely, and does not require any conflict between the provisions of an international agreement and EU law norms. Even a disconnection clause, which aims to preclude conflict, is insufficient for avoiding the *AETR* principle.[16] The case law also takes into account the potential future development of EU law, in the area concerned.[17] Advocate General Tizzano has spoken about areas which are contiguous to EU legislation.[18]

To us it seems that the ESM Treaty is sufficiently close to EU law norms to be capable of 'affecting' them or 'altering their scope'. The conditionality which it puts forward as the cornerstone of any financial assistance is very closely linked to the obligations which are imposed on the Eurozone Member States under the Sixpack and the Twopack. The fact that the Commission and the ECB are closely involved with the operation of the ESM only confirms the close connection with EMU governance. The Court could therefore have found that, on this basis too, there is EU exclusive competence. Again, the Member States could be duly empowered to exercise EU exclusive competence, and Art 136(3) does precisely that. The advantage, though, of such a conception would be that the ESM Treaty would be regarded as fully subject to EU law.

Admittedly, the Court did examine, in *Pringle*, whether the ESM Treaty complies with EU law. Nevertheless, a finding of exclusive competence

16. Opinion 1/03, para. 130.
17. Opinion 1/03, para. 126.
18. Opinion in the Open Skies cases, Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427, para. 75.

would have created a stronger structural link between the ESM Treaty and EU law than exists at present.

Lastly, even if the finding of exclusive competence, resulting from a closer scrutiny of the *AETR* conditions, might not have made much of a difference in *Pringle*, it would have been relevant to other non-EU instruments such as the Fiscal Compact. The difference between the ESM Treaty and the Fiscal Compact is of course that there was no Treaty empowerment for the Member States to adopt the latter.

The interpretation of the 'no bail-out' clause (Art 125 TFEU)

In the *Pringle* judgment the Court also analysed whether the ESM Treaty complies with Art 122, 123 and 125 TFEU. By far the most significant analysis concerns Art 125, the so-called 'no bail-out' clause. We are not aware of any clear United Kingdom position on the interpretation of that provision. The Court's analysis is to us convincing, in particular as regards the general finding that the ESM financial assistance mechanisms are not in breach of that clause. Indeed, it would be awkward to argue the opposite, for essentially two reasons. The first is that it would lead to a reading whereby the Member States are not entitled to take action considered necessary to protect and even save the euro project as such. Art 125 TFEU is designed to further the success and survival of monetary union, not to destroy it. The second is that the Member States, by amending Art 136 TFEU, have modified the TFEU so as to enable them to offer financial assistance under the conditions for which the ESM Treaty provides. Artt 125 and 136(3) TFEU need to be read harmoniously, as they have equal legal status. The strict conditionality imposed by the ESM Treaty clearly does about as much as is conceivable to protect the function of Art 125, i.e. to maintain national budgetary discipline. If anything, the Court's strong emphasis on conditionality could perhaps be seen by some as too much on the side of an 'austerity Union'.

The use of EU institutions

The ESM Treaty makes use of three EU institutions: the Commission, the ECB, and the Court of Justice. A decision of the representatives of the governments of the Member States records their agreement with such use.[19] This,

19. See Council Cover Note of 24 June 2011, Document-No 12114/11, and recital 10 in the preamble to the ESM Treaty.

by the way, is in contrast with the Fiscal Compact, for which there is no such agreement. The position of the United Kingdom is that the use of the EU institutions outside the EU Treaties requires the consent of all the Member States.[20] To our knowledge, however, the United Kingdom has not pursued this in any of its legal challenges.

Advocate General Kokott considered it significant that there is a decision demonstrating sufficient collective action on the part of the Member States (para. 173 of her View). She referred to the Court's *Bangladesh* and *Lomé IV* judgments, which each accepted that the Member States (all of them) could entrust certain tasks to the Commission.[21] The Court, by contrast, did not refer to the decision, and did not appear to require that the authorization be given by *all* Member States to make use of an EU institution outside the framework of the founding Treaties. All the Court did was to refer to the *Bangladesh* and *Lomé IV* precedents, as well as three Opinions analysing changes to the roles of the EU institutions.[22] From these precedents the Court deduced that the Member States are entitled to entrust certain tasks to EU institutions, outside the EU framework, provided three conditions are fulfilled:

a) the EU must not have an exclusive competence in the area concerned;
b) the relevant institutions do not make decisions of their own;
c) and the tasks do not alter the essential character of the powers conferred on those institutions by the founding Treaties.

It is not clear though that the case law referred to stands for these three propositions. The three Opinions concerned international agreements, to be concluded by the EU itself. It is from those Opinions that the Court derives the third principle; the Court is however taking that principle one step further by accepting that the *Member States*, rather than the EU, may entrust new tasks to the institutions provided that the essential character of their powers is not altered. From a constitutional perspective it is wholly appropriate that the Treaties themselves, where amended, or agreements concluded by the EU, or

20. S. Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 EuConst 37, 53-54.
21. Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685 (*Bangladesh*) and Case C-316/91 *Parliament v Council* [1994] ECR I-625 (*Lomé IV*).
22. At para. 158 of the judgment; the references are to Opinion 1/92 [1992] ECR I-2821, paras 32 and 41; Opinion 1/00 [2002] ECR I-3493, para. 20; and Opinion 1/09, not yet reported, para. 75.

indeed legislation made under the Treaties, may entrust new tasks to the institutions. It is a different proposition that this may be done by the Member States acting outside the EU Treaties.

The *Bangladesh* and *Lomé IV* precedents are not strong either. Both cases turned on whether the Parliament's prerogatives were violated, as was required by the then principle for the Parliament to be entitled to bring an action for annulment. The *Bangladesh* case concerned humanitarian aid, provided by the Member States, but coordinated by the Commission. The Greek aid had been channelled through the then Community budget, without involving the Parliament. The Court, following the Opinion of Advocate General Jacobs, simply found that the Greek aid was not Community revenue, and its disbursement not Community expenditure, and the said channelling could therefore not violate the Parliament's budgetary prerogatives. The *Lomé IV* case concerned a mixed agreement, the Court accepting that the development aid for which it provided could originate from the Member States, and that its disbursement constituted a kind of joint action, outside the Community budget. All that can be derived from these judgments is that the Court, in the particular contexts in issue, did not object to the entrusting of certain executive tasks to the Commission.

There has been a debate among UK academics as to whether the Court's liberal approach towards the use of EU institutions outside the EU law framework is correct and appropriate. Paul Craig has written about both the Fiscal Compact and the *Pringle* judgment, developing a series of principled arguments challenging the liberal approach.[23] Steve Peers, on the other hand, is more sympathetic.[24] Within the confines of this report it is impossible to do the debate any real justice, even by summarising the main arguments. The reader is referred to these writings, and in particular to Paul Craig's impressive critique. To us it seems that that critique is essentially right, and that the lawfulness and constitutionality of the conferral of extra-EU powers on the Commission and the ECB, particularly by the Fiscal Compact, are questionable. The latter has not been agreed to by all Member States, and to a large extent duplicates the EU law instruments for economic governance. Its adoption has subverted the Treaty amendment process – in so far as it contains provisions equivalent to those in the Treaties – and the EU legislative process – in

23. P. Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism' (2012) 37 (3) ELRev 231-248; '*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263-284;
24. Peers (cited above).

so far as the Fiscal Compact contains provisions which could be adopted by way of EU legislation; or indeed by way of enhanced cooperation. The constitutional rigour and concepts of representative democracy which the Treaty of Lisbon introduced have been circumvented just a few years after its entry into force.

But also as regards the ESM Treaty, the Court's analysis may have unfortunate consequences. The Court considers that the ESM Treaty does not enable the Commission and the ECB 'any power to make decisions of their own', and that their activities within the ESM Treaty 'solely commit the ESM' (para. 161). That is a rather formalistic conception of the tasks conferred on these institutions, in particular as regards the negotiation of MoUs with Member States requiring financial assistance. There is a serious risk that this renders ESM decisions unreviewable. The Member States participating in the ESM may well hide behind the ESM's legal personality, and the Court does not seem prepared to hold that the actions of the Commission and the ECB will be reviewable. As to the finding that the ESM Treaty does 'not alter the essential character of the powers conferred' on the Commission and the ECB (para. 162), that may well be the case, but the main question seems to us to be whether those powers are *exercised* in accordance with the founding Treaties; not just whether they are *altered*.

Lastly, the *Pringle* judgment also accepts the role allocated to the Court itself. In light of the express wording of Art 273 TFEU, and the opportunity which a wide conception of its own jurisdiction gives the Court to review ESM decisions and to uphold EU law, that acceptance is to be welcomed.

The Charter of Fundamental Rights

In *Pringle* the Court did not accept that the Member States were 'implementing Union law', for the purposes of the Charter, when establishing the ESM. This was so because the founding Treaties do not confer any specific competence on the EU to do so (para. 180). This finding has the unfortunate consequence that the ESM is not bound by the Charter. Given the potential for ESM decisions to interfere, through conditionality, with fundamental rights – in particular social and economic rights[25] – the Court's finding is, with respect, hard to accept. The EU has proudly proclaimed the Charter, and has made it legally binding, as an instrument intended to protect EU citizens from fundamental rights violations. It is no doubt difficult to explain to the ordi-

25. See http://euobserver.com/social/122899, referring to a report by Prof Fischer-Lescano.

nary citizen in bailed-out Member States that such bail-outs, and the conditions which they impose, do not emanate from the EU. A different approach was definitely conceivable. The Court has identified the close link between the ESM and EU-regulated conditionality. It is therefore difficult to accept that the Member States are not, to some degree, implementing EU law when bailing out another Member State by means of ESM support. Moreover, the Commission and the ECB participate in such bail-outs, and as institutions of the EU they are in any event bound by the Charter.

Question 3

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Question 4

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Questions 5 and 10: the UK, Banking Union and financial regulation

Banking Union

From mid-2012, the most important policy development in response to the Eurozone crisis has been the Banking Union – widely regarded as central to deepening EMU. The UK has been supportive of the proposed Banking Union provided that it contributes to financial stability in the Eurozone and safeguards the UK's position in the single market.

The Banking Union is based on five components: a single rule book underpinning centralised supervision; a single framework for banking supervision of cross-border banks (Single Supervisory Mechanism, SSM); a common deposit guarantee scheme; a single framework for the managed resolution of banks and financial institutions[26] (Single Resolution Mechanism, SRM), and a common fiscal backstop for temporary financial support of banks.[27]

26. Proposal of 13.07.2013, COM (2013) 520 final.
27. D. Howarth and L. Quaglia, 'Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union' 51 JCMS: Journal of Common Market Studies 103, 103; European Council, Completing EMU, 18 October 2012; A. Dombret and P.S. Kenadjian, Introduction, in: A. Dombret and P.S. Kenadjian (eds), *The Bank Recovery*

The Banking Union involves a significant move towards supranational financial regulation, in potentially in lieu of a regulatory race-to-the bottom in the field of financial services. The supranational approach to supervision and resolution arguably represent a departure from the traditional mutual recognition model.

The Single Supervisory Mechanism

The Single Supervisory Mechanism confers new supervision tasks on the ECB.[28] Under the SSM, the ECB acquires important supervisory responsibilities. Its powers are divided into 'investigatory powers' (Arts 9-12) and 'specific supervisory powers' (Arts 13-15). The investigatory powers cover the ECB's right to periodically request data necessary to fulfil its tasks, and the corresponding duty of financial institutions to provide such data; its right to examine books and records, obtain written or oral explanations from staff.[29]

The ECB Supervisory Board is due to assume its functions in autumn 2014. Each participating member state has one vote.[30] This stands in contrast with EBA's double majority voting system that includes both participating and non-participating Member States. One of the UK's chief concern is that, over time, the ECB Supervisory Board could become the central player, with the EBA mirroring its approach, undermining the double majority system that applies with respect to the EBA.

Non-Eurozone Member States can enter into a close co-operation agreements. They are then required to abide by ECB guidelines and requests. The UK has no intention of entering into such an agreement, and UK financial institutions and subsidiaries of EU financial institutions in the UK will not be subject to ECB supervision, but instead continue to be supervised by the UK FCA and PRA. However, UK-authorised branches of credit institutions/large investment firms headquartered in other Member States will be subject to ECB supervision. Examples include Allied Irish, Banca Monte Dei Paschi di

and Resolution Directive: Europe's Solution for 'Too Big To Fail' (Berlin/Boston: Walter de Gruyter 2013), p. 1.

28. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013.
29. Art 10 para. 1 of proposal COM (2012) 511 final (Council).
30. http://www.ecb.europa.eu/ssm/orga/html/index.en.html.

Siena, BNP Paribas, Commerzbank, Raiffeisen and SEB.[31] As a result, London as a financial centre has a significant stake in the success of the new, ECB-led supervisory regime.

Internal Market Harmonisation under Art 114 TFEU across a group of EU member states

Article 114 TFEU has been relied on more frequently since 2008, including in competition law and state aid law. For example, Regulation 1093/2010 establishing the EBA has Art 114 as legal basis.[32] The UK's central concern about the use of Article 114 TFEU by a group of the EU member countries concerns the integrity of the EU's single market, and effective safeguards for countries not participating in the Eurozone and Banking Union against single market rules being skewed by Eurozone countries in their favour.

The Single Resolution Mechanism

The Commission proposed a Single Resolution Mechanism (SRM) in July 2013 to apply to all banks incorporated in member states participating in the Single Supervisory Mechanism (SSM). The UK will not participate in the SRM and maintains its own resolution mechanism. The latter will have to meet the requirements of the minimum harmonisation regime under BRRD by the end of 2014.

The SRM is a necessary complement to the SSM. Undesirable incongruence would result if supervision shifted to the supranational level with the creation of the SSM, yet resolution authority remained at the national level.[33] The SRM can also achieve a level playing field and equal treatment of depositors and other creditors across jurisdictions.

Article 114 TFEU may not be an appropriate legal basis (especially for the Common Resolution Fund). The implementation of the SRM may require limited treaty change; however, the discussion on this issue is a moving target.

The Bank Recovery and Resolution Directive's scope sets up a unified framework for the recovery and resolution of 'credit institutions' and large

31. http://www.bankofengland.co.uk/pra/Documents/authorisations/banklist1312.pdf.
32. Regulation 1093/2010 establishing a European Supervisory Authority (EBA Regulation).
33. Kern Alexander, 'Bank Resolution and recovery in the EU: enhancing banking union?', *ERA Forum* (2013), p. 11.

investment firms, whether systemically important or not.[34] Implementation at the national level under Art. 3 (1) and (2) BRRD is the task of National Resolution Authorities, which need to be public authorities (unlike deposit insurance schemes under the Deposit Insurance Directive).

Germany disputes that the SRM can be implemented on the basis of Article 114 TFEU alone. The Commission's legal authority to decide on resolution, the fiscal implications of the Single Resolution Mechanism on the budgetary autonomy of Member States while the Single Bank Resolution Fund is being built up, and the right of the Single Resolution Board to request contributions from banks are controversial. The UK shares some of the German concerns, even if the SRM does not affect it directly, given potential spillovers from the SRM to other areas of financial regulation and supervision (especially the use of Article 114 TFEU as a legal basis).

The Legal Service of the Council assessed the suitability of Article 114 TFEU as a legal base for the SRM in a legal opinion dated 11 September 2013.[35] Among others, it evaluated 'whether the measures envisaged under the proposal may be applied only to entities established in a limited number of Member States'. The Legal Service had no fundamental objection in this respect. We will revert to Art 114 below, when analysing the recent ESMA judgment.

Politically, the creation of the Single Supervisory Mechanism is a precondition for possible direct recapitalizations of banks by the European Stability Mechanism. While the UK does not question the need for a single supervisory mechanism or a single resolution mechanism (including a fiscal backstop), it is concerned that this fundamental reconfiguration of the regulatory and supervisory landscape and the shift of regulatory and supervisory authority to the supranational level might disadvantage financial services firms operating from the UK and could introduce discriminatory treatment against countries, such as the UK, that have no plans to participate in Banking Union. The UK has already overhauled its supervisory framework and adopted a resolution mechanism, faster than the EU and many other EU Member States.

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34. Michael Schillig, 'Bank Resolution Regimes in Europe I – Recovery and Resolution Planning, Early Intervention, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2136101, p. 9.
35. Opinion of the Legal Service, Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of the Single Resolution Mechanism and a Single Bank Resolution Fund amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council, Doc. 13524/13.

The Single Market and Non-Discriminatory Financial Regulation

In relation to central pieces of financial services regulation, in particular the ongoing review of MiFID, the UK is keen to include stronger safeguards for non-Eurozone countries on market access and non-discrimination. It insists on non-discriminatory access to CCPS, trading venues and benchmarks as a general rule – a major reason behind the UK's challenge to the ECB's location decision in respect of CCPs for bonds of Eurozone member states. The UK also has broader concerns about binding, supranational financial regulation. One example is bonus cap included in CRD IV, another is the restriction on short selling, and most importantly, its challenge to the financial transaction tax. We examine these issues in turn, below.

Financial Transactions Tax[36]

Following a failure by the EU27 to agree on a financial transaction tax (FTT) in ECOFIN in 2012, 11 participating member states (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovakia, and Spain) moved ahead under enhanced cooperation. Of the Eurozone's 18 member states, seven chose not to participate in the FTT at this stage (Cyprus, Finland, Ireland, Latvia – Eurozone member from 1 January 2014, Luxembourg, Malta, and the Netherlands).

The EU11 FTT proposal issued in February 2013 is based largely on the EU27 proposal dating back to September 2011 (including a 0.1 percent charge for spot transactions and 0.01 % for notional derivatives). However, it extends the geographical scope by including the issuance principle and includes a number of anti-avoidance measures. The EU11 aimed to have the tax in place by 1 January 2014, but this is now delayed until at least 2015.

The FTT combines a residence principle with an Issuance Principle to mitigate potential avoidance of the FTT. From the UK's perspective, the broad notion of 'deemed establishment' gives the tax extraterritorial effect. This concern about the feasibility and desirability of the residence principle is also shared by some participating Member States, such as Spain, Italy, and France, though generally smaller participating member states such as Belgium, Slovenia, and Slovakia are keen on the residence principle out of a concern that the issuance principle only would substantially lower FTT tax revenues due to them.

36. See in particular Financial Transaction Tax: Alive and deadly, House of Lords, Report, 17 December 2013.

The UK challenged the Council decision authorising enhanced cooperation as regards the FTT on 18 April 2013.[37] Another important EU financial centre, Luxembourg, has also reserved the right to seek legal remedies. The UK is particularly concerned about the use of the enhanced co-operation procedure in relation to tax, and its potential for undermining the unanimity requirement on tax, especially in cases where taxation substantially affects the internal market.[38] It seeks the annulment of the Council's authorisation (Decision 2013/52/EU) under the Enhanced Cooperation Procedure to introduce the FTT (the UK, alongside Luxembourg, Malta, and the Czech Republic abstained in the Council). The UK maintains that the FTT does not respect the competences, rights and obligations of Member States which choose not to participate (Art 327 TFEU), imposes non-administrative costs from the implementation of the enhanced cooperation on non-participating Member States (Art 332 TFEU) and interferes with the Single Market

Even though the UK arguably does not object to the FTT as such, it has major reservations about important design features, in particular its impact on non-participating Member States and on the grounds that it exceeds the limits of participating Member States's jurisdiction to tax – a concern about the FTT shared, at least to a degree, by the Council's and the German Bundestag's legal services. However, it is doubtful whether there is much traction in the extraterritoriality argument. The argument on the single market appears stronger.

The UK's economic concern is that financial institutions operating from the UK would bear a disproportionate burden of the FTT, even though the UK has decided to stay outside and will not receive any FTT revenues – a concern it has in common with other Member States with financial centres in the EU (Luxembourg, Ireland, Netherlands, Cyprus) and financial centres in third states (Hong Kong, Switzerland, US, Singapore).

The UK advocates important exemptions if the EU11 ultimately implement the FTT, including for pensions, currency, repo transactions. The UK is also keen to reduce the impact of the tax by limiting the types of transactions taxable as far as possible. The FTT should only apply after netting and settlement. Derivatives settlements, repo and securities lending agreements should be regarded as a single transaction. Moreover, transactions between

37. Case C-209/13, pending. See Review of the Balance of Competences between the UK and the European Union, Single Market: Financial Services and the Free Movement of Capital: Call for Evidence, October 2013, paras 4.11-4.16.
38. Ibid., paras 6.13-6.24; see also Anzhela Yevgenyeva, The Financial Transaction Tax under the Enhanced Cooperation Procedure (Doctoral thesis, Oxford).

different legal entities in the same group should be exempted. OTC transactions should be subject to differentiated tax rate depending on the duration of the transaction.

The (unsuccessful) challenge by Italy and Spain to the introduction of common EU patent suggests that the CJEU will only consider whether the FTT as designed intrinsically contravenes requirements of the Enhanced Co-operation Procedure and whether participating Member States have complied with the procedural requirements of this process.[39] It is therefore unlikely that the CJEU will consider the substantive design features of the FTT such as the issuance or residence principle at this stage. This challenge by the UK against the FTT is unlikely to succeed. The legal action is widely seen as a tactical move designed to strengthen its negotiation position.

Short-Selling

ESMA has the power to prohibit short selling if necessary to address a threat in exceptional circumstances (Article 28 Short Selling Regulation).[40] Accordingly, ESMA can intervene by way of legally binding acts in Member States financial markets in the event of a 'threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union',[41] subject to the requirements set out in Art 1(2) ESMA Regulation.

Art 9(5) ESMA Regulation vests ESMA with the power to temporarily ban financial products and/or practices,[42] including short-selling. Insofar as the UK is concerned, Article 33 Regulation overrides sections 131B to 131D of the Financial Services and Markets Act 200 (c.8), thereby limiting the Prudential Regulatory Authority's (PRA) power to devise rules on short selling.

The Short Selling Regulation (SSR), which entered into force on 1 November 2012, imposes restrictions in four areas: (i) a ban on uncovered sovereign CDS (with the possibility for member states to opt-out under certain conditions) (ii) restrictions on uncovered short sales of shares and sovereign debt, (iii) transparency requirements for net short positions in shares, sovereign debt and, if a competent authority invokes the opt-out in respect of (i),

39. Joined Cases C-274/11 and 295/11 *Spain and Italy v Council,* judgment of 16 April 2013.
40. Regulation 236/2012.
41. Art 9(5) ESMA Regulation.
42. The requirements under Art 1(2) or alternatively in case of emergency under Art 18 ESMA Regulation.

uncovered sovereign CDS and (iv) intervention powers of competent authorities and ESMA.

The UK's concerns are twofold. First, it doubts whether bans on uncovered sovereign CDS and restrictions on short-selling shares and sovereign debt pass cost-benefit analysis. Second, it is also concerned that the conditions for the opt-out are overly restrictive. And more fundamentally, the UK's position is that decisions to ban certain financial products should be taken at Member State, rather than at supranational level.

One way of addressing the UK's concerns would be for the market making exemption to be read broadly. If this exemption applies, market makers do not have to disclose net short positions to competent authorities of significant or the public. They laso do not have to apply the restrictions on entering into uncovered positions in shares, sovereign debt and sovereign CDS. ESMA Guidelines specify that the exemption applies on an instrument by instrument basis and it is necessary for the financial institution to be member of a trading venue where it conducts some market making activities on a specific financial instrument.

In June 2013, the UK Financial Conduct Authority (FCA) stated that it would not comply with ESMA market making exemption guidelines. Rather, the UK FCA accepted that OTC derivatives fall under the scope of the SSR market making exemption. This deviation from the ESMA Guidelines above means that market making activities in corporate bonds and OTC derivatives are exempt from notification and publication. ESMA and/or the Commission could seek to challenge this implementation by the UK.

Two questions arise in this context. First, does the market making exemption granted by the UK FCA apply throughout the EU in respect of UK financial institutions, or is it territorially limited to the UK? The UK favours a comprehensive, territorially unlimited exemption that benefits financial institutions wherever they may operate in the EU. Second, even if the market making exemption applied throughout the EU, the financial institution itself may also be bound by the ESMA Guidelines. The UK opposes that the market making exemption could reach through the Member States directly to individual financial institutions.

The UK challenged Art 28 of the SSR before the Court of Justice. It entered four pleas in law:

a) breach of the principles relating to the delegation of powers laid down in *Meroni*;[43]
b) breach of the principle established in *Romano*;[44]
c) delegation of powers incompatible with Artt 290 and 291 TFEU;
d) breach of Art 114 TFEU.

The Court, in its judgment of 22 January 2014, rejected all those pleas. On the *Meroni* principle the Court emphasized a number of differences between ESMA and the private law entities in issue in that ECSC case. ESMA is an EU entity created by the EU legislature. It is governed by the ESMA Regulation, and the exercise of the powers under Art 28 of the SSR is circumscribed by various conditions and criteria which limit ESMA's discretion (paras 43-45). ESMA's powers are precisely delineated, and moreover subject to judicial review (para. 53). In relation to *Romano*, the Court emphasized the fact that the TFEU, in Artt 263 and 277, expressly permits Union bodies, offices and agencies to adopt acts of general application (para. 65).[45]

As regards Art 290 and 291 TFEU, which do not mention EU bodies, offices, or agencies with respect to delegation of powers or implementation of legislation, the Court considered – rightly in our view – that those provisions do not establish a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission. It focused on the fact that the acts of agencies are subject to judicial review; that several agencies are capable of adopting legally binding acts; that ESMA is operating in an area which requires the deployment of specific technical and professional expertise; and that Art 28 should be read in its overall regulatory context (paras 80-86).

The Court was more elaborate on the Art 114 TFEU plea. It did not follow the Opinion of Advocate General Jääskinen, who argued that only Art 352 TFEU could function as the proper legal basis. There were two issues here: whether the conferral on an agency such as ESMA of the power to adopt measures which are legally binding on individuals comes within the concept of 'approximation' of laws; and whether that power has as its object the establishment and functioning of the internal market. On the first issue, the

43. Case 9/56 *Meroni v High Authority* [1957-1958] ECR 133.
44. Case 98/90 *Romano* [1981] ECR 1241.
45. The express reference to acts of general application in Art 277 is overlooked by N Farage, 'Brussels is trying to bury the City by forcing it to play by warped EU rules', City A.M., 5 February 2014, see http://www.cityam.com/article/1391561167/brussels-trying-bury-city-forcing-it-play-warped-eu-rules.

Court essentially placed that power within its overall regulatory context, and accepted that it was part of a harmonization effort aimed at ending the current fragmented situation, and avoiding divergent national measures (paras 111-112). On the second point, the Court accepted that the Regulation is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States. The purpose of the powers provided for in Art 28 was in fact to improve the conditions for the establishment and functioning of the internal market in the financial field (paras 114-116).

We find the Court's reasoning persuasive, though also revealing of an important competence issue bedevilling EMU. It is notable that the UK did *not* seek to argue that the Regulation did not have an internal-market objective as such. Its issue was the powers conferred on ESMA. However, there are important questions about the dividing line between internal market measures and instruments which are essentially aimed at financial stability. In terms of the EU's competences related to financial markets and EMU, financial stability is the (absent) elephant in the room. The complexity of measures adopted after the financial crisis is, in essence, aimed at ensuring such financial stability: at the level of sovereigns (sovereign debt) and of financial institutions (mainly banks). Yet, the Treaties are all but silent on the aim of ensuring financial stability. This seems to us a major gap in the constitutional framework governing EMU; a gap which can only be filled by Treaty amendment.[46]

Capital Requirements Directive (CRD IV)

In December 2010, the Basel Committee on Banking Supervision (BCBS) released the Basel III rules with significant changes to the Basel II framework on the level and quality of capital, counterparty credit risk, liquidity, and the introduction of a leverage ratio. In July 2011, the Commission proposed the CRD package to replace the previous CRD with a recast Directive and a Regulation. The Capital Requirements Directive IV and the Capital Requirements Regulation (CRR) set out a harmonisation regime on capital, liquidity, leverage, and counterparty credit risk, implementing Basel III in the Union. The Directive also goes beyond Basel III to regulate remuneration by providing for a bonus cap on material risk takers employed by credit institutions.

46. See further Louis and Lastra (cited above), 134-139.

Both entered into force on 1 January 2014. The UK has already implemented CRD IV, though not all Member States have done so.[47]

In May 2013, the EBA consulted on the definition of material risk-takers for remuneration purposes which determines to which employees the CRD IV remuneration rules apply. The UK is critical of how broad these criteria are. The EBA also consulted on draft Regulatory Technical Standards (RTS) related to variable remuneration.

The UK has not availed itself of Member States discretion on remuneration. It is an open question whether this opt-out means that UK-based financial institutions are exempted from the bonus cap only in relation to branches in other EU Member States, or also in relation to subsidiaries. A separate question is whether the bonus cap is directly applicable to financial institutions based in the UK.

The UK challenged the legality of the bonus cap ratio provisions in Article 94 CRD[48] and the related remuneration disclosure provisions in Article 450 of the Capital Requirements Regulation.[49] The UK's chief concern is that the bonus cap would have a disproportionate impact on the UK, where the majority of employees in the financial services industry with bonus entitlements affected by CRD IV work. The UK also maintains that the cap, as designed, is unworkable, will not contribute to financial stability, and is likely to be counterproductive.

Markets in Financial Instruments Directive (MiFID) Review

Third country access is a priority for the UK, because the location decisions of financial institutions can depend on the modalities of third country access. If third country access is subject to too many, or burdensome, regulatory hurdles, the attractiveness of London as Europe's leading financial centre could suffer.

A related concern of financial institutions operating from the UK, and consequently of the UK, is that the UK carries sufficient weight in shaping legislative proposals in Brussels. British influence can shape legislative proposals, such as the MiFID II proposal, in particular the Third Country provision.[50]

For example, the Wealth Management Association (WMA) takes the view that

47. PRA policy statement (PS7/13).
48. Directive 2013/36/EU (CRD IV).
49. Regulation EU 575/2013.
50. BBA answer 11.

The third country access restrictions in the AIFMD and original MiFID texts are not only bad for the UK, but also for the EU as a whole. They affect not only the USA and other trading partners but also the UK Crown Dependencies with which we have strong historical ties as well as substantial business interests.[51]

Other uncertainties on third country market access relate to[52]

- EMIR Art 25 which prohibits EU bank branches from clearing products in central counterparties (CCP) outside the EU, except and unless the home jurisdiction is assessed as equivalent by Commission and ESMA;
- Credit Rating Agencies rating from Third Countries face hurdles to market access due to uncertainty in the equivalence of the ratings for the calculation of capital requirements;
- Current proposals for the Financial Benchmarks Regulation with respect to the Third Country provision effects the prohibition of financial products such as the S&P 500 Tracker.

Legal orders of the Member States

Question 6

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Question 7

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Question 8

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51. Response of the Wealth Management Association to Review of the Balance of Competences between the UK and the European Union, Single Market: Financial Services and the Free Movement of Capital: Call for Evidence, 16 January 2014.
52. Response of the British Bankers' Association to Review of the Balance of Competences between the UK and the European Union, Single Market: Financial Services and the Free Movement of Capital: Call for Evidence, 16 January 2014.

Question 9

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Monetary policy

Question 11

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Questions 12-13: role of the ECB

In the UK central banking culture, price stability is seen as intimately linked to financial and monetary stability. Accordingly, the Bank of England pursues two core purposes in its work, monetary and financial stability. The Bank of England Act 1998, as amended by the Financial Services Act 2012 and which entered into force on 1 April 2013, provides relevantly in sec 2A(1) that '[a]n objective of the Bank shall be to protect and enhance the stability of the financial system of the United Kingdom.'

The Bank of England has had an important financial stability division since 1998, led by one of the two Deputy Governors. One of the deputy governors, who reports directly to the Governor, is responsible for Financial Stability, the other for Monetary Policy. The Financial Services Act 2012 created the post of a third Deputy Governor with responsibility for prudential regulation. This Deputy Governor is at the same time the Chief Executive of the Prudential Regulation Authority, PRU. It also established an independent Financial Policy Committee (FPC), a new prudential regulator – the PRU – as a subsidiary of the Bank, and vested new responsibilities for the supervision of financial market infrastructure in the Bank of England.

Institutionally, the ECB elevated the status of financial stability in February 2010 with the creation of a Directorate General of Financial Stability, replacing the former Directorate of Financial Stability. However, neither the TFEU nor the ECB Statute refers expressly to 'financial stability' as an objective, or task of the ECB. That said, fundamental financial instability is likely – at least in the medium run – to undermine price stability, the ECB's primary objective under Article 127(1) TFEU, and put at risk the support that the ECB ought to provide to the general economic policies of the Union. The

ECB divides its functions into (i) basic tasks (monetary policy, foreign exchange operations, management of reserves, and the operation of the payment system) and (ii) further tasks (issuance of banknotes, collection of statistics, financial stability and supervision as well as international and European cooperation).[53] In terms of the mandate and the governing instruments, financial stability thus appears to play a lesser role.

The legal basis for the ECB Regulation (SSM) is Article 127(6) TFEU. Under this provision, the Council acts by means of Regulations, and the European Parliament and the ECB are only consulted. In the Council, unanimity is required.

Scope of Article 127(6) TFEU

Article 127(6) permits the conferral on the ECB of *specific* tasks concerning *prudential* supervision. Arguably, it prevents conferral of all aspects of prudential supervision to the ECB. The conferral needs to be limited in scope. One important question is whether the limited supervisory powers conferred on the ECB are discretionary à la *Meroni.*

The need for certain adjustments to the EBA Regulation, a matter for co-decision by the European Parliament and the Council, has given the European Parliament leverage over the content of the ECB Regulation.[54]

Constraints in relation to Member States outside the euro area

A central concern for non-participating countries is that 'the emergence of the ECB as a powerful coordinating force in supervision could have disturbing implications for the EBA in the longer term. Rather than being a crucial single market cohesion mechanism, the EBA could itself become marginalised.'[55] The emergence of EU17 national authorities as a voting bloc was an acute concern to the UK, given that 'the EU17 national authorities will increasingly coalesce around a common position as the ECB puts its stamp on Euro Area supervisory practices, procedures, policies and philosophies, since this growing uniformity can be expected to spill over into regulatory thinking as well.'[56]

53. http://www.ecb.europa.eu/ecb/tasks/html/index.en.html.
54. VSG Babis and E Ferran, 'The European Single Supervisory Mechanism'(2013) 13(2) Journal of Corporate Law Studies 255.
55. Ibid.
56. Ibid.

The double-majority voting system in the EBA represents a compromise between Eurozone and non-Eurozone EU member states. It seeks to ensure equality of treatment within the SSM between participating and non-participating member states by addressing the risk that member states of the SSM vote en bloc, and consequently, that participating states can outvote those outside.

Accordingly, 'any decision [requires] majority support among those participating in the SSM (including non-members of the Euro Area that have concluded close co-operation arrangements with it) and those not participating. Decisions under art. 17 of Regulation 1093/2010 concerning breaches of Union law or under its art. 19 concerning the settlement of disagreements are first to be examined by an independent panel of voting members of the Board of Supervisors.[57] The decisions proposed by the panel to the Board of Supervisors are to be adopted by a simple majority of those members of the Board from Member States participating in the SSM, and a simple majority of those from non-participating Member States.'[58]

The rationale of this voting system, as stated in Recital 6 of the Preamble of the Regulation 1093/2010, is

> 'to ensure that interests of all Member States are adequately taken into account and to allow for the proper functioning of the EBA with a view to maintaining and deepening the internal market in the field of financial services'.

Once the number of Member States not participating falls to four, a simple majority on the Board of Supervisors suffices, provided at least one of the non-participating member states votes in favour (Art 44(1)(2)(4)). At that stage, the Commission will review and report to the EU Parliament, the Council and the European Council.

Non-Eurozone states have secured safeguards against states participating in the SSM reaching decisions on their own. The conclusions of the October 2012 European Council meeting called for 'the equitable treatment and representation of both euro and non-euro area Member States participating in the SSM'. Nevertheless, according to Babis and Ferran, in the long run the only satisfactory solution for non-participating states such as the UK is an amend-

57. Panels are to be convoked by the Board of Supervisors consisting of the chair of the Board and six other members who do not have any conflicts of interest in the matters in issue: Regulation 1093/2010, as amended, Art 41(1a) and (2).
58. Sir Alan Dashwood QC, 'The United Kingdom in a re-formed European Union' (2013) 38(6) European Law Review 737, 748.

ment to Art 127(6) TFEU.[59] Whether it is possible to opt-in only to participate in the SSM, but not the SRM – including contributing to the Single Resolution Fund – is an open question (though one that is not of direct relevance to the UK given that it is committed not to join the SSM in the first place).

If a non-participating Member State disagrees with the ECB Governing Council's objection, decision or amendments, it can demand that the Governing Council give a reasoned opinion.[60] The safeguard shall only be invoked in 'duly justified, exceptional cases'.[61] The Member State can notify the ECB 'that it will be not bound by any amendments to the Supervisory Board's decision made by the Governing Council'.[62] In turn, if the non-participating Member State disagrees with the Supervisory Board, it can ask the Governing Council to decide the dispute. Otherwise, as a last resort, the Member State can terminate the close cooperation agreement and, as a result, would no longer be bound by the relevant decision.[63] 'Finally, non-euro Member States have equal status to Euro Area Member States with regard to a range of issues in the ECB Regulation, including accountability of the ECB and the Supervisory Board.'[64]

Under Art 44 of Regulation (EU) 1093/2010), EBA decisions on binding technical standards are subject to qualified majority voting, whereas supervisory decisions are subject to simple majority voting in the Board of Supervisors. The EBA Amendment Regulation included a safeguard for non-participating states in respect of regulatory decisions. These must include, in addition, a simple majority from both participating Member States and non-participating Member States.[65] The downside of this mechanism is that non-participating member states could potentially veto rule-making for the Banking Union as a whole.

59. Recital 85 ECB Regulation, referring to the Commission Communication of 28 November 2012 on a Blueprint for a deep and genuine economic and monetary union (COM(2012) 777 final).
60. Art 7(7) and Art 26(8) ECB Regulation. The ECB Regulation envisages that the Governing Council should invite the representatives from non-euro participating Member States when it contemplates to object to a draft decision prepared by the Supervisory Board as stipulated in Recital 72 ECB Regulation.
61. Recital 43 ECB Regulation.
62. Babis and Ferran (cited above), 274.
63. Art 26(8) and Art 7(8) ECB Regulation.
64. Babis and Ferran (cited above), 274-275.
65. EBA Amendment Regulation, Art 1(7) amending Regulation (EU) 1093/2010 Art 44.

The ECB is also called upon to develop a 'supervisory manual' for national authorities under its remit.[66] As Babis and Ferran note, 'the ECB's guidelines, recommendations and decisions--and, consequently, the ECB's manual--should comply with the EBA's supervisory handbook'. Conversely, the EBA is expected to 'develop a Single Supervisory Handbook for the whole EU, attributed to the EBA, recognises the importance that key chapters of the manual are truly common across the Single Market'.[67]

There is controversy about whether the ECB's independence conflicts with the EBA's power to impose binding decisions on competent authorities (including the ECB). All competent authorities, including the ECB, are required to follow the EBA's lead.

A further safeguard against regulatory decisions tilted towards the interests of those member states participating in the SRM is that the European Commission could intervene by refusing to endorse or by amending an EBA draft standard because 'the Union's interests so require'.[68]

Question 14: role of the Court of Justice

The UK is comfortable with the idea that central banks, from time to time, engage in open market purchases of sovereign debt to support the central bank's monetary and financial stability objectives. Indeed, the Bank of England embarked on its first major wave of quantitative easing from March 2009-November 2009, with purchases of up to £200 billion in UK government debt,[69] a year ahead of the ECB's (much less ambitious) Securities Market Programme (SMP) which started in May 2010 and its successor, Outright Monetary Transactions (OMT) that commenced only in August 2012.[70] Neither the SMP nor the OMT amounts to quantitative easing as the ECB fully sterilises asset purchases. If anything, the criticism from the UK, from the official as well as the private sector, was that the ECB did too little, too late,

66. Art 6(5) ECB Regulation.
67. A Enria, 'Implications of the Single Supervisory Mechanism on the European System of Financial Supervision: The EBA Perspective', Intervention at the European Commission public hearing on financial supervision in the EU, Brussels, 24 May 2013.
68. Arts 10 and 15 Regulation (EU) 1093/2010.
69. Bank of England, The United Kingdom's quantitative easing policy: design, operation and impact, Quarterly Bulletin, 2011, Q3.
70. ECB, Press Release, 6 September 2012, Technical Features of Outright Monetary Transactions.

and could have counteracted the Eurozone crisis headwinds by moving towards full-scale quantitative easing when the Greek debt crisis first erupted.

In addition, the UK does not have objections in principle to the ECB acquiring a more important role in financial supervision, including macroprudential regulation, provided its position as a non-member of the Eurozone does not lead, directly or indirectly, to unequal treatment in the single market.

In one important respect, the UK has been critical of ECB policy. The UK challenged the ECB's location decision in respect of central clearing counterparties (CCPs).[71] Under a standard adopted by the ECB, the Eurosystem is to use only those CCPs that meet ECB standards.[72] Systems that settle euro-denominated payment transactions above a threshold (€5 billion per day or more or a market share larger than 0.2 percent) must settle in central bank money, must be located in one of the Member States of the Eurozone and managerial and operational control must be exercised from within a Eurozone Member States.

The UK maintains that the ECB lacked competence to adopt this standard of Eurozone clearing at all, or in any event, it could have only been included as part of a regulation. Furthermore, it contends that the policy restricts the free movement of capital and the right of establishment, restricts and distorts competition in the Single Market and discriminates against CCPs by nationality, to the disadvantage of CCPs in the UK.

The challenge of the location decision apart, it is highly unlikely, in view of the UK's policy preferences described above, for the UK to challenge other ECB decisions, especially on monetary policy. Eurozone member states would likely regard such challenges as an interference in the Eurozone's internal monetary arrangements. Viewed from that perspective, it would be odd for a non-Eurozone state to seek to challenge monetary or financial stability decisions of the Eurozone's central bank.

In principle, the decisions and actions of the European System of Central Banks are subject to judicial review.[73] The possibility of judicial review could

71. See Cases T-496/11, T-45/12 and T-93/13 *United Kingdom v ECB*, pending.
72. ECB standards for use of CCPs in Eurosystem foreign reserve management operations, November 2011.
73. R Smits, *The European Central Bank : Institutional Aspects*, *International Banking and Finance Law Series* (The Hague ; Boston: Kluwer Law International, 1997), p. 106; P Craig, 'EMU, the European Central Bank and Judicial Review' in P R Beaumont and N Walker (eds), *Legal framework of the single European currency* (Hart Pub. 1999); P Brentford, 'Constitutional Aspects of the Independence of the European Central Bank' 47 ICLQ 75.

be regarded as an important check on the ECB, given that it is not embedded in a (national) system of checks and balances on the model of other CBs and given that it enjoys the highest degree of independence of any major central bank in the world. In the absence of effective political accountability mechanisms, judicial review could provide a measure of accountability.

Even though several commentators regard judicial review of central bank conduct as natural in a rule-of-law-based community such as the EU,[74] in international comparison this possibility is unusual. Central banks have traditionally operated in an environment in which litigation is a virtual unknown, and where the exact rules and competences were less important than the standing of the central bank and the weight of its advice.[75]

As a general rule, internationally there is no review of monetary policy decisions, though judicial review may be provided for in relation to central banks acting in a supervisory capacity. The question of when judicial review of ECB acts (and omissions) is possible, is likely to become more important as the ECB takes on its new supervisory responsibilities under the SSM.

The rationale for limiting (or entirely precluding) judicial review in respect of monetary policy decisions is the tension between central bank independence and judicial review, and doubts about the justiciability of monetary policy and holder of institutional competence (courts vs. central banks). In the UK, the possibility of judicial review in respect of monetary policy decisions of the Bank of England is in practice more limited than with respect to supervisory decisions (now the remit of the new Prudential Regulation Authority). The obstacles to liability of the Bank of England under English law are high. The Bank enjoys wide statutory immunity from liability in damages, which is limited to cases of bad faith (Sec 1(4) Banking Act 1987, Schedule 1, S. 17(1) of the Financial Services and Market Bill). The English courts have been very reluctant to impose a duty of care upon regulators in respect of economic loss. Misfeasance in public office, an intentional tort involving bad faith, is the only option, or EU law.

In *Three Rivers v Bank of England*, the House of Lords considered the question of state liability for inadequate supervision.[76] BCCI depositors initiated legal action on the grounds that the BoE had wrongfully granted a li-

74. Smits (cited above).
75. See also Ralph J. Mehnert-Meland, Central Bank to the European Union: European Monetary Institute, European System of Central Banks, European Central Bank: Structures, Tasks, and Functions (London; Boston: Kluwer Law International, 1995), 50-51.
76. Three Rivers DC v Bank of England (No. 3) [2001] UKHL 16.

cense to BCCI and had failed to adequately supervise the bank which caused loss to depositors. The depositors also alleged that the Bank of England was liable in damages for having breached its supervisory obligations under EU law. Even though the House of Lords allowed a misfeasance action to proceed against the Bank of England, the action ultimately failed.

The Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* held that the financial regulator does not owe any duty of care to depositors and no tortious liability can be established for the failure of taking reasonable steps to prevent loss to depositors.[77]

By contrast, judicial review of the ECB could extend, again in principle, to monetary policy decisions and open market operations – which does not accord with UK's tradition. Unlike many national central banks such as the BoE, the ECB does not enjoy statutory (treaty) immunity from suit, in either national courts or before the CJEU.[78]

There is potentially broader scope for challenging the acts and omission of the ECB under Article 35.1 of its Statute, including the new ECB Supervisory Board: 'The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union.' Judicial review of the ECB could thus extend, again in principle, to monetary policy decisions and open market operations.

The reach of judicial review of ECB conduct is however limited, due to two principal factors. First, the CJEU can only review the legality of binding ECB measures. Second, and even more importantly, standing is circumscribed. Those most likely to seek to challenge monetary policy and prudential decisions – individuals affected by the measures or opposed to such measures for reasons of principle – are unlikely to enjoy standing. As non-privileged applicants, they enjoy standing only under the (restrictive) conditions laid down in Art. 263(4) TFEU. As a rule, they are unlikely to meet the standing requirements for actions for annulment against ECB decisions in the field of monetary policy or supervision.

By contrast, Member states such as the UK, as privileged applicants for actions of annulment under Article 263 TFEU, automatically satisfy the standing requirement. However, the Governing Council's monetary policy

77. [1988] A.C. 175; see *R. (on the application of SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWHC 227 (Admin), para. 141 (extending the reasoning to the Financial Services Authority).
78. See further P Athanassiou, Financial Sector Supervisor's Accountability, A European Perspective, ECB Legal Working Paper Series, No. 12, August 2011.

decisions are not intended to produce legal effects, and for that reason, actions in annulment by member states are unlikely to succeed. Only ECB decisions, but not guidelines are reviewable acts (Article 12 ECB Statute, Article 289 TFEU). Matters could be different with respect to supervisory decisions in relation to particular banks. Attempts to hold the ECB to account in this area are more likely.

Concluding remarks

It is not necessary in these concluding remarks to sum up the range of issues connected to the UK's position towards EMU and financial markets governance. Yet, we would like to reiterate two general concerns.

First, the use of non-EU instruments such as the ESM, the Fiscal Compact, and others which are potentially to follow, seems to us difficult to sustain in the middle to long term. The awkward legal relationship with EU law is unsatisfactory, and contrary to constitutional principle. The latter are not just concerned with abstract concepts. As the EU aims to promote greater financial stability, the use of intergovernmental mechanisms and institutions risks eroding the stability of the EU legal system. The *Pringle* judgment is, with greatest respect, a flashing indicator of such erosion.

Second, the UK's major concern is to safeguard the internal market and its financial services industry. The dividing lines between internal market competences, EU economic policy coordination, and monetary policy are difficult to draw. This is in our view particularly so because the founding Treaties lack specific provisions expressly enabling the EU to safeguard financial stability.

Both these concerns point in one direction: the need for significant Treaty amendment.

Open question

Question 15

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ANNEX

ABBREVIATED QUESTIONNAIRE GENERAL TOPIC 1

Economic policy

EU legal order

Question 1

To what extent does primary Union law allow for the adoption of the EU and non-EU instruments that have been agreed upon in response to the euro area debt crisis?

Question 2

What are the constitutional and institutional implications at the European level of the use of supranational (e.g. Six-Pack, Two-Pack), intergovernmental (e.g. Treaty on Stability, Co-ordination, and Governance), private law (European Financial Stabilization Facility), and 'soft-law' (e.g. Euro Plus Pact, Europe 2020) instruments in reforming economic governance in the EMU?

Question 3

In '*A blueprint for a deep and genuine economic and monetary union'* the European Commission argues for a stepwise approach in, ultimately, ensuring a full fiscal, economic, and political union, including e.g. the establishment of a stronger fiscal capacity for the euro area. In the Four Presidents Report '*Towards a Genuine Economic and Monetary Union*' the plans towards a European fiscal capacity and more integrated economic decision making are further developed and – to some extent – concretised. To what extent and in what ways do these plans call for an amendment of national and (primary and secondary) Union law?

Question 4

What legal modifications (if any) are required at the EU level to ensure democratic legitimacy and accountability of economic governance in Economic and Monetary Union?

Question 5

What legal challenges (if any) does the EU face with regard to financial market regulation and supervision?

Legal orders of the Member States

Question 6

What legal challenges do euro area Member States, Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency face with regard to their national fiscal rules and the applicable budgetary processes as a result of the various European ad hoc (e.g. European Financial Stabilisation Mechanism, European Financial Stabilisation Facility) and long term reform measures (e.g. Six-Pack, Two-Pack, Treaty on Stability, Co-ordination, and Governance in the European Union, Treaty establishing the European Stability Mechanism)?

Question 7

What changes (if any) have to be made at the level of the Member States to ensure democratic legitimacy and accountability of economic governance in the Economic and Monetary Union?

Question 8

How have the duties arising from the Treaty on Stability, Co-ordination, and Governance in the European Union, namely those set out in Articles 3 (1), 4, 5 and 6, been accommodated for in the national legal order?

Question 9

Have the EU or non-EU instruments employed in addressing the euro area debt crisis been challenged before national (highest or constitutional) courts? If so, on which grounds and with what outcome?

Question 10

What are the specific legal challenges for Member States outside the euro area, that is Member States in the antechamber to the euro area and Member States that – for the time being – have opted not to participate in the single currency, of the emergence (mainly subject to Articles 121(6), 126(14), 136 TFEU, and intergovernmental treaties) of an ever more detailed economic governance regime for euro area Member States?

Monetary policy

Question 11

Has the European Central Bank acted in accordance with its legal mandate laid down in primary Union law in responding to the euro area debt crisis?

Question 12

Considering its primary objective laid down in Article 127(1) TFEU, what precisely can the role of the ECB be from a legal point of view in prudential supervision of credit institutions (micro-prudential supervision) and how can this be linked to a role in contributing to the stability of the financial system (macro-prudential supervision)?

Question 13

How can the statutory objectives of the ECB be redefined?

Question 14

What (if any) can the role of the Court of Justice of the European Union be in the interpretation and application of the primary and secondary EU law pertaining to monetary policy?

Open question

Question 15

What are the other main legal concerns at the EU or national level regarding constitutional and institutional aspects of economic governance in the EMU that are not covered by any of the previous questions?

The proceedings of XXVI FIDE Congress in Copenhagen in 2014 are published in three volumes, where this book concerns: The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU.

The three editors, Professor and President of FIDE, Ulla Neergaard, Associate Professor and Secretary General of FIDE, Catherine Jacqueson, and Professor Jens Hartig Danielsen, are all distinguished scholars within EU law. The General Rapporteur, Professor Fabian Amtenbrink, is one of the absolute leading scholars within the particular field of economic governance in Europe. The Institutional Rapporteur, Jean-Paul Keppenne, is Legal Advisor at the Legal Service of the Commission of the European Union, and has long and acknowledged experience in the area.

Their impressive analyses are contained in this book together with important and valuable studies on the implementation of the relevant EU law in the Member States all over Europe. Thereby, this book hopefully constitutes a goldmine for comparative and EU lawyers in the field of economic governance.

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