

RULE OF LAW AND ECONOMIC EXIGENCY IN “POST-DEMOCRATIC EXECUTIVE FEDERALISM”¹: SOME CONSTITUTIONAL ISSUES OF THE EURO CRISIS²

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UDK: 342.24
Ur.: 17. ožujka 2017.
Pr.: 26. svibnja 2017.
Izvorni znanstveni rad

Summary

The author analyzes EU's response to the ongoing economic crisis, focusing on the problem of legislative and institutional fragmentation. She argues that the authoritarian crisis management – fueled by “crisis” discourse – subverted democratic accountability by its reliance on executive discretion and intergovernmentalism. Through an analysis of European Court of Justice's case law as well as a close look at the exact workings and implications of European Central Bank's ultra vires actions, she shows how Lisbon Treaty was sacrificed to the exigency of creating an Ersatz Union law more pliable to the immediate concerns of reforming the EMU. She holds that the intergovernmental instruments not only “unconstitutionally” requisitioned the involvement of EU institutions, but also established a political administration unresponsive to democratic accountability, damaging the legitimacy of the Union. The resulting subjugation of the political and social constitution to economic conditions threatens an abdication of law and undermines the integrity of the Union legal order.

Keywords: EU, economic crisis, rule of law, executive federalism, intergovernmentalism.

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- 1 Jürgen Habermas's appraisal of the mode of governance in the euro crisis which stresses the central role of the heads of states and government of the EU Member States, convened in the European Council or other inter-governmental settings: “in order to ensure the political implementation of all goals agreed upon with their colleagues in Brussels, the heads of government would organize majorities in their respective national parliaments under threat of sanctions. This kind of executive federalism of a self-authorizing European Council of the seventeen [now nineteen – A.H.V.] would provide the template for a post-democratic exercise of democratic authority” – *The Crisis of the European Union: A Response* (translated by Ciaran P. Cronin), Polity, 2012, p. viii.
- 2 This paper has been completed through the Zagreb Faculty of Law's 2016 research program titled „New Croatian legal system“.

1. INTRODUCTION

The economic crisis brought change to EU's constitutional balance, primarily in the field of the euro-zone. Emergency-driven economic governance in the Union pushed for strong deference by the courts reviewing the legal instruments involved. The European Central Bank (ECB) has become a governing body with limited accountability in the institutionally and legislatively fragmented³ Europe of a "new form of law"⁴ that reformed the Economic and Monetary Union (EMU) with the approval of an unduly deferential Court of Justice (ECJ), who is blessing the engagement of EU institutions outside of the Treaty's constitutional matrix. National courts have attempted to clarify the boundaries of the involved EU institutions' competences, invoking the *ultra vires* doctrine against ECB's Outright Monetary Transactions (OMT) program (the *Gauweiler* saga) and citing constitutional identity concerns (Portuguese Constitutional Tribunal).

Some of the most important issues of these developments in the European economic constitution are: the legality of the "esoteric"⁵ crisis management tools reshaping the EMU; sustainability of the "emergency" discourse fueling them; accommodation of the double role of EU institutions in intergovernmental arrangements (amalgamating decision-making on policies that differ in democratic input legitimacy requirements); reconsideration of ECB's accountability in a no longer rule-, but policy-based EMU; and the need for deference to technical economic choices of a (permanent?) crisis to be replaced by strict(er) judicial review.

2. EARLY CRISIS-MANAGEMENT TOOLS

It would be an oversimplification to consider the effects of the crisis as contained to EU's economic constitution. This *constitutional* crisis also saw a fundamental shift in political and social dimensions, affecting democracy and social rights.⁶ The root of the problem lies in "the Maastricht asymmetry"⁷, *i.e.* a combination of transnational monetary policy and fragmented national fiscal policies. The EMU centralized monetary policy for the euro-area⁸, entrusting the

3 Tuori, K., *The European Financial Crisis – Constitutional Aspects and Implications*, European University Institute, EUI Working Paper - Law 2012/28, 2012, p. 1.

4 Peers, S., *Towards a New Form of EU Law? The use of EU Institutions outside the EU Legal Framework*, *European Constitutional Law Review*, vol. 9, 2013, p. 37.

5 Fahey, E.; Bardutzky, S., *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in the EU Courts, Plural*, *Michigan Journal of International Law*, vol. 1, 2013, p. 102.

6 Tuori, K., *The European...*, *cit.*, p. 2.

7 *Ibid.*, p. 5. It's a "decisive birth defect" – Sauer, H., *Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment*, *German Law Journal*, vol. 16, 4/2015, p. 973.

8 Art. 3(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU), [2012] OJ C326, pp. 47-390.

achievement of its *telos* (price stability⁹) to a technocratic and independent ECB and the national central banks.¹⁰ Member States still remained sovereign in the field of fiscal policy, limited only by a coordinating role of the Union¹¹ and the primacy of exclusively “European” monetary policy.¹² Their fiscal responsibility was insured by the interest rates’ dependence on the soundness of a State’s finances. In lieu of auxiliary precautions, the Treaty precluded a bailout in case of default (Art. 125(1) TFEU) as well as central-bank financing of government spending (Art. 123(1) TFEU); it also blocked privileged access to financial institutions by the public sector (Art. 124 TFEU) and forbade excessive budget deficit and government debt (Art. 126 TFEU). The national fiscal policies are coordinated through the Stability and Growth Pact¹³, while Protocol No. 14 annexed to the Treaties on the Euro Group “constitutionalizes” the euro-area-only rendition of the ECOFIN Council.¹⁴

Belying adequacy of these precautions, the sovereign debt crisis caught the EU unprepared. Dealing with the crisis necessitated a coordinated effort on two planes: 1) palliative – focusing on financial stabilization through emergency assistance (European Financial Stabilisation Mechanism (EFSM)¹⁵, European Financial Stability Facility (EFSF)¹⁶ and ESM) and regaining the trust of the financial markets

9 Arts. 119(2) and 127(1) TFEU.

10 Art. 130 TFEU. ECB and national central banks form the European System of Central Banks (hereinafter: ESCB) – Art. 282 TFEU.

11 Arts. 120 and 121 TFEU.

12 Art. 119 TFEU.

13 Concluded in 1997 and encompassing Council Regulations 1466/97 and 1467/97 (hereinafter: SGP). Regulation 1466/97 (amended by Council Regulation 1175/2011) is the “preventive arm” based on Art. 121 TFEU, assessing the consistency of national economic policies with broad economic guidelines. For the euro-zone states, the information necessary for multilateral surveillance is contained in their “Stability programmes”, stating the medium-term objective (hereinafter: MTO) for the budgetary position of close to balance or in surplus and the adjustment path towards this objective. The “corrective arm” (Regulation 1467/97, amended by Council Regulation 1177/2011) is grounded in Art. 126 TFEU and regulates the excessive deficit procedure. The SGP was expanded in 2011 with three more Regulations (1173/2011, 1174/2011 and 1176/2011) and a Directive (2011/85/EU), and was renamed as the “Six-pack”. In 2013, another two Regulations (472/2013 and 473/2013 - the “Two-pack”) joined the fold.

14 The Economic and Financial Affairs Council (ECOFIN) consists of the economics and finance Ministers of the Member States. It is responsible for economic policy, taxation matters, financial markets and capital movements, and prepares the EU’s annual budget. Monthly meetings of the informal Euro Group take place on the eve of the ECOFIN meetings, with the participation of the President of the ECB and of the Commissioner for economic and financial affairs, with the task of discussing questions related to the „specific responsibilities they share with regard to the single currency“ – Protocol No. 14.

15 Council Regulation (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1.

16 An intergovernmental Special Purpose Vehicle incorporated as an LLC under Luxembourg law on 7 June 2010, and funded by the euro-area States in accordance with their share in the paid-up capital of the ECB - Bertocchi, M. and others, *Euro Bonds: Markets, Infrastructure and Trends*, World Scientific Series in Finance, vol. 7, Singapore, World Scientific, 2014, p. 30. The representatives of all the EU Member States adopted a decision allowing the

(Asset Purchases Programmes (APPs) and OMT), and 2) strategic – strengthening economic governance against shocks (“Six-pack”, “Two-pack”, and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) with its “Fiscal Compact”¹⁷). The palliative efforts were objects of improvisation¹⁸: the first Greek rescue package in 2010 used intergovernmental agreements outside of the Treaty framework, while the adjustment program was detailed in a memorandum¹⁹ between Greece and the Commission, the ECB and the IMF. The intergovernmental method was again used with the EFSF, achieving an unprincipled merger which later served as a template for the ESM: the Treaty was sidestepped and the EU institutions’ personal and technical expertise outsourced²⁰ for the negotiation, completion and enforcement of EFSF activities. Most unsettlingly, “conditionality...[was] ensured by including the essential contents of MoUs in Council Decisions...[so] that actually the MoUs determine and constrain the contents of the Council decisions and not *vice versa*!”²¹

3. EUROPEAN STABILITY MECHANISM (ESM)

3.1. Establishment

As the crisis deepened, the European Council agreed in December 2010 on the need for euro-area states to establish a permanent stability mechanism that would assume EFSF/EFSM’s tasks. While the EFSM was (shakily) established on

Commission’s involvement in the EFSF - Extraordinary ECOFIN meeting, Brussels, 9/10 May 2010, Press release 9596/10. The euro-area States then concluded a Framework Agreement with it, making the overall legal nature of the Vehicle “difficult to define” – Tuori, K., *The European...*, cit., p. 13. Following the by then established precedent, the Agreement postulated a strict conditionality of assistance - Recital 2 of the Preamble of the EFSF Framework Agreement, available on the ESM’s website at <https://www.esm.europa.eu/sites/default/files/20111019_efsf_framework_agreement_en.pdf>. Throughout the paper, 14 March 2017 is to be considered date of access to any and all cited Internet resources.

17 Signed on 2 March 2012 by all the Heads of State or Government of the EU Member States with the exception of the Czech Republic, the United Kingdom and Republic of Croatia. It entered into force on 1 January 2013 – Fiscal Compact Treaty: Scorecard for 2015, European Parliament Research Service, PE 581,403, June 2016, p. 7.

18 Tuori, K., *The European...*, cit., p. 12.

19 The Memorandum of Understanding (hereinafter: MoU) on Specific Economic Policy Conditionality, The Economic Adjustment Programme for Greece, Occasional Papers No. 61, 3 May 2010, pp. 59-84.

20 Sester, P., *The role of ECB in relation to the modified EFSF and the future ESM*, <https://www2.uni-hamburg.de/fachbereiche-einrichtungen/handelsrecht/ECFR/_Sester.pdf>, p. 27. All of the websites referenced in this paper have been accessed on 8 March 2017.

21 Tuori, K.; Tuori, K., *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press, 2014, p. 155. With the adoption of the “Two-pack’s” provisions on macroeconomic adjustment programs, however, the beneficiary Member States first have to prepare such programs, which then have to be complied with by a *subsequently* concluded MoU – *ibid.*, p. 157.

the emergency-relief provision in Art. 122 TFEU, it couldn't have served as the fundament of a permanent mechanism. So on 25 March 2011, the European Council adopted a Decision²² amending Art. 136 TFEU by a simplified revision procedure²³, enabling the euro-states to establish the ESM if it should prove "indispensable to safeguard the stability of the euro area as a whole" (new par.3). Furthermore, "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". The ESM Treaty was signed by all euro-area States on 2 February 2012, and became operational on 8 October 2012. However, the "legitimizing" amendment of Art. 136 entered into force only on 1 May 2013. This prompted doubts as to the legality of the ESM, established as it (seemingly) was without a Treaty basis.

Moreover, the legality of the amendment itself (*whenever* it entered into force) was questioned, since the simplified revision procedure precludes the expansion of Union competences. Misgivings were compounded by a repeat recourse to the intergovernmental method that shirked the Treaty-based options of enhanced cooperation or use of Article 352 TFEU (see *infra*), and shielded the ESM participants from adherence to provisions of the Treaty and its Charter of Fundamental Rights (CFR). Such willingness to circumvent options of housing the ESM within the EU constitutional architecture led to the question of legality of EU institutions' involvement in implementing an international agreement concluded outside the EU framework.²⁴

3.2. *The Pringle case*

These doubts were addressed by the ECJ in *Pringle*.²⁵ The Court concluded that the ability of the Member States to enter into a separate agreement removed from the EU framework is not contingent upon a special authorization in the Treaties (par. 68 and 72)²⁶, since the activities of the ESM do not fall within the

22 Decision 2011/199 amending Article 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1.

23 Art. 48(6) of the Treaty on European Union (TEU - [2012] OJ C326, pp. 13-46) provides for a simplified revision procedure regarding the provisions of Part Three of the TFEU relating to the internal policies and action of the Union. In such cases, TFEU is amended by a unanimous decision of the European Council, after consulting the European Parliament and the Commission (and the ECB in case of institutional changes of the monetary area). The decision enters into force upon approval by the Member States. The „rub“ lies in the 3rd subparagraph: „The decision...shall not increase the competences conferred on the Union in the Treaties“.

24 De Witte, B., *Using International Law in the Euro Crisis: Causes and Consequences*, Oslo, Centre for European Studies, Working Paper No. 4, June 2013, p. 18.

25 Case C-370/12 *Thomas Pringle v. Government of Ireland, Ireland and the Attorney General*, 27 November 2012.

26 Even if a stability mechanism could've been established on the basis of Article 352 TFEU (as suggested by the European Parliament in its Resolution of 13 March 2014 on the enquiry on the role and operations of the Troika with regard to the euro area program countries

realm of monetary policy (exclusive competence of the Union – par.95), but constitute “only” an economic policy measure. As there is no field pre-emption in the field of economic policy, states are free to conclude agreements under private and international law - if the principles of supremacy and sincere cooperation are honored and there is no contradiction to EU primary or secondary legislation²⁷ (*cf. Pringle*, paras.109 and 148). Subjection of ESM programs to strict conditionality (*per* amended Art. 136 TFEU) provides insurance against their non-compliance with EU law (par. 72).

This is an analysis we consider to be piecemeal and lacking an overarching perspective. According to the Court, the purpose of the ESM is “not to maintain price stability” (a monetary policy concern and EU’s exclusive competence), but “to meet the financing requirements of the ESM Members...if indispensable to safeguard the financial stability of the euro area as a whole” (par. 96). The activities of the ESM might well influence the rate of inflation, but “only [as an] indirect consequence” (par. 97). The levity of negating the obvious is strongest where ECJ holds that “Even though the stability of the euro area may have repercussions on the stability of the currency used, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole [even if very substantial – AHV] reason that it may have indirect effects on the stability of the euro” (par. 56).²⁸ Confusing the nominal with the substantive²⁹, the Court glosses over the fact that the stability of the euro area as the *purpose* of the ESM is inseparable from the stability of the euro itself³⁰. The two terms are virtually synonymous, motivating the

(2013/2277(INI), p. 108)). Its Resolution of 24 June 2015 (on the review of the economic governance framework: stocktaking and challenges (2014/2145(INI)) qualifies the ESM as a „setback to the political integration of the Union“ and calls for the ESM to be fully integrated into the community framework so it could finally be made accountable to the Parliament (par. 51). There is a good case against the Commission’s participation in the ESM, as “where the contracting states have not used enhanced cooperation [where it was available] this should incline the EU institution against participation...[This position] should be regarded as especially strong if the states have not even considered in good faith...[such] enhanced cooperation” – Craig, P., *Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance, Oxford, Oxford Legal Studies Research Paper No. 96/2013, 9 September 2013, p. 17.

- 27 Tuori, K.; Tuori, K., *op. cit.*, p. 155. This is „the most powerful format of federal pre-emption: any national legislation within the occupied field is prohibited. The reason for the total exclusion lies in the perceived fear that *any* supplementary national action may endanger or interfere with the strict uniformity of Union law“ –Schütze, R., *European Union Law*, Cambridge, Cambridge University Press, 2015, p. 135.
- 28 Therefore, measures taken with a view to protecting the stability of the euro area „as a whole“ (Article 136(3) TFEU) *may* have repercussions on the stability of the currency used within that area (monetary policy concern), but such indirect effects do not alter its economic policy character – paras. 56 and 96.
- 29 „This is, with respect, legal formalism“ – Craig, P., *Pringle: Legal Reasoning, Text, Purpose and Teleology*, Maastricht, Maastricht Journal of European and Comparative Law, vol. 20, 1/2013, p. 5.
- 30 These two concepts have „complementary functions“ – de Lhoneux, E.; Vassilopoulos, C., *The European Stability Mechanism before the Court of Justice of the European Union:*

Member States to action by fear of the domino effect linking one State's default/financing difficulties with defaults/business difficulties of its creditors (mostly large banks), which would in turn spell difficulties for the rest of the euro area.³¹ Given that the member states are individually responsible for the rescue of their (for some states mammoth) banking systems the fiscal consequences of rescuing banks are very large, spilling the stress in the banking system over to the sovereigns.³² ECB's Quantitative Easing (QE – see *infra* 4.3.2.) program, while pumping liquidity into the system in an effort to achieve the target inflation of 2%, shields banks from such exposure to default and uses them as intermediaries in circumventing the primary financing prohibition, ridding them of (risky) government bonds assets. The interconnectedness of QE (*purportedly* designed to raise inflation) and the ESM (see *infra* 4.3.2.) all but disqualifies the ECJ's conclusion of the ESM's "indirect" and tangential connection to the monetary policy.

3.3. *Strict conditionality and MoUs' congruence with EU law*

The Court has deservedly attracted criticism for its conclusion that strict conditionality of ESM's programs ensures compliance with EU law in general as well as with the TFEU's "no bail-out" provision (*Pringle*, paras. 69 and 111).

Regarding the latter, financial rescue efforts run the obvious risk of causing moral hazard problems³³ for the borrowing countries, who might not be induced to fiscal consolidation if anticipating a "safety net". Addressing this issue of ESM's credibility, the Court interpreted Art. 125 TFEU as not prohibiting mutual financial assistance between Member States but rather as barring the *imposition* of liability for the commitments of one upon others (par.130). The goal is to ensure sound budgetary policy and discipline, and States' subjection to market logic when entering into debt (par.135) - strict conditionality assures that such sound policy wouldn't be *dis-incentivized* (paras.135-136; *cf.* par.111). Also assuring congruence with Art. 125 TFEU, assistance is activated only by a peril to financial stability of the whole euro area (paras.136-137) – this particular *provisio* is hard to explain, since it recognizes the existence of an overarching aim over Art. 125.

Comments on the *Pringle* Case, Springer, 2013, p. 25. It is "not clear how there could be price stability in relation to the euro, given the serious instability of the euro area as a whole" – Craig, P., *Pringle: Legal Reasoning*, cit., p. 5.

31 Fabbrini, F.; Hirsch Ballin, E.; Somsen, H., *What Form of Government for the European Union and the Eurozone?*, Bloomsbury Publishing, 2015, p. 198.

32 Merler, S.; Pisani-Ferry, J., *Hazardous tango*, Bruegel, <<http://bruegel.org/2012/04/hazardous-tango-sovereign-bank-interdependence-and-financial-stability-in-the-euro-area/>>, 15 April 2012. If robbed of access to their primary lenders, states (especially high-deficit ones on the periphery of the Union) would either default or (more likely) turn to their central banks - who would be pressured into raising the volume of money in circulation, leading to price instability

33 Badinger, H.; Nitsch, V., *Routledge Handbook of the Economic of European Integration*, Routledge, 2015, p. 146.

Tuoris' concern is that this "higher-order *telos*" could be "used broadly to derogate from the bailout prohibition" and increase the risk of financial instability that it aims to prevent.³⁴ Such significant changes to the constitutional foundations of the EMU should not be introduced, or rubberstamped, by a court³⁵, as it moves the EMU from a rule- to a policy-based union - with important consequences for its democratic legitimacy. Joerges find that such a move ushers in managerialism and policy-making³⁶, and that the new economic constitution is being implemented by a "political administration" insulated from democratic legitimation and accountability demanded by the rule of law.³⁷ Its core concepts cannot be precisely defined, making them non-justiciable and suspending the legal protection requirements³⁸ - instead of a reasoned framework for new economic governance, the Court merely "parrot[s] the orthodoxy of 'conditionality' as a justification".³⁹

The ESM Treaty also places procedural safeguards against incongruence of a MoU and EU law. An ESM Member's request for stability support is assessed by the Commission in liaison with the ECB⁴⁰, and followed by a decision of the Board of Governors⁴¹ to grant stability support. That Board then entrusts the Commission (again in liaison with the ECB and the IMF) with negotiating a MoU detailing the conditionality that is then annexed to the Financial Assistance Facility Agreement between the Member State and the ESM. The MoU must be "fully consistent" with measures of economic policy coordination, in particular with any act of European

34 Tuori, K.; Tuori, K., op. cit., p. 130.

35 Dawson, M.; Enderlein, H.; Joerges, C., *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation*, Oxford, Oxford University Press, 2015, p. 117. Scicluna's view is that "the euro crisis has expedited the ECJ's transformation from vanguard of European integration to laggard" – Scicluna, N., *European Union Constitutionalism in Crisis*, Routledge, 2015, p. 133. It's her opinion that the euro rescue has left the Court deposed – loc. cit.

36 *ibid.*, p. 117.

37 Everson, M.; Joerges, C., *Who is the Guardian for Constitutionalism in Europe after the Financial Crisis?*, LSE "Europe in Question" Discussion Paper Series, Paper No. 63/2013, June 2013, p. 13.

38 *ibid.*, pp. 13-14. Evaluation of Member States' performance is "highly discretionary". Economist Andrew Watt's analysis of the Commission's review of 13 EU countries considered to have macroeconomic imbalances characterized the Commission's language as opaque „gobbledygook“ – *EU Commission Makes a Mockery of Imbalance Procedure*, Social Europe, <<https://www.socialeurope.eu/2013/04/eu-commission-makes-a-mockery-of-imbalance-procedure/>>, 11 April 2013.

39 Everson, M.; Joerges, C., op. cit., p. 21.

40 This assessment includes the existence of a risk to the financial stability of the euro area as a whole or of its Member States, the sustainability of public debt, and the actual or potential financing needs of the ESM Member concerned – Art. 13(1) of the ESM Treaty (hereinafter: ESMT, available at the official website of <<https://www.esm.europa.eu/legal-documents/esm-treaty/>>).

41 Each ESM Member appoints one Governor, who is that State's minister of finance (Article 5 ESMT). The Board of Governors is tasked with providing stability support by the ESM, including the economic policy conditionality as stated in the MoU, and establishing the choice of instruments and financial terms and conditions (Art. 5(6(f)) ESMT).

Union law (Art.13(3) ESMT). Under Art. 16 ESMT, where financial assistance is given in the form of a loan⁴², the MoU has to detail a macro-economic adjustment program (MEAP), which is a creature of the “Two-pack” Regulation 472/2013/EU. Article 7 of that Regulation provides that a draft MEAP is prepared in agreement with the Troika; the Council, on a proposal from the Commission, shall approve the MEAP, while the Commission shall ensure its strict observance in the MoU signed by the Commission on behalf of the ESM. Such signature is given after the MoU’s approval by the Board of Governors (effectively the Euro Group, as per their identical composition - Art.13(4) ESMT). The engagement of the Troika doesn’t end there, as they are also tasked with monitoring compliance with the conditionality (Art. 13(7) ESMT).

The economic strictness of financial assistance conditionality has grown since 2010.⁴³ As a corollary of fiscal discipline and consolidation, MEAPs mandate structural reforms of public sector core activities and make EFSF/ESM MoUs’ reliance on austerity measures suspect due to their impact on the equilibrium between the economic and social dimension of the EU.⁴⁴ The conditionality in assistance programs for Greece, Ireland and Portugal clashed with their visions of a welfare state in a way that went beyond the limits imposed by the Treaties.⁴⁵ Developments of this kind force national actors into defensive positions, shielding the uncompromising features of their national constitutional systems from untenable re-definition.

In the paradigmatic Portuguese case, on 5 July 2012 the Constitutional Tribunal declared a 2012 budget provision suspending payment of the 13th and 14th monthly salary for public sector employees unconstitutional. While acknowledging that the budget was adopted pursuant to the MoU (as a condition for loans), the Tribunal found that it still violated the constitutional right to equality and proportionality.⁴⁶ On 5 April 2013, it struck down several provisions of the budget law for 2013.⁴⁷ On

42 *I.e.* not in the form of one of the other assistance facilities envisaged by the ESMT– purchase of bonds in the primary and secondary markets, precautionary program and recapitalization of financial institutions (banks) through loans to governments (Arts. 14-18 ESMT). ESM’s initial lending volume (consolidated with that of the EFSF) is €500 billion (Art. 39 ESMT).

43 Ioannidis, M., *How strict is „strict conditionality“? The new Eurozone agreement on Greece*, European Law Blog, < <http://europeanlawblog.eu/2015/03/19/how-strict-is-strict-conditionality-the-new-eurozone-agreement-on-greece/>>, 19 March 2015.

44 Costamagna, F., *Saving Europe „under strict conditionality“: A threat for EU social dimension?*, Torino, Centro Luigi Einaudi, Working Paper No. 7, 2012, p. 12.

45 *ibid.*, p. 15.

46 The Constitution „prevents economic and social objectives from prevailing, without limits, on the principles...which the Constitution defends“ – Acórdao No. 353/2012, par. 6, translated in Fabbrini, F., *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, Oxford, Oxford University Press, 2016, p. 87.

47 Acórdao No. 187/2013 - the Court only dealt with the „international arm“ of the rescue package (the MoU and Financial and Assistance Programme with the EFSF), while neglecting the „EU side“ of the assistance (the EFSM). The MoU was treated as legally binding and providing for direct legal constraints upon the Portuguese constitutional system – Fasone, C., *Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative*

19 December 2013 it pruned parts of the budget law for 2014 that reduced pensions of public sector workers and infringed the principle of legitimate expectations.⁴⁸ This should be recognized as an implicit invocation of the constitutional identity narrative, highlighting the significance of social rights and equality in the Portuguese constitutional tradition.⁴⁹ Gaining momentum, on 14 August 2014 the Tribunal fully unveiled its stance toward EU crisis law, finding Council's recommendation to be binding only in its objectives and not the national means employed.⁵⁰ Approximation of national legislation to the EU standard cannot release it from its obligation of fidelity to the Constitution: "domestic norms necessarily have to comply with the Constitution".⁵¹

As of 1 March 2013, assistance from the ESM is also conditioned upon ratification of the ("complementary"⁵²) intergovernmental TSCG and compliance with the requirements of its Title III ("Fiscal Compact") Article 3. Most of what the TSCG contains in terms of economic governance could have been adopted by EU legislation⁵³, but the German government (a perennial EU agenda setter) considered the new balanced budget commitment to be more permanent if "constitutionalized" in the TFEU.⁵⁴ After the UK government refused to agree on this amendment in December 2011, a separate treaty became the agreed venue for circumvention of the veto. In taking the "risk of engaging in this new and unpredictable treaty game", time was not taken "to consider whether...the wisest course might have been to adopt EU legislation through enhanced cooperation"⁵⁵. Article 3 of the TSCG stipulates that the Contracting Parties' budgetary positions be balanced or in surplus, and that this obligation be enforced by way of "provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes" (par. 2).

This means that the annual structural balance of the general government should be at its country-specific MTO - tethering the ESM to the "Six-pack" in the same way the strict conditionality element ties it to the "Two-pack". Integration of intergovernmental agreements and EU secondary legislation is therefore complete, intertwining the instruments in an organic way that defies the jurisdictional/

Perspective, Florence, European University Institute, Max Weber Programme 2014/25, p. 48. In comparison, the Greek Council of State considered the MoUs as declaratory political plans, not binding instruments – see Decision 668/2012 [28], cited by Hinarejos, A., *The Euro Area Crisis in Constitutional Perspective*, Oxford, Oxford University Press, 2015, p. 146.

48 Fasone, C., *ibid.*, pp. 28 and 48.

49 *ibid.*, p. 48.

50 *ibid.*, p. 49.

51 *loc. cit.* Unsurprisingly, the Commission's reaction to the Tribunal's decisions treated the Tribunal's verdict "as a hindrance that could not be allowed" – Scicluna, N., *op. cit.*, p. 135.

52 Recital 5 ESMT.

53 De Witte, B., *op. cit.*, p. 8, and Curtin, D., *Challenging Executive Dominance in European Democracy*, *Modern Law Review*, vol. 77, 1/2014, p. 10.

54 De Witte, B., *loc. cit.*

55 *ibid.*, p. 9.

organizational disparities between them. Reinforcing the synergism of the new economic governance, this interconnectedness also highlights the willingness to sacrifice legality to efficiency. The ECJ is tasked with overseeing adherence to the balanced budget rule, even imposing a lump-sum or penalty payments not exceeding 0.1% of the State's GDP.⁵⁶ The TSCG limits the "structural deficit" to 0,5% of the GDP (par.2(b)) without mentioning *how* to operationalize this structural deficit concept, which presupposes the elimination of cyclical effects *i.e.* a determination of an economy's normal capacity. Theoretically, structural deficit represents a gap between a country's actual and potential output, *i.e.* output it would have if all of its resources were actively employed.⁵⁷ The part of the deficit caused by business cycle fluctuations ("cyclical deficit") is, therefore, not taken into account. The problem is, "the way the potential output [of an economy] is established provides a significant entry point for discretionary choices... [T]he concept of 'structural balance' is 'not observable', and...depends on estimations, which 'implies difficulties, uncertainties and controversies'.⁵⁸ It follows that enshrining such a malleable and controversial concept "preferably" in constitutional provisions demonstrates ignorance or even contempt of the role national constitutions play in codifying social morality.

4. ROLE OF EU BODIES IN THE NEW ECONOMIC GOVERNANCE

4.1. "Emergency" discourse

While there are a number of earlier international treaties concluded between discreet groups of Member States (*e.g.* the Schengen regime), such practice has declined in the course of the evolution of European integration.⁵⁹ "Coalitions of the willing" supplementing the Treaty framework should be a matter of last resort, since even if they do not contradict EU norms their existence implies the breakdown of the regular decision-making process and the bond of mutual trust between States.⁶⁰ This is especially salient in the present context, imbued with an understanding that compliance with the letter of the law would cause more harm than its breach.⁶¹

The most recent crisis resulted in a proliferation of decision-taking by

56 Article 8(2) TSCG. Damian Chalmers objects to making the ECJ „an active agent of EU executive government. The Court is now so enmeshed with the regular policy-making of the EU as to lose much of its original purpose“ – *The European Court of Justice is not little more than a rubber stamp for the EU*, LSE blog, <<http://blogs.lse.ac.uk/europpblog/2012/03/08/ecj-rubber-stamp-replacement/>>, 8 March 2012.

57 Darvas, Z., *Mind the gap! And the way structural budget balances are calculated*, Bruegel, <<http://bruegel.org/2013/10/mind-the-gap-and-the-way-structural-budget-balances-are-calculated/>>, 18 October 2013.

58 *loc. cit.*

59 De Witte, B., *op. cit.*, p. 2.

60 White, J., *Authority After Emergency Rule*, *Modern Law Review*, vol. 78, 4/2015, p. 601.

61 Everson, M.; Joerges, C., *op. cit.*, p. 23.

supranational and national executives.⁶² A troubling feature of this rise of intergovernmentalism is the centrality of emergency discourse that legitimizes a shift of governance from a normative type to one “clearly and explicitly exercising hands-on executive power even in such sensitive fields as national budgets and macro-economic decisions”.⁶³ A mere citing of crisis conditions seems to be enough of a justification for executive discretion - “[e]xceptionalism and improvisation have been widespread” as necessary responses to an urgent situation.⁶⁴ Such emergency rule poses a number of problems, such as the danger that the temporary, urgently scrambled-together measures acquire lasting legitimacy⁶⁵, and also that its casualties could include fundamental principles and the institutional patterns that channel them.⁶⁶ One of those principles, equality of states, is pressured by the “Six-pack’s” introduction of the reverse qualified majority voting (RQMV) whereby the Commission’s recommendation of sanctions proceeds *unless* blocked by a qualified majority of Member States in the Council. Sanctions can thus proceed only upon approval by the large “core” countries (France and Germany), and the Commission’s powers of initiation are increased.⁶⁷ Also infringed is state sovereignty, pressured by the use of conditionality that compromises the nationalized nature of decision-making on taxation and welfare spending. Democratic control is also skirted on the level of the EU proper, where the role of the European Parliament is informational and consultative at best under the ESM and TSCG.⁶⁸

62 Curtin, D., op. cit., p. 2.

63 *ibid.*, p. 6, noticing a shift from „economic governance“ (rules-based normative system) towards „economic government“ (discretionary executive decisions).

64 White, J., op. cit., p. 586.

65 *loc. cit.*

66 *ibid.*, p. 587. The use of crisis to rewrite the terms of the political order (*ibid.*, p. 604) is criticized by a number of national political movements.

67 The automatism described puts „power totally in the hands of the experts“ – Christine Lagarde’s 2010 remarks (as the then French Finance Minister) in *France, Germany clash over austerity measures*, Sydney Morning Herald, <<http://www.smh.com.au/world/france-germany-clash-over-austerity-measures-20100928-15vrx.html?deviceType=text>>, 29 September 2010.

68 In general, see Fasone, C., *European Economic Governance and the Parliamentary Representation: What Place for the European Parliament?*, *European Law Journal*, vol. 20, 2/2014, p. 164: „the risk within EU economic governance is that fiscal austerity is put in place and pursued...by an authority which is lacking in representative credentials according to democratic standards” and by “marginalising the institutions which directly represent the citizens affected by these policies, to wit the EP and the national parliaments“ (p. 185). National parliaments are structurally outsiders in these processes. Secret meetings behind closed doors, with no public debate, make effective parliamentary input and control difficult (Curtin, D., op. cit., p. 17), and the role of parliaments may be thus eviscerated (*ibid.*, p. 24).

4.2. Participation in the enforcement of crisis-fueled intergovernmental agreements

4.2.1. The role of the Charter of Fundamental Rights

The conclusion that Member States are free to make intergovernmental agreements under private and international law that are calibrated towards crisis resolution has another worrying consequence – it largely shields their operation from the scope of the Charter. Regardless of the necessity of congruence of ESM-Member State agreements with EU law, the *telos* of Article 125's imposition of strict conditionality is tied only to the *economic* dimension, that of policing an incentive to sound budgetary policy. Inasmuch as the Charter's provisions are binding on Member States only when "implementing EU law" (Article 51(1) CFR), and as the set-up of the ESM is not *mandated* by a rule of EU law (or specifically stipulated as the Union's competence), MoUs adopted within the ESM framework are immune against the Charter's application (*Pringle*, paras.178-180).⁶⁹ It is still formally applicable to the participating EU institutions⁷⁰ - however, "assigning blame" to an EU institution may prove particularly problematic, seeing as it may not be the formal decision-maker, and/or the responsibility may be shared with Member States.⁷¹

The question is: will the ECJ hold EU institutions to Charter's standards? So far, it has declined to address this issue in the small number of cases it was seized with.⁷² It has also abdicated jurisdiction to review *national* measures adopted pursuant to an EFSF/EFSM MoU⁷³, citing a lack of link to EU law despite the existence of a Council Decision that implemented the contents of the MoU. It held that "it should be recalled that...the provisions [of the Charter] are addressed to 'the Member States only when they are implementing Union law' [and]...there is no specific evidence to consider that the law [in question, implementing the MoU]

69 „For similar reasons it could be argued that the conclusion of the TSCG did not infringe the Charter“ –Barnard, C., *The Charter, The Court – and the Crisis*, Cambridge, University of Cambridge Research Paper 18/2013, August 2013, p. 12. „However, the TSCG is different from the ESM because...the content of the fiscal compact part of the TSCG largely overlaps with the content of the 'six pack' rules...Further, the link with the EU Treaties is much stronger (especially bearing in mind the commitment in Article 16 of incorporating the substance of the TSCG into the legal framework of the Union)“ – loc. cit. This suggests that acts taken under the TSCG need to be read subject to the Charter – „which they would be if they were taken under the six pack which is part of EU law“ – loc. cit.

70 *Pringle*, Opinion of AG Kokott, par.176.

71 Craig, P., *Pringle and Use...*, cit., p. 28.

72 Hinarejos, A., *The Euro Area...*, cit., p. 133.

73 The following references for preliminary ruling were all made by the Portuguese courts (Labor Tribunals of Porto and Lisbon): C-128/12 *Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios SA* of 7 March 2013, C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial — Companhia de Seguros SA* of 26 June 2014, and C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa - Companhia de Seguros SA* od 21 October 2014.

aims to implement the EU law”.⁷⁴ The reforms which a Member States undertakes as a condition for financial assistance are considered to be voluntary, since they are not tied to a binding obligation mandated by EU law.⁷⁵ This “suggests a twin-track approach: on the one hand the Charter will be applied with vigor to non-crisis situations; on the other, the Charter will not be applied to rules arising out of the EU’s response to the financial and economic crisis”.⁷⁶ Such an approach is “not legally, politically or practically sustainable”⁷⁷, avoiding a contextualization of its role along with a (necessarily!) synthetic reading of the totality of euro-crisis law. The Court’s actions are inconsistent, given its willingness to extensively interpret the scope of EU law when it should prove favorable for the Union.⁷⁸ While the cited case-law relates specifically to the EFSM/EFSF conditionality, the link with EU law is even more apparent regarding the ESM and the application of the “Two-pack”, where such emergency-discourse hastened eschewing of judicial responsibility cannot be sufficient.⁷⁹ The draft MEAP approved by the Council and then inserted in the MoU, synthetically linking ESM’s activities with those of the EU, *should have* to comply with provisions of the Charter.

ESM conditionality was most recently taken to court in Cypriot bank-bailout appeal cases in 2016, where the applicants challenged the validity of a MoU. In *Ledra Advertising*⁸⁰ and *Mallis*⁸¹, the ECJ reiterated that ESM acts fall outside the scope of EU law (*Ledra Advertising*, paras.53-54). But, the involvement of the Commission and the ECB in the adoption of the MoU may be unlawful and give rise to EU’s non-contractual liability for damages (par.55) if the breach of rule of

74 *Sindicato dos Bancários do Norte*, paras. 11-12. The Court did not distinguish its reasoning in this case, where the Council Decision implementing the MoU was adopted *after* the specific national measures at stake, and the one in cases C-264/12 and C-665/13 (which were different in that regard).

75 Hinarejos, A., *The Euro Area...*, cit., p. 134.

76 Barnard, C., *op. cit.*, p. 2.

77 *loc. cit.*

78 Hinarejos, A., *The Euro Area...*, cit., p. 135, referring to the case C-617/10 *Åklagaren v Hans Åkerberg Fransson* of 26 February 2013, where the Court re-interpreted Article 51 of the Charter as mandating its application where Member States act „in the scope of Union law“, rather than when „implementing“ it (paras. 19-22).

79 Hinarejos, A., *loc. cit.* – while the link between MoUs and EU law was that essential contents of MoUs were mostly adopted within Council Decisions under Arts. 126 and 136 TFEU, the “Two-pack” made it more explicit. It created an obligation for the Member State asking for financial assistance to adopt a MEAP in agreement with the Commission, which is then adopted by the Council. The Commission, furthermore, ensures that the MoU is *fully consistent* with the MEAP.

80 Joined cases C-8/15 P to C-10/15 P (*Ledra Advertising, Andreas Eleftheriou, Eleni Eleftheriou, Lilia Papachristofi, Christos Theophilou and Eleni Theophilou v. European Commission and ECB*), of 20 September 2016.

81 Joined cases C-105/15 P to C-109/15 P (*Konstantinos Mallis, Elli Konstantinou Malli, Tameio Pronoias Prosopikou Trapezis Kyprou, Petros Chatzithoma, Elenitsa Chatzithoma, Lella Chatziioannou and Marinos Nikolaou v. European Commission and ECB*), of 20 September 2016.

law (unlawfulness of the act in question) is sufficiently serious (par.65).⁸² As the Commission is the “guardian of the Treaties”, it cannot support/sign an act that doesn’t conform to EU law.⁸³ At least some Charter provisions within the ESM framework could potentially give rise to damages liability – social security and many welfare claims fall within the scope of the right to property according to the case-law of the European Court of Human Rights.⁸⁴ This is of particular interest, as the adjustment programs rest “upon draconian austerity measures...[that entail] drastic reductions to social expenditure”.⁸⁵

4.2.2. “Loaning” EU institutions

The governance system of the ESM forms a “curious hybrid”⁸⁶: decision-making powers are entrusted to organs composed of representatives of the Members, who happen to be the same persons who represent their country in the EU’s Euro Group and its Working Group. EU institutions like the Commission and the ECB are given a prominent role in preparing and implementing those (intergovernmental) decisions⁸⁷, while disputes concerning the interpretation and application of the (intergovernmental) ESM Treaty are submitted to the ECJ (as authorized by Article 273 TFEU, recital 16). Representatives of the European Commission, President of the ECB and the President of the Euro Group may participate in the meetings of the Board of Governors of the ESM as observers (Article 5). The Board of Governors tasks the Commission with negotiating, in liaison with the ECB, the economic policy conditionality attached to financial assistance (Art. 5(6(g))). It is clear that the Commission and the ECB play the role of agents of the ESM, preparing its operations and overseeing their implementation.

While tasking the ECJ finds an explicit base in the TFEU, rationalization regarding the Commission and the ECB is not so linear. In *Pringle* the ECJ confirmed that the Member States are clearly entitled 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 TEU/TFEU (par.158). This formulation carries a number of problems from a constitutionalist standpoint. The first is a case of a failed analogy – such loaning of EU institutions was originally allowed in cases of non-exclusive Union competence

82 This much welcome addition to the Court’s case-law was prematurely hailed as „the end of impunity“ –Dermine, P., *ESM and Protection of Fundamental Rights*, *Verfassungsblog*, <<http://verfassungsblog.de/tag/ledra-advertising/>>, 21 September 2016.

83 This is compounded by – but not limited to! – the fact that the ESMT explicitly obliges the Commission to ensure that the MoUs concluded by the ESM are consistent with EU law – *Ledra Advertising*, par. 58.

84 Hinarejos, A., *Bailouts, Borrowed Institutions, and Judicial Review: Ledra Advertising*, *EU Law Analysis*, <<http://eulawanalysis.blogspot.hr/2016/09/bailouts-borrowed-institutions-and.html>>, 25 September 2016.

85 Costamagna, F., op. cit., p. 5.

86 De Witte, B., op. cit., p. 7.

87 loc. cit.

where Member States decided to act outside the framework of the Treaties, because the “foundational imperative was that Member States acted in their field of competence, but found it useful to ask the Commission for help”.⁸⁸ However, with the ESM Treaty is “the implicit legal metaphor...is governance and survival: the EU institutions had to be involved”.⁸⁹ The second problem is that the “differentiated integration” treaty must only *not entrust* tasks which alter the essential character of powers conferred on the Commission and ECB by the Treaties. There are *no formal legal requirements* regarding this process – no obligation of adopting a reasoned justification for action, no particular form of the institution’s decision, no mandatory consultation with other actors or agreement of other institutions.⁹⁰ We can observe an unsettling shift in allegiances – when the Commission “invests heavily” in an external treaty, this makes for a very strong influence on the way it designs subsequent proposals for EU legislation.⁹¹ Whether the new tasks alter the essential powers of the institution or not will also depend on the degree of broadness with which that character would be judicially construed⁹² (*cf. Pringle*, par.163).

The initial assumption might have been that ECB’s technical expertise serves as a complement to that of the Commission, and that it could support it in negotiating and monitoring the implementation of various EU/IMF programs. Virtually all financial assistance facilities since the start of the crisis has set out a role for the ECB.⁹³ However, ECB’s participation in this regard is not clearly defined, hiding behind an oblique “in liaison with” formula. Indeed, “Reasons for European authorities to request ECB participation in the Troika are not spelled out, and there is no straightforward rationale for this involvement”.⁹⁴ In the ordoliberal conception of the EMU, monetary policy is a non-political field pursued by independent experts unconcerned by issues of democratic legitimacy.⁹⁵ Fiscal

88 Craig, P., *Pringle and Use...*, cit., pp. 7-8.

89 *ibid.*, p. 8.

90 *ibid.*, p. 10. Decisions on the part of „loaned“ EU institutions to participate in an asymmetrically-concluded treaty may not be binding on the Union, but they’re still integral to the EU as a whole – 12. As to the issue of authorization by non-participating Member States, on 20 June 2011 the representatives of the 27 governments authorized the Contracting Parties of the ESMT to request the Commission and ECB to perform the tasks provided for in that Treaty – De Witte, B., *op. cit.*, p. 19. Tuori notes the legal insignificance of this: “EU legislative procedures aim not only at guaranteeing the influence of all Member States but also the democratic input of the European Parliament and, after Lisbon, national parliaments as well” – Tuori, K., *The European...*, cit., pp. 36-37.

91 Craig, P., *Pringle and Use...*, cit., pp. 15-16.

92 *ibid.*, p. 22.

93 Athanassiou, P., *The ECB’s Discretionary Powers and Role in the Sovereign Debt Crisis: An Overview*, London, King’s College, 11 March 2016, p. 9 (presentation available at <<https://www.kcl.ac.uk/law/research/centres/european/Binder1---all-papers.pdf>>, starting at p. 48).

94 Pisani-Ferry, J.; Sapir, A.; Wolff, G., *EU-IMF assistance to euro-area countries: an early assessment*, Bruegel, <<http://bruegel.org/2013/06/eu-imf-assistance-to-euro-area-countries-an-early-assessment/>>, 16 June 2013, p. 24.

95 „Not only has monetary policy no need of continuously produced democratic legitimacy but subordinating the ECB to the whims of democratic politics would be disastrous“ – Tuori, K., *The European...*, cit., p. 8.

policy, on the other hand, rests on a particular redistributive justice paradigm, and must receive democratic input legitimacy provided by national political fora.⁹⁶ Involvement of an expert and technocratic body such as the ECB in the implementation of extra-Treaty intergovernmental frameworks runs the risk of conflating the two policies in a hard-to-distinguish manner. As an institution relying on output legitimacy⁹⁷, the ECB is „politically and socially ‘disembedded’“, operating in a political and social vacuum.⁹⁸ It doesn’t interact with a (non-existent) European government or public opinion. Different democratic countries have found different solutions for this problem, but they all include a crucial role for public opinion and communication between such non-majoritarian, and democratically legitimated institutions. *National* central banks do not operate in vacuum, and are embedded in national debates which make them at least somewhat accountable to public opinion.⁹⁹ But in the case of the ECB, the lack of democratic control does nothing to encourage self-restraint¹⁰⁰. In his Opinion in *Gauweiler*¹⁰¹, AG Villalón agrees with the claim that the ECB’s dual role in the never-activated OMT program (see *infra*) compromises its limitations under the Treaty (paras.142 and 151). Seeing as the Treaties do not provide for criteria for the delimitation between monetary and economic policy, ECB’s competences should be narrowly interpreted due to democratic problem inherent in the ECB’s independent status.¹⁰² That means that in no scenario should it be possible for ECB officials to blackmail a President into

96 Tuori notices that the non-political character of monetary policy suffered a severe blow during the crisis, as the relationship between the monetary and national fiscal policy shifted: the needs of the latter now determine the former – Tuori, K., *European Constitutionalism*, Cambridge, Cambridge University Press, 2015, p. 196. On the other hand, “a contrary tendency of *de-politicization* is perceivable in fiscal – and even macro-economic policy.” – *id.*, *The European...*, *cit.*, p. 45. Efforts to tighten fiscal discipline have diminished Member States’ fiscal policy sovereignty, as they were forced (through various provisions of the TSCG, “Six-pack” and “Two-pack”) to conform their national budget procedures to European requirements. Constitutionalized balanced budget requirement, excessive deficit and imbalance procedures, annual budget planning overseen by the Commission within the European Semester etc., fly in the face of the need for democratic legitimacy of fiscal policy – *loc. cit.*

97 ‘Input’ considerations relate to the democratic character of the decision procedure, and in particular the right of all citizens to participate on an equal basis in political decision-making. By contrast, ‘output’ considerations relate to the degree to which the substance of the decision may be said to promote collective interests in a manner compatible with the democratic goals of equal concern and respect” – Bellamy, R., *Democracy without democracy? Can the EU’s democratic “outputs” be separated from the democratic “inputs” provided by competitive parties and majority rule?*, *Journal of European Public Policy*, vol. 17, 1/2012, p. 3.

98 Majone, G., *Rethinking European Integration After the Debt Crisis*, London, University College, European Institute, Working Paper No. 3/2012, June 2012, p. 14

99 Bellamy, R., *op. cit.*, p. 11.

100 Majone, G., *op. cit.*, p. 17.

101 Case C-62/14 *Peter Gauweiler and others v. Deutscher Bundestag*, opinion delivered on 14 January 2015.

102 Schmidt, R., *Die entfesselte EZB*, *Juristenzeitung*, vol. 70, 2015, as referred to (disapprovingly) by Sauer, H., *op. cit.*, p. 976.

resigning¹⁰³, or to explicitly threaten a sovereign state with default should it not comply with its instructions.¹⁰⁴

4.3. ECB to the rescue – creative monetary policy, or ultra vires actions?

After the lid was blown on the severe situation in Greece in October 2009, doubts grew over the stability of public finances in some euro area countries and the spreads between government bond yields across the Continent rose sharply. Sovereign markets became highly fragmented, fueled by (nervous) market perceptions about the viability of some countries' fiscal balances, and the monetary policy transmission mechanism was impaired.¹⁰⁵ ECB had to try to resolve these problems, preserving price stability through (euphemistically called) “unconventional monetary policies”.¹⁰⁶ Joining the bandwagon of conditionality-legitimizing-actions-beyond-the-meaning-and-scope-of-the-Treaty, it quoted “strict and effective conditionality” (attached to an EFSF/ESM program) of its (never implemented) OMT program¹⁰⁷ and its later Quantitative Easing (QE) policy.¹⁰⁸

4.3.1. OMT and Gauweiler – continuation of monetary policy by other means

The ECB has certainly resorted to highly unusual instruments of monetary policy anent the euro-crisis. Conventional monetary policy has not been able to “mop up” in the aftermath of the financial crisis and stimulate the economy into

103 Land, C., *The Eurozone Crisis and the European Central Bank's Lost Independence*, *Minnesota Journal of International Law*, vol. 25, 2/2016, p. 507, citing accounts by Lorenzo Bini Smaghi (former member of the ECB Executive Board) and Timothy Geithner (former U.S. Secretary of the Treasury).

104 *ibid.*, p. 509.

105 *The Determinants of Euro Area Sovereign Bond Yield Spreads During the Crisis*, ECB Monthly Bulletin, May 2014, p. 67.

106 *loc. cit.* The ECB had to intervene in order to reduce the bond yield spreads, whose acute divergence between „peripheral“ euro countries and Germany made it not only increasingly difficult for the former to finance their public deficits, but also triggered a flight of investors to safety, namely the latter. The ensuing unavailability of funds (or their prohibitively high cost) would (in the long run) cause possible pressures on their national central banks to increase liquidity by entering into a primary emission. In the short run, the high cost of borrowing meant that countries with high budget deficits entered into a vicious circle where they issued more bonds (at high cost) just to cover repayment of the older ones. Such unproductive use of funds – which are not being used to stimulate production via investments etc. – inevitably causes inflation, pressuring price stability and the uniform transmission of the ECB's monetary policy.

107 See *Technical features of Outright Monetary Transactions (OMT)*, ECB press release, 6 September 2012.

108 *Decision (EU) 2015/774 of the ECB on a secondary markets public sector asset purchase programme*, ECB/2015/10, 4 March 2015.

recovery.¹⁰⁹ Colloquially called “Draghi’s bazooka”¹¹⁰, the OMT was designed to remedy central shortcomings of the Securities Markets Programme (SMP) – namely, its limited size.¹¹¹ In a speech given on 26 July 2012 in London, the President of the ECB Mario Draghi announced it “is ready to do whatever it takes to preserve the euro”, adding “believe me, it will be enough”.¹¹² On 6 September 2012, the Governing Council of the ECB announced its decision on a number of technical features of the OMT¹¹³: purchase of euro-zone countries’ short-term bonds (with maturity between 1 and 3 years) in the secondary market, conditioned by the existence of a EFSF/ESM program or macroeconomic adjustment program unrelated to those institutions, *without any ex ante quantitative limits*. The excess liquidity would be “fully sterilised”, perpetuating the template introduced with the SMP.

Even if it was never activated, the OMT program triggered a major challenge to the “constitutionality” (*vis-à-vis* the Lisbon Treaty) of ECB’s actions. ECJ’s OMT decision in the *Gauweiler* case is considered to be “the most important decision on the role of the ECB”¹¹⁴ in the governing of the euro-crisis – not least

109 Joyce, M. and others, Quantitative Easing and Unconventional Monetary Policy – an Introduction, *The Economic Journal*, vol. 122, 2012, p. 272.

110 Steen, M.; Fontanella-Khan, J.; Stothard, M., *ECB signals resolve to save euro*, *The Financial Times*, <<https://www.ft.com/content/b70ff9a8-f84c-11e1-b0e1-00144feabdc0>>, 6 September 2012.

111 On 10 May 2010, the central banks of the Eurosystem started purchasing securities in the context of the SMP – a program to purchase bonds (especially sovereign bonds) on the secondary markets. Its aim was to counteract disruptions in the monetary policy transmission mechanism, and at its peak its (overall – from 2010 to 2012) volume totaled around €210 billion (Blackstone, B., *Bundesbank would favor end of ECB sterilization* – Source, Dow Jones Newsletters, <<http://new.dowjones.com/newsletter/bundesbank-favor-end-ecb-sterilization-source/>>, 31 January 2014). Following a Governing Council decision on 6 September 2012 to initiate the OMT, the SMP was terminated. The existing securities in the SMP portfolio were to be held to maturity. Sterilization (re-absorbing of liquidity provided by the SMP *via* weekly operations that include offers of interest-bearing deposits to banks in the amount corresponding to liquidity injected) was suspended by the ECB’s decision of 5 June 2014 (the last operation was allotted on 10 June 2014) - <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>. This date coincides with the ECB’s introduction of the *negative interest rate on the deposit facility* at -0.1% on 11 June 2014 (the last update of this key interest rate was on 16 March 2016, setting it at a historical low of -0.4% - <https://www.ecb.europa.eu/stats/monetary/rates/html/index.en.html>). 2014 also saw increased discussions about the extent to which there is a risk of deflation in the euro area, given that the overall annual inflation in that area has declined from 3% in November 2011 to just 0.5% in May 2014. On that basis, the IMF estimated the risk of deflation in the euro area by the end of 2014 to be at 20% - *Economic and Monetary Developments*, ECB Monthly Bulletin, June 2014, p. 65.

112 Speech made at the Global Investment Conference in London, <<https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>>.

113 See *supra*, note 107.

114 Goldoni, M., *The Limits of Legal Accountability of the European Central Bank*, University of Glasgow, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712240>, 7 January 2016, p. 9.

due to its origin in the first ever reference for a preliminary ruling by the German Federal Constitutional Court.¹¹⁵ The interaction of the ECJ and BVerfGE in that case underlined the profound constitutional nature of the dispute, with the latter court questioning: (1) whether the ECB's OMT Decision exceeds the Bank's monetary policy mandate¹¹⁶ regarding its conditionality¹¹⁷, selectivity (purchase of bonds only of selected States), parallelism (with programs of the EFSF/ESM) and bypassing of the EFSF/ESM's programs' conditions and terms; and (2) whether it is incompatible with the prohibition of monetary financing, seeing as it doesn't provide for quantitative limits or a time lag between the bonds' emission and purchase through OMTs (influencing pricing), allows for bonds to be held to maturity, and contains no requirements for the credit rating of the bonds purchased (default risk). The BVerfGE drew upon its case-law enabling it to review acts of European institutions and agencies that are based on *manifest* transgressions of powers (*ultra vires* acts and the "Honeywell doctrine"¹¹⁸) or affect an area of constitutional identity¹¹⁹ (regarding the principle of the overall budgetary responsibility of the Bundestag – par. 28).¹²⁰

115 Order of the Second Senate, 2 BvR 2728/13, 2 BvR 2729/2013, 2 BvR 2730/13, 2 BvR 2731/13 and 2 BvE 13/13 of 14 January 2013, suspending proceedings and referring two questions for a preliminary ruling pursuant to Art. 367 TFEU.

116 Interfering with the responsibility of the Member States for economic policy – par. 39. The Union's competences in that area are limited to a coordination of Member States' economic policies. The ECB may only *support* their general economic policies, not pursue its own (*ibid.*).

117 Linking the OMT to assistance measures of significant financial scope and general political implication that belong to the core aspects of the Member States' economic policy responsibilities (par. 40). Tying the purchase of government bonds of selected Member States to full compliance with the requirements of the assistance programs of the EFSF/ESM, the ECB makes the purchase an instrument of economic policy. This is confirmed by the fact that OMTs would not be carried out unless the program conditionality is fully respected (par. 77). OMTs then become functional equivalents to an assistance measure of those institutions, without parliamentary legitimation and monitoring (par. 78).

118 BVerfGE, 126, 286: „*Ultra vires* review may only be exercised in a manner which is friendly towards European law...The Union...is in particular bound by the principle of conferral and by fundamental rights, and it respects the constitutional identity of Member States...[T]he Federal Constitutional Court must in principle comply with the rulings of the Court of Justice” which is “to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings“. *Ultra vires* review may be considered only if the transgression of powers is (a) manifest; (b) specifically violating the principle of conferral; making the breach of powers (c) sufficiently qualified and (d) highly significant for the allocation of powers between the Member States and the Union (paras. 303-304).

119 Review cannot be waived with regard to the „eternity clause“ of Art. 79(3) of the Grundgesetz. Germany is one of the „masters of the Treaties“, making the primacy/priority of Union law non-comprehensive in this regard (*Gauweiler* order, 26).

120 “*Bundestag* may not consent to an automatism of bonds or benefits that are agreed upon intergovernmentally or supranationally and that is not subject to strict specifications and whose effects are not limited, and which – once it has been set in motion – is removed from the *Bundestag*'s control and influence“ (citing BVerfGE 129, 124). The OMT decision could violate the constitutional identity of Germany if it created a mechanism which would amount

Moreover, it stressed the incompatibility of this protection of German constitutional identity (which is *not* subject to balancing in the matrix of proportionality analysis) with the guarantee of “national identity” in Article 4(2) TEU (which is). There is no legitimate aim capable of compromising the “inviolable core content” of the Grundgesetz (paras. 27 and 29). The reference is framed in conclusive terms, stating that the “applications would probably be successful”, unless the OMT Decision were interpreted “in conformity with primary law” (55).¹²¹ Where there is a blurring of the lines between monetary policy (competence of the ECB) and “just” economic policy (a province of the States), it is the duty of the ECJ to delineate these two, and determine the scope and content of the ECB’s mandate - the Court’s inaptness in economic sciences notwithstanding (par.60). While the Court in *Pringle* stressed the objectives of a policy, it is important to review the instruments used, as well as their *link to other provisions* (paras.64-65).

In our view, it is this last feature of a program which is most indicative of its nature, as it illuminates the *ratio* behind its nominal objectives. The BVerfGE states that “references...to other provisions and the embedding of an act in an overall regulation that consists of several individual measures can indicate its adherence either to the economic or monetary policy” (par.66). We must “pierce the veil” in the sense of reviewing the *amalgamated* picture of *individually legal* instruments, reassessing their constitutionality in this synoptic view of mutually intertwined mechanisms. In doing so, we must notice the convenient parallelism between *Pringle* and *Gauweiler*, with the first confirming ESM’s constitutionality on the grounds that it was a measure of economic policy with *tangential* monetary policy implications, and the latter approved the OMT as a program within the ECB’s monetary policy mandate with *tangential* economic policy implications (52).¹²² As the OMT’s conditionality tethers it firmly to ESM’s activities, one cannot but conclude that it represents an extension of economic policy cloaked by monetary policy justifications, transgressing the ECB’s mandate under the Treaties. It’s a pity

to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate (par.102).

121 The reference is „not formulated in terms of a dialogue between Courts, each respecting the other’s distinctive powers. Instead, the BVerfG...asks the CJEU essentially to confirm“ its interpretation, with a „thinly veiled threat“ to unilaterally hold an act of an EU institution to be invalid within Germany – Hofmann, H., *Gauweiler* and OMT: Lessons for EU Public Law and the European Economic and Monetary Union, University of Luxembourg, Working Paper, 19 June 2015, p. 1.

122 “The delimitation of monetary...and economic policy...is viewed by the CJEU in *Gauweiler* as a question of primary versus secondary effects of a measure. In reality, the distinction mirrors older case law of the CJEU on the so called ‘*centre of gravity*’ rule which was applied in situations where a measure could have several competing legal basis each proposing a different decision making procedure. The Court informs that the fact that a measure in the field of the Union’s monetary policy might incidentally also have secondary effects ‘on the stability of the euro area’, which is a matter of economic policy, does not call that assessment into question” – *ibid.*, p. 13.

that the ECJ did not address AG Villalón's opinion¹²³ on the untenable character of the ECB's dual role of (a) holder of a claim the basis for which is a government bond issued by a State, and (b) supervisor and negotiator of a financial assistance program applied to the same State. AG Villalón held that, in the event that the OMT program be activated, the ECB would be prevented from direct involvement in the financial assistance programs of the ESM or EFSF applied to the State concerned – if the OMT were to stay regarded as a monetary policy measure (paras.142 and 150-151).¹²⁴

The ECJ's response on 16 June 2015 took upon face value ECB's claim that the OMT is targeted (just) at "appropriate monetary policy transmission and the singleness of monetary policy" (par. 47 - an expansive and undefined objective, if there ever was one).¹²⁵ From the economic-technical viewpoint, the decision is surprisingly devoid of a closer scrutiny of ECB's claims and arguments. While acknowledging the ECJ's judges' lack of expertise in this regard, as well as the limited scope of the judiciary's mandate (rulings on points of law, instead of technical, discretionary choices)¹²⁶, we do believe that an assessment of legality of independent regulators' activities necessitates a degree of examination stricter than mere rubberstamping. The Court reiterates its previous case-law where it held that an EU institution that enjoys broad discretion must give an "adequate" statement of reasons for its decision (par. 69), even if it needn't go into every relevant point of fact and law (par. 70). In this case ECB's information "doesn't appear" to be vitiated by a "manifest error of assessment" (par. 74). The "least restrictive means" step of proportionality analysis is thus restated as "not manifestly unnecessary" means (par. 81)¹²⁷ – in this regard, we cite the BVerfGE's belief that "the independence

123 Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, opinion delivered on 14 January 2015.

124 Where a state is the recipient of substantial assistance from the ECB on the secondary government bond market, putting the ECB *simultaneously* in a position where it oversees the implementation of a financial assistance program that its OMTs are conditional upon compromises its purely monetary policy agenda (paras. 150-151). The Court, inversely, viewed adherence to program conditionality positively, as a means through which to avoid the risk of the launch of OMTs lessening the incentives of beneficiary Member States to follow a sound budgetary policy (Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, 16 June 2015, par. 120).

125 „[T]he Court of Justice accepts the assertion that the OMT programme pursues a monetary policy objective without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions with regard to the indications that evidently argue against a character of monetary policy“ – BVerfGE's *Gauweiler* judgment on 21 June 2016, Press release (in English) No. 34/2016 of 21 June 2016.

126 "This type of highly technical, very complex and information intensive activity is...very difficult to monitor through 'traditional' legal means of a framework of powers and judicial review" – Hofmann, H., op. cit., p. 16.

127 „Interestingly, the CJEU decides actively to reduce its level of review as compared to the AG who in par. 177 of his opinion refers to more onerous second-leg proportionality test by looking for whether 'the means used may none the less be excessive if compared with the other options that would have been available to the ECB.'“ – *ibid.*, p. 19.

granted to the European Central Bank leads to a noticeable reduction in the level of democratic legitimation of its actions and should therefore give rise to restrictive interpretation and to particularly strict judicial review of the mandate of the European Central Bank”.¹²⁸

The ECJ does, however, concede that ESCB’s intervention “could, in practice, have an effect equivalent” to monetary financing “if the potential purchasers of government bonds on the primary market know for certain that the ESCB was going to purchase...within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds” (par.104). Having the benefit of hindsight, we can conclude that the ECB’s activities since OMT’s announcement (with the introduction of an unsterilized PSPP and especially principal reinvestment policy – see *infra*) reduce this margin of uncertainty to a degree compromising ECJ’s conclusion. However, cornered by the *Honeywell* doctrine and its request of a manifest transgression of competences¹²⁹, on 21 June 2016 the BVerfGE confirmed (with some conditions – par. 206) its legality¹³⁰.

4.3.2. “What’s in a name” – QE as primary financing in disguise

As a program entailing full sterilization of excess liquidity it created, the OMT was (just like the SMP) not amenable to being used as a price stabilization tool. The most high-profile form of unconventional monetary policy thus became QE. Under Art. 18(1) of the Statute of the ESCB and of the ECB, the ECB and national central banks of euro-states may operate in the financial markets by buying and selling marketable instruments outright. On 22 January 2015, the Governing Council of the ECB decided that its existing Asset Purchases Programmes (APPs)¹³¹ be expanded

128 loc. cit.

129 The BVerfGE found that the ECJ’s interpretation „barely passed muster“ – Lindseth, P., *Meanwhile, in Germany...the OMT ruling of the German Constitutional Court*, EUTopia Law, <<https://eutopialaw.com/2016/06/23/meanwhile-in-germany-the-omt-ruling-of-the-german-constitutional-court/>>, 23 June 2016.

130 Judgment of the Second Senate of 21 June 2016, 2 BvR 2728/13.

131 Consisting of a covered bond purchase programme (already in its third generation at the time of launch of QE in 2015 – hence termed CBPP3) and an asset-backed securities purchase programme (ABSPP), and aimed at „further enhancing the transmission of monetary policy, facilitating credit provision to the euro area economy, easing borrowing conditions of households and firms and contributing to returning inflation rates“ to about 2% - Decision (EU) 2015/774 of the ECB on a secondary markets public sector asset purchase programme (ECB/2015/10, 4 March 2015), 3rd recital. Aimed at debt securities issued by financial institutions (i.e. banks), CBPP was originally (CBPP1) launched by a Decision of the ECB of 2 July 2009 (ECB/2009/16), encouraging credit institutions to maintain and expand their lending to clients and improve market liquidity – Beirne, J. and others, *The impact of the Eurosystem’s Covered Bond Purchase Programme on the Primary and Secondary Markets*, ECB Occasional Paper Series, No. 122, January 2011, p. 5. The then President of the Governing Council of the ECB Trichet expressly denied that the CBPP was quantitative easing, as the excess liquidity created by APPs before PSPP and 2015 was sterilized –

to include secondary markets *public sector* debt securities, in order to mitigate the risk of developments jeopardizing maintenance of price stability (Public Sector Purchases Programme - PSPP).¹³² The purchasing program began on 2 April 2015, totaling €60 billion per month until March 2016. On 10 March 2016, the ECB announced that it would increase this amount to €80 billion until at least March 2017 or until it sees inflation hit the target rate of 2% over the medium term.¹³³ It also expanded the eligible assets to include “euro-denominated bonds issued by non-bank corporations established in the euro area”, thus adding the Corporate Sector Purchase Programme (CSPP) to the pre-existing APPs and PSPP.¹³⁴ The figures for October 2016 show that, at the end of the month, Eurosystem holdings of marketable debt instruments came at €1391 billion (almost €1.4 trillion) of liquidity injected into the banking system.¹³⁵ In January 2017, they already passed the €1.5 trillion mark by €117 billion.¹³⁶

Is this elaborate scheme constitutional, i.e. within the mandate of the TFEU? We posit that it is not, and that it shows “a willingness of the monetary authority [i.e. ECB] to selectively violate the Treaty provisions when it [is] ideologically consistent to do so”.¹³⁷ The ECB has turned itself into a lender of last resort

ECB Market Intervention: Covered Bond Purchasing Programme, Place du Luxembourg, <<https://placeduluxembourg.wordpress.com/2012/02/22/ecb-market-intervention-covered-bond-purchasing-programme-cbpp/>>, 22 February 2012. Sterilization of those purchases (in order to limit their inflationary effects) was achieved by auctioning fixed term deposits on a weekly basis. This means that the immediate effect of the policy was calibrated only towards narrowing the bond yield spreads among euro-zone states, and not increasing market liquidity. This second aspect was introduced with the PSPP in 2015, ushering the “big QE” era as a natural extension of the “mini QE” represented by its decision in 2014 to stop sterilizing its purchases under the SMP – Mattich, A., *5 takeaways from the ECB's moves on rates*, The Wall Street Journal, <<http://blogs.wsj.com/briefly/2014/06/05/5-takeaways-from-the-ecbs-moves-on-rates/>>, 5 June 2014.

132 Decision (EU) 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10). Eligible for purchases are euro-denominated marketable debt securities issued by central governments of Member States whose currency is the euro, recognized agencies located in the euro area, and international organizations and multilateral development banks located in the euro area (Art. 3). Article 5 stipulates an aggregate purchase limit of 33% of an issuer’s outstanding securities (par.3). However, the number rises to 50% in case where the issuer is an eligible international organization or multilateral development bank – Decision (EU) 2016/702 of the ECB of 18 April 2016 amending Decision (EU) 2015/774 (ECB/2016/8).

133 The annual euro-zone inflation rate has been continuously below 0.5% since September 2014, even diving below zero in January 2015.

134 Decision (EU) 2016/948 of the ECB on the implementation of the corporate sector purchase programme (ECB/2016/16 of 1 June 2016). Such an Expanded Asset Purchases Programme will be temporarily paused between 22 December and 30 December 2016, in anticipation of lower market liquidity during this period. Purchases will resume on 2 January 2017 - <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

135 Table showing Eurosystem holdings under the expanded asset purchase programme, <<https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>>.

136 loc. cit.

137 Mitchell, B., *ECB – every which way but to the point*, Bill Mitchell – billy blog, <<http://bilbo.economicoutlook.net/blog/?p=34706>>, 2 November 2016.

against an explicit TFEU prohibition.¹³⁸ Art. 123 TFEU constricts the ECB in the possibility of utilizing “helicopter money”¹³⁹, i.e. in using monetary financing. This is due to historical inflation traumas of a number of Member States¹⁴⁰, and bars it from purchasing government bonds in the primary market and thus increasing the monetary base.¹⁴¹ But, as the ECJ’s ruling in the OMT case has shown, there is considerable leeway since the ECB can purchase government bonds in the secondary markets, “ensur[ing] that there is a real opportunity... for a market price to form in respect of the government bonds concerned, in such a way that there continues to be a real difference between a purchase of bonds on the primary... and...secondary market”.¹⁴²

The drawing of this line proves to be difficult, not least due to a stunning variability of ECB’s activities that defy the Treaty prohibition of monetary financing in non-orthodox ways. The PSPP proved very efficient in going *praeter* the monetary financing prohibition, allowing the ECB and national central banks to finance Member States’ government debt virtually interest-free. Article 6 of the Decision on the PSPP stipulates that “The NBCs’ share of the total market value of purchases of marketable debt securities eligible under PSPP shall be 90%, and the remaining 10% shall be purchased by the ECB. The distribution of purchases across jurisdictions shall be according to the key for subscription of the ECB’s capital”. Germany holds the greatest capital key of 17.9973%. France and Italy are following with 14.1792% and 12.3108%, with Spain at 8.8%. However, the data shows that the NBCs have been buying significantly more than is allowed – between March 2015 and April 2016, Germany made 23.4%, France 18.6%, Italy 16.1% and Spain 11.5% total purchases.¹⁴³ The effects of such a policy are clear, given that the NBCs prevalently invest in bonds issued by their own home governments¹⁴⁴: driving up demand lowers the yields (interest rates) on the bonds. Private bond investors – stimulated by a near-certainty of offloading the bonds to the ECB and NBCs – buy

138 Natali, D.; Vanhercke, B., *Social policy in the European Union: state of play*, Brussels, European Trade Union Institute, 2015, p. 44.

139 Friedman, M., *The Optimum Quantity of Money*, Transaction Publishers, 2005, pp. 4-5 („the money from the sky seems like a bonanza, a true windfall gain“ – *ibid.*, p. 14).

140 Helicopters 101: your guide to monetary financing, Deutsche Bank Research, Special Report, 15 April 2016, p. 7.

141 „‘Monetary finance’ is defined as running a fiscal deficit (or a higher deficit than would otherwise be the case) which is not financed by the issue of interest-bearing debt, but by an increase in the monetary base – i.e. of the irredeemable fiat non-interest-bearing monetary liabilities of the government/central bank“ – Turner, A., *The Case for Monetary Finance – An Essentially Political Issue*, 16th Jacques Polak Annual Research Conference, IMF, Washington, 5-6 November 2015, p. 2.

142 Opinion of Advocate General Cruz Villalón in *Gauweiler*, par. 225.

143 Mitchell, B., *ECB’s expanded asset purchase programme – more smoke and mirrors*, Bill Mitchell – billy blog, <<http://bilbo.economicoutlook.net/blog/?p=33643>>, 30 May 2016.

144 Ewing, J., *Quiet Start to Central Bank Bond-Buying Program for the Eurozone*, *The New York Times*, <https://www.nytimes.com/2015/03/10/business/international/ecb-bond-buying-program-quantitative-easing.html?_r=0>, 9 March 2015.

up the debt, at prices that reflect the rate expected to be acceptable to the ECB.¹⁴⁵ However, traditional Keynesian theory warns us that excess liquidity in itself cannot act as a counter-cyclical stimulus if uncoupled with an expansionary fiscal policy, stimulating demand and expanding production. The asset swap (bonds for increased reserves) does not automatically translate to bank lending, since it's not the reserve (un)availability that keeps banks from lending – it's the credit untrustworthiness of potential borrowers. At the same time, in conditions of high unemployment and general uncertainty borrowers are not stimulated by a mere drop in interest rates – unless it's not accompanied with an increase of their borrowing power (through lowered income taxes and VAT, raised non-taxable minimum income, highly progressive tax system etc.). It is unsurprising that a senior economist at the ECB stated in October 2016 that “Despite this stimulus [*i.e.* QE], the euro area's low level of investment might well appear disappointing”.¹⁴⁶ Regarding the real impact of the QE, it hasn't delivered on its promise to trigger inflation by inundating the markets with increased liquidity – even if there have been some positive changes in the inflation rate, recovering from a -0.6% in January 2015 to +1.1% in December 2016.¹⁴⁷

Interestingly, listed as one of the international organizations whose marketable debt instruments are purchasable through the PSPP is the European Stability Mechanism. It is difficult to belie the clear manipulation of the Treaty: 1) the ESCB may not legally engage in monetary financing, but it *can* 2) finance (through a purchase of bonds) an international organization (ESM) established in order to circumvent the Treaty, which can then 3) use such funds for facilities that may take the form of 4) purchase of a Member States' bonds on the primary market. In addition, in December 2015 the ECB announced plans to *reinvest* payments on the securities purchased under the expanded APP as they mature, “*for as long as necessary*”.¹⁴⁸ That means that the ECB intends to “maintain the degree of monetary

145 Mitchell, B., ECB's..., cit.

146 Vermeulen, P., *The recovery of investment in the euro area in the aftermath of the great recession: how does it compare historically?*, ECB, Research Bulletin No. 28, <<http://www.ecb.europa.eu/pub/economic-research/resbull/2016/html/rb161028.en.html>>, 28 October 2016.

147 Overall inflation rate by month (1996-2016), at: <<https://www.ecb.europa.eu/stats/prices/hicp/html/inflation.en.html>>. The main cause is to be found in its fundamentally flawed presumption that banks aren't lending (and consumers aren't taking out loans) because of a shortage of money. There is no straightforward answer to the question of why this “cheap” money isn't converted into investments, due to the opaqueness of the transmission mechanism. Some proposals call for a switch to strategic QE that targets investments directly to the real economy, sidestepping the intermediaries (*i.e.* commercial banks). E.g., Varoufakis proposes that EIB's bonds be the *single* asset the ECB is buying in the secondary markets, and that the EIB simultaneously embarks upon a large-scale, pan-euro-zone investment-led recovery program – Varoufakis, Y., *A QE proposal for Europe's crisis (Economists' roundtable on the euro zone)*, The Economist, <<http://www.economist.com/blogs/freexchange/2014/11/economists-roundtable-euro-zone-3>>, 7 November 2014.

148 Introductory statement to the press conference, Mario Draghi (President of the ECB) and Vitor Constâncio (Vice-President of the ECB), Frankfurt, 3 December 2015.

accommodation...for a longer horizon” and that “conditions of quite abundant liquidity...will continue for a long, long time”.¹⁴⁹ Coupled with a strong commitment to continue the PSPP until March 2017 and “further if necessary” (this “necessity” being all but a certainty at this point, and the semblance of restraint mere lip service to the cautious observers), this measure comes as close to monetary financing as it can without explicitly admitting to it.¹⁵⁰ Namely, “acquisition of over a trillion euros of government bonds...is not strictly direct financing”, since it doesn’t *per se* raise the monetary base (as they are bought on secondary markets).¹⁵¹ However, a commitment to a principal reinvestment program intending to systematically keep investing in public-sector bonds distorts the market and effectively monetizes the debt “for the foreseeable future, which is exactly what monetary financing is”.¹⁵² Extending Kipling’s famous adage to the present situation, it must be said that: if it looks and feels like monetary financing, and has the *effect* of monetary financing, it must be recognized as monetary financing. The Treaty prohibitions cannot be circumvented by functionally equivalent measures, their *mimesis* of constitutionality notwithstanding.

5. FINAL REMARKS

The most recent global financial crisis seriously damaged the financial stability of Member States, forcing a number of them to seek financial assistance. Its provision – both within and outside the Union – imposed strict conditionality on states receiving the aid and tight fiscal discipline rules on the rest of them. Austerity policies further deepened the crisis, transforming it from a sovereign debt problem to an ongoing recession on the EU level.¹⁵³

The choice of legal instruments designed to combat the crisis entailed a decision-making pattern that skirted the need for their democratic approval.¹⁵⁴ Adoption of an international treaty such as the ESM circumvented the EU Treaty-

149 *ibid.*

150 Paul, J., *The ECB’s Covers Monetary Financing is Risky Business*, Bloomberg View, <<http://origin-www.bloombergvew.com/articles/2015-12-04/the-ecb-s-new-policy-sets-a-dangerous-precedent>>, 4 December 2015.

151 *loc. cit.*

152 *loc. cit.* Lurking in the background is also the problem of “unwinding” QE: selling the bonds would push down their prices and push up interest rates (bringing the problem back to square one). The European Parliament is among the many worrying about the timing and cost of such an endeavor – Delivorias, A., *The ECB’s Quantitative Easing: Early results and possible risks*, European Parliamentary Research Service, December 2015, pp. 5-6.

153 „[T]he imposition of austerity...was...to maintain the ideological hegemony of an intrinsically neo-liberal European Commission. The recession that followed was created by the austerity“ – Mitchell, B., *ECB...*, *cit.*

154 Armstrong, K., *Responding to the Economic Crisis: Public Law in a Post-Lisbon Age*, EUtopia Law, <<https://eutopialaw.com/2012/02/21/responding-to-the-economic-crisis-public-law-in-a-post-lisbon-age/>>, 21 February 2012.

amending process. This preference for *ad hoc* arrangements may have been legal in form, but did not produce a comprehensive – or a substantively “constitutional” – legal framework. The abundance of options for rule-making had the effect of reinforcing executive discretion, and allowing frameworks to be sidestepped when they became inconvenient.¹⁵⁵ The “*Ersatzunionsrecht*” – substitute EU law¹⁵⁶ – facilitated a particular form of authoritarian crisis management¹⁵⁷, establishing a political administration outside the realm of a democratic politics and the form of accountability which the rule of law demands.¹⁵⁸ Intergovernmental stability mechanisms remain outside the scope of application of both Treaty provisions on the principle of transparency and complementary secondary legislation. Such an institutional development makes any control by the European parliament or national parliaments, not to mention civil society and the citizenry, extremely difficult.¹⁵⁹ Moreover, the Charter has “yet to bite in the most sensitive area of all – the consequences of the financial crisis. This failure is damaging to the long term legitimacy of the Union and undermines the Court’s oft-expressed commitment to human rights”.¹⁶⁰ The Fiscal Compact is deeply problematic¹⁶¹ from a national constitutional perspective, constraining budgetary process and national parliaments’ discretion in this matter, as well as mandating constitutional amendments. Therefore, the new economic and fiscal governance instruments have faced widespread criticism for evading democratic control and accountability.¹⁶² We are witnessing a re-dedication of the EU federalist structure, this time to (in democratic terms more primitive) intergovernmentalism supported by epistocratic reliance on expertise-based institutions such as the Commission and the ECB.¹⁶³ This has rightly been termed executive federalism.¹⁶⁴

155 White, J., op. cit., 597.

156 „*Ersatz law*“ being an oxymoron which indicates that instruments thus generated are not „law“ as we know it – de Búrca, G.; Kilpatrick, C.; Scott, J., *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek*, Bloomsbury Publishing, 2013, p. 313.

157 Everson, M.; Joerges, C., op. cit., p. 11.

158 *ibid.*, p. 13.

159 Tuori, K., *The European...*, cit., p. 47.

160 Barnard, C., op. cit., p. 16.

161 *loc. cit.*

162 Rittberger, B., *Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU*, *Journal of Common Market Studies*, vol. 52, 6/2014, p. 1174.

163 Epistocracy is a political regime that asks citizens to surrender their standards of judgment in favor of experts who are better placed than they to address the policy questions that affect their lives – Isiksel, T., *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State*, Oxford, Oxford University Press, 2016, p. 221.

164 Tuori, K., *The European...*, cit., p. 46. Incrementalist reactions to the fiscal crisis produces a plethora of new official, semi-official and unofficial bodies – some with formal decision-making powers, other without formal competence but still exercising considerable influence. The institutional and legal fragmentation hampers supervision by the European and national parliaments, as well as by civil society and the citizenry – *loc. cit.*

Despite serving as the leitmotiv of the European response to the economic crisis, conditionality still represents a controversial instrument, whose legal nature has yet to be clearly defined.¹⁶⁵ Not only is the economic constitution dictating the political agenda, it is also subordinating the social constitution. The temptation to rubberstamp this new austere economic paradigm due to fears of uncertainty of taking a different route must be resisted. Asking what would've happened if *Pringle* hadn't confirmed ESM's legality or if the banks were allowed to go bankrupt cannot authorize the courts to obediently approve the measures adopted. Pure citing of exigent circumstances implies an abdication of law. The goal must be to search for alternatives to a "devastating" legal default¹⁶⁶, in line with European shared commitment to common values of democracy and rule of law. Even in exceptional circumstances, adoption of measures inconsistent with such values undermines the integrity of the Union legal order as a whole.¹⁶⁷ We support the view that "'more Europe' had come to mean more intergovernmental collaboration under Franco-German hegemony...The Union has reverted to...elitist decision making"¹⁶⁸ that puts considerable strain on its democratic legitimacy. (Austerity) orders barked from Olympian heights of executive politics exacerbate already weak growth and rising unemployment, and unwisely allow popular resentment to metastasize into populist movements across the Continent, feeding on citizens' frustrations. De-fragmentation, abandonment of the "multi-speed Europe" idea¹⁶⁹ (which is abortive to the European commitment to unity), a return to the foundational European federalist principles; these (intertwined with a dedication to continent-wide solidarity and social welfare) seem to be necessary steps if the EU is to avoid compromising a shared dream irrevocably.

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166 Everson, M.; Joerges, C., *op. cit.*, p. 20.

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Sažetak

VLADAVINA PRAVA I EKONOMSKA NUŽDA U “POST-DEMOKRATSKOM IZVRŠNOM FEDERALIZMU”: NEKA USTAVNA PITANJA EURO-KRIZE

Autorica analizira odgovor Europske unije na još uvijek aktualnu ekonomsku krizu, usredotočujući se na problem zakonodavne i institucionalne fragmentacije. Tvrdi da autoritarno upravljanje krizom – poticano rječnikom „stanja nužde“ – podriva demokratsku odgovornost svojim oslanjanjem na izvršnu diskreciju i intergovernmentalizam. Kroz analizu jurisprudencije Suda Europske unije i uz pogled izbliza na točno funkcioniranje i implikacije *ultra vires* djelovanja Europske središnje banke, pokazuje kako je Lisabonski ugovor žrtvovan u ime nužde stvaranja Ersatz prava Unije, koje bolje odgovara neposrednim potrebama reformiranja Ekonomske i monetarne unije. Drži da su intergovernmentalni instrumenti ne samo “protuustavno” rekvirirali sudjelovanje institucija EU, već i da su naštetili legitimitetu Unije uspostavivši političku upravu netaknutu zahtjevima demokratske odgovornosti. Posljedično podčinjavanje političkog i socijalnog ustava onom ekonomskom dovodi do abdikacije prava i podriivanja integriteta pravnog poretka Unije.

Ključne riječi: EU, ekonomska kriza, vladavina prava, izvršni federalizam, intergovernmentalizam.

Zusammenfassung

RECHTSSTAATLICHKEIT UND WIRTSCHAFTLICHE DRINGLICHKEIT IM POSTDEMOKRATISCHEN EXEKUTIV-FÖDERALISMUS: EINIGE VERFASSUNGSRECHTLICHE FRAGEN DER EURO-KRISE

Die Autorin analysiert die Antwort der Europäischen Union auf die noch immer aktuelle wirtschaftliche Krise, indem sie sich in der Arbeit auf das Problem der gesetzgebenden und institutionellen Fragmentierung fokussiert. Sie behauptet, dass das autoritäre Krisenmanagement, betrieben durch Notstand, die demokratische Verantwortlichkeit untergräbt, indem es sich auf den Ermessensspielraum der Exekutive und die Zwischenstaatlichkeit verlässt. Durch die Analyse der

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Rechtsprechung des Europäischen Gerichtshofs und genauere Betrachtung der Funktionierung und Implikationen von *ultra vires* Handlungen der Europäischen Zentralbank weist die Arbeit auf die Tatsache hin, dass der Vertrag von Lissabon für den Notstand der Herstellung des EU-Ersatzrechtes geopfert wurde, welches für sofortige Bedürfnisse der Reformierung von Wirtschafts- und Währungsunion geeignet ist. Die Autorin ist der Meinung, dass zwischenstaatliche Instrumente nicht nur „verfassungswidrig“ die Teilnahme von EU-Institutionen requiriert, sondern auch die Legitimität der Union geschädigt haben, indem sie die politische Verwaltung unempfänglich für Forderungen der demokratischen Verantwortlichkeit gemacht haben. Solche Unterwerfung der politischen und sozialen Verfassung unter die wirtschaftlichen Umstände führt zur Rechtsniederlegung und Untergrabung der Integrität der EU-Rechtsordnung.

Schlüsselwörter: *die EU, wirtschaftliche Krise, Rechtsstaatlichkeit, Exekutiv-Föderalismus, Zwischenstaatlichkeit.*

Riassunto

LO STATO DI DIRITTO ED IL BISOGNO ECONOMICO NEL „FEDERALISMO ESECUTIVO POST-DEMOCRATICO“: ALCUNE QUESTIONI COSTITUZIONALI DELLA CRISI DELL'EURO

L'autrice analizza la risposta dell'Unione europea alla ancora attuale crisi economica, concentrandosi sulla questione della frammentazione legislativa ed istituzionale. Ritene che la gestione autoritaria della crisi – stimolata dall'uso di termini quale „lo stato di bisogno“ – pregiudichi la responsabilità democratica, appoggiandosi sulla discrezione esecutiva e sull'intergovernalismo. Attraverso l'analisi della giurisprudenza della Corte di Giustizia dell'Unione europea ed osservando da vicino l'esatto funzionamento, ma anche l'operare *ultra vires*, della Banca Centrale europea, mostra come il Trattato di Lisbona sia stato sacrificato nel nome del bisogno di creare un diritto dell'Unione „Ersatz“, il quale risponde meglio alle esigenze immediate della riforma dell'Unione economica e monetaria. Ritene che gli strumenti intergovernativi abbiano non soltanto „incostituzionalmente“ requisito l'operato delle istituzioni dell'UE, bensì abbiano anche recato danno alla legittimità dell'Unione, costituendo un'amministrazione politica estranea alle esigenze della responsabilità democratica. La sottomissione della costituzione politica e sociale a quella economica conduce alla rinuncia del diritto ed al soggiogamento dell'integrità dell'ordinamento giuridico dell'Unione.

Parole chiave: *UE, crisi economica, stato di diritto, federalismo esecutivo, intergovernalismo.*