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The Birth of the EMF

Integrating the ESM into the EU Legal Order:

'Constitutional' Challenges

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ABBREVIATIONS

BoD	Board of Directors
BoG	Board of Governors
CJEU	Court of Justice of the European Union
EBA	European Banking Authority
EFB	European Fiscal Board
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilization Mechanism
EIB	European Investment Bank
EIOPA	European Insurance and Occupational Pensions Authority
EMF	European Monetary Fund
EMU	Economic and Monetary Union
EU	European Union
ESM	European Stability Mechanism
ESMA	European Securities Market Authority
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

ABSTRACT

The establishment of the ESM has been a key factor in the confrontation of the financial and sovereign debt crisis. Its risk sharing character, the austerity requirements in the context of strict conditionality and of course its institutional placement outside the EU legal order, have for long time placed ESM at the center of political and legal controversy within the EU. The Commission has recently come forth with a proposal for the integration of the ESM into the EU legal order and its subsequent succession by an “EMF”. The compatibility of the proposal with EU primary law is, as always, the first and foremost step, towards its adoption. In this context, the issues of the appropriateness of the legal basis of Art 352 TFEU as well as the ambiguous status of the planned EMF hide significant questions of core constitutional nature.

INTRODUCTION

The Five Presidents' Report of June 2015[1] recalled the need to complete the EMU and mapped out a way forward towards this objective. The year 2025 has been set as the overall time limit. The report signaled the initiation of a first phase of "deepening by doing" until June 2017, where important developments such as the creation of the European Fiscal Board, and initiatives for the bolstering of the Banking Union[2] have taken place; and a second phase for steps further needed until 2025. In the context of the currently ongoing second "deepening" phase, the Commission presented the "Reflection Paper on the deepening of the Economic and Monetary Union", as well as the "Reflection Paper on the future of EU finances" which elaborated on possible ways for completing the EMU until the horizon of 2025. The proposal of the Commission for the integration of the ESM into the EU legal order and the substantial creation of an EMF[3], constitutes an integral part of these initiatives and systematically must be classified and understood as one of the key steps towards the evolution and completion of the EMU, as designated in the above-mentioned documents.

The establishment of the ESM has been a key factor in the confrontation of the financial and sovereign debt crisis. The ESM has long been at the center of political and legal controversy. On the one hand its orientation as a risk sharing measure and, on the other hand, the choice of austerity requirements and macroeconomic reforms attached to ESM loans in the context of strict conditionality, have been fueling strong political conflict in the EU. At the same time the placement of ESM outside the EU legal order has raised significant legal concerns about deficits in democratic accountability and access to justice, with the implications being rather evident in the field of fundamental rights[4]. According to the Commission the proposal for the integration of the ESM, comes as an appeasement to the remaining deficiencies of this "parallel" to the EU legal order structure.

The aim of this thesis is to examine the compatibility of the present proposal of the Commission for the integration of the ESM into the EU legal order and its succession by the planned EMF, with EU primary law. The

[1] "Completing Europe's Economic and Monetary Union", Report by Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, 22 June 2015
[2] See Proposal for amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586 final, 2015/0270(COD)
[3] Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM(2017) 827 final 2017/0333 (APP)
[4] R. O'Gorman, "The Failure of the Troika to Measure the Impact of the Economic Adjustment Programmes on the Vulnerable." in Legal Issues of Economic Integration Vol. 44 Issue 3, (Aug.2017); A. Poulou, 'Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?', in Common Market Law Review (2017)

"constitutionality" review is focused around two main axes which subsequently form the two main chapters of the thesis.

The first chapter focuses on the issue of the legal basis of the proposed Regulation, namely the so called, "flexibility clause" of Art 352 TFEU. The chapter begins with an attempt to understand the notion of "flexibility" within EU law and its relation to the field of the EMU. Within this context a limited historical review of the use of the flexibility clause in this field will help us draw significant conclusions about the aforementioned relation. In continuation, a thorough analysis of the substantial conditions required for the usage of the flexibility clause, will be attempted in order to establish whether in the specific case Art 352 TFEU can be used as a legal basis.

The second chapter concerns the legal status and the powers of the planned EMF. The chapter starts with a brief description of the new status and powers of the EMF as provided in the proposed Regulation and the Statute of EMF as well as an attempt to decode precisely what kind of EU entity the new EMF will constitute and classify it respectively. Subsequently, the aforementioned provisions of the proposed Regulation and the Statute of the EMF will be put to the test against the relevant case law of the CJEU and the provisions of the Treaties, in order to diagnose whether the proposed new legal status and the powers of the EMF are in conformity with EU primary law.

In the course of the analyses of the two chapters, there will arise issues of core constitutional nature, such as the limits of Union competence on economic policy and the possibility of delegation of powers to EU decentralized bodies. In conclusion, the findings emanating from the examination of all these issues will be combined in order to answer the central question of compatibility of the proposal with EU primary law.

As already indicated, the main tools to be used for the examination of all the aforementioned constitutionality issues, are EU primary and secondary law as well as the rich case law of the CJEU and (to the extent necessary) the case law of National Courts.

CHAPTER 1: The legal basis of Art 352 TFEU

1.1 Flexibility: an inherent characteristic and an imperative need of the EMU

The establishment of the Economic Monetary Union with the entrance into force of the Maastricht Treaty took the EU one step further in its process of economic integration. However, despite the birth of economic integration, the

moment of the establishment of the EMU was simultaneously the moment where differentiated integration between Member States became for the first time an inherent characteristic of the very core of EU primary law[5]. The existence of a fundamental institutional diversification between a group of Member States which have integrated much further than others in a specific policy area, -"the ins"-, and on the other hand of a group of Member States that remain either temporarily[6] or permanently (*de jure*[7] or *de facto*[8]) outside of this integration, -"the outs"-, already reveals that flexibility has always been a requisite for the Euro area. Art 136 TFEU constitutes such a specified (in terms of concerning solely the field of the EMU) "flexibilization vehicle" that allows "the ins" to proceed further up the road of deeper economic integration without having to adhere to a procedure of amendment of the Treaties and without having to obtain the consent or participation of "the outs"[9].

The need for flexibilization of the Eurozone has appeared and been discussed more intensively after the outbreak of the Eurozone financial and sovereign debt crisis. The effects of the "fragmented integration"[10], introduced by the Maastricht Treaty, were amplified by the economic crisis, as the Eurozone Member States were pushing for closer cooperation and stronger economic and fiscal integration as an antidote to the crisis, while the Member States outside the Eurozone were facing these developments the very least with suspicion. The political boundaries of this "allowed by the Treaties" flexibility would sooner or later be met; and they were[11].

At the same time, during the crisis, the need of the Eurozone Member States for greater flexibility, as a result of the need for stronger fiscal rules and further integration, would encounter another limit, this time not from the side of "the outs" but from the side of the EU itself. The coordination powers of the EU in the field of economic policy, proved lesser than the challenges that were created by the financial and sovereign debt crisis. It was highly doubtful whether the far reaching changes needed in the field of economic and fiscal policy actually fell within the notion of "coordination" or whether they swerved towards the conduction of a more "independent" economic policy. It is crucial to note here that as far as the Union's powers are concerned the only

[5] C. Herrmann, "Differentiated Integration in the Field of Economic and Monetary Policy and the Use of (semi)extra Union Legal Instruments - the Case for Inter Se Treaty Amendments" p. 241, in Bruno deWitte, Andreas Ott and Ellen Vos (eds) "Between Flexibility and Disintegration : The Trajectory of Differentiation in Eu Law", p. 237-251, Edward Elgar Publishing, (2017)
[6] MS with derogation, Art 139 TFEU
[7] UK and Denmark have secured an opt-out
[8] Sweden has a de facto opt-out, since although it substantially meets the convergence criteria it is not acceding to the Eurozone based on the referendum of 14 September 2003, where 55.9% of voters rejected accession to the Euro. For further analysis, see G. Majone "Rethinking the Union of Europe Post-Crisis", CUP (2014).
[9] E.g. see Reg. 1173/2011 (in Six-Pack), Reg. 473/2013 (in Two-Pack), based on Art 136.
[10] A. Hinarejos Parga, "The Euro Area Crisis in Constitutional Perspective" 1st edition ed. Oxford Studies in European Law Oxford, United Kingdom: Oxford University Press (2015) p. 103
[11] E.g. the adoption of TSCG and ESM. See below

available flexibility mechanism existing in the Treaties, is Art 352 TFEU, also known as the "flexibility clause", which enables the Council to adopt necessary measures, even where the Treaties have not explicitly provided the Union with the necessary powers to achieve one of the objectives enshrined in the Treaties.

Consequently, the need of the Eurozone for greater flexibility within the context of the Treaties, encountered a twofold limit during the crisis; one was the political unwillingness of the rest of the Member States, "the outs", to follow up or allow further flexibilization when their consent was needed[12] and the second, and perhaps even more important, was the boundaries of the Union's competences in the field of economic policy. These political and constitutional limits that *de facto* and *de jure* "restrained" the Eurozone's need for flexibility, were to a large extent overstepped by adhering to new legal instruments founded outside the EU legal framework[13]. Although this was no novelty in the history of the EU[14], during the economic crisis the "Union method" was systematically and repeatedly circumvented and the Eurozone Member States adhered to the intergovernmental method in order to find answers to the crisis[15]. The establishment of the ESM by an international Treaty, after a prior amendment of Art 136 TFEU,[16] is a genuine example of this constraint for further flexibility and integration in the Eurozone, which could not be achieved within the existing EU framework, because of the aforementioned political and constitutional limits. On the one hand, the non-Eurozone Member States were unwilling to "pay" for the Eurozone crisis[17] and on the other hand it was highly doubtful if the framework of the Treaties, in terms of Union competences and conferral of powers, allowed for the creation of such an EU mechanism.

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[12] E.g. the veto of the UK that led to the adoption of TSCG as an international agreement

[13] Examples are the Treaty establishing the ESM, the international agreement establishing of EFSF (predecessor of the ESM), the Treaty on Stability, Coordination and Governance (TSCG) as well as the international agreement which regulate certain aspects of the Single Resolution Fund

[14] E.g the Schengen Agreement of 1985, the Social Policy Agreement of 1991, the Prùm convention of 2005, were all international agreements signed between EU MS. See, B. De Witte "Using International Law in the Euro Crisis", ARENA Working Paper No. 4, (June 2013) available at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf; and B. De Witte, "Chameleonic Member States: Differentiation By Means of Partial and Parallel International Agreements" in B. D .Witte, D, Hanf and E. Vos (eds), "The Many Faces of Differentiation in EU Law" (Intersentia 2001) p. 231–67

[15] On that see S. Van den Bogaert and B. Vestert, "Differentiated integration in EMU", in Bruno deWitte, Andreas Ott and Ellen Vos (eds) "*Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*", Cheltenham, UK: Edward Elgar Publishing, (2017) doi: https://doi.org/10.4337/9781783475896.00016

[16] On 25 March 2011, the European Council adopted, under the simplified Treaty revision procedure of Article 48(6) TEU, Decision 2011/199, which added to Art 136the following third paragraph: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality"

[17] B. De Witte, and T. Beukers, "The Court of Justice Approves the Creation of the European Stability Mechanism Outside the Eu Legal Order: Pringle.", Common Market Law Review 50, no. 3 (2013), p. 809, 813

During the period of the crisis various suggestions have been put forward as to how to deal with the need of the Eurozone for greater flexibility and differentiation, or to put it differently with the fact that some just wanted or needed more. From more radical proposals pushing for a comprehensive revision of the Treaty of Lisbon and the evolution to a federal union[18], to proposals that support the creation of a two-speed Europe through deeper integration among certain states, on the basis of additional treaties outside the EU legal framework[19] and more modest ideas supporting the creation of a specific EMU – Eurozone flexibility clause within the measures of the already existing general flexibility clause of Art 352 TFEU[20]. The common delineator among almost all of these proposals is that they seem to converge over the finding that the need of the Eurozone for further integration cannot be satisfied within the existing framework of flexibility that the Treaties provide.

Against this background comes the proposal of the Commission for the transposition of the ESM into an EMF, which is based on the long existing flexibility clause of the Treaties, namely Art 352 TFEU. The essence of "flexibility" as regards this clause is, as already said, conceptually connected with the prism of the competences that the Union has been vested with. In this sense, the "flexibility" characteristic of this clause reflects the fundamental acknowledgement of the fathers of the Treaties, that "law cannot foresee all". Pursuant to classical public international law theory, the EU enjoys no "*kompetenz – kompetenz*"[21] and is allowed to act only under the principle of the conferred powers. This means that the EU legislature has no general competence to legislate but is obliged to base each and every legal instrument on one of the articles (legal bases) of the Treaties. However, the powers explicitly attributed to the EU may prove lesser or inadequate for the purpose of attaining one of the objectives enshrined in the Treaties. Art 352 TFEU is aimed at confronting precisely this potential discrepancy between the *numerus clausus* of the legal bases of the Treaties and the competence *ratione materiae* of the Union[22].

This kind of *ratione materiae* "flexibility" encapsulated in the clause of Art 352 TFEU has proved rather valuable in the course of evolution of the Union in

[18] The Spinelli Group, "A Fundamental Law of the European Union" Verlag Bertelsmann Stiftung, (2013) p. 5, 20

[19] Piris, "The Future of Europe. Towards a Two-Speed EU?" Cambridge University Press (2012); See also Glienicker Group, "Towards a Euro Union", 18 October 2013 available at http://www.bruegel.org/nc/blog/detail/article/1173- towards-a-euro-union/

[20] T. Beukers, "Flexibilisation of the Euro Area: Challenges and Opportunities", Ssrn Electronic Journal (2014), doi: 10.2139/ssrn.2462481

[21] Brunner and Others, German Constitutional Court (1994) CMLR 75. In this case the German Constitutional Court reserved competence to review and annul *ultra vires* acts of EU law, based on the reasoning that the EU is not "legally sovereign" but draws its competence from the sovereign Member States

[22] Konstantinides characterizes it as a "gap filling provision". T. Konstadinides, "Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause." Yearbook of European Law 31, no. 1 (2012) doi:10.1093/yel/yes006

general, and of the economic and monetary integration in particular. In the pre-Lisbon era, the text of the Treaties lacked any systematical classification of the competences of the Union. In this context, the flexibility clause enshrined in Art 235 EEC Treaty and, after the Nice Treaty, in Art 308 EEC Treaty, vested the Council with the option to undertake specific measures for the attainment of Community objectives in cases where a *lex specialis* would be absent from the context of the Treaties. The decades of 1970s and 1980s were the "golden era" of the flexibility clause[23]. In particular, the creation of EU agencies or generally of bodies with their own legal personality has for long now been the main field of usage of Art 352 and its predecessors[24]. Even after the introduction of the Maastricht Treaty where the legal bases of the Treaties were certainly expanded numerically and materially, recourse to the flexibility clause remained robust[25].

In 1973, Art 235 EEC Treaty (current Art 352 TFEU) was used as the basis of Council Regulation (EEC) 907/73 which established the European Monetary Cooperation Fund in order to support the functioning of the "snake" mechanism. Member States would deposit reserves to provide a pool of resources to stabilize exchange rates and finance balance of payments support. The value of the unit of account was determined on the basis of the value of a certain weight of fine gold. Later on, in 1978, Council Regulation (EEC) 3181/78 empowered the European Monetary Cooperation Fund to receive monetary reserves from monetary authorities of the Member States and issue ECUs against such assets[26]. Once again, the legal basis of this Regulation was the flexibility clause of Art 235 EEC Treaty.

Perhaps the most closely related usage of the flexibility clause to the present proposal for the incorporation of the ESM into the EU legal order and the creation of an EMF can be traced back to 1975. The oil crisis of 1973 and the difficulties in balance of payments faced by several Member States rendered the credit volume insufficient and the procedure of bilateral assistance too time-consuming to constitute an effective remedy for crisis situations[27]. In this context, the Council adopted Regulation (EEC) 397/75 concerning Community

[23] T. Konstadinides, "Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause." Yearbook of European Law 31, no. 1 (2012): p. 1, doi:10.1093/yel/yes006.

[24] See M. Busuioc, , European Agencies: Law and Practices of Accountability (Oxford University Press, Oxford, 2013) p. 18; See also, Opinion of A.G. Jääskinen in Short-selling (C-270/12) September 12, 2013 par. 27

[25] Pursuant to a SIEPS survey conducted in 2002 the flexibility clause was used as a legal basis in the 406 cases of Regulations and Directives. Working Group V: 'Complementary Competencies', Working Document 10, Note by Mrs Hjelm-Wallen, "The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC"", Brussels, 03.09.2002, WG V – WD 19.

[26] The basket currency known as ECU had previously been laid out in Council Regulation (EEC) No 3180/78 changing the value of the unit of account used by the European Monetary Cooperation Fund on the basis of the provisions laid down in Council Regulation (EEC) No 907/73

[27] See the recitals of Regulation (EEC) 397/75. Among others it is mentioned: "Whereas, moreover, intervention by the community as such is likely to contribute to a stabilization of capital movements due to the increase in the price of petroleum products, to the benefit of the whole international community"

loans, based on the flexibility clause of Art 235 EEC Treaty. The then European Community took an action that materially can be parallelized to the core function and purpose of today's ESM. Specifically, the Community was authorized to raise funds of up to $3 billion from third countries, banks or directly from capital markets, by issuing loans with a duration of at least five years, and making them available to the Member States. Later on, in 1981, the Council Regulation (EEC) 682/81, once again on the basis of Art 235 EEC Treaty, would take the existing facility one step further in terms of mutualization and integration since it enabled the Commission to conclude the loans on behalf of the EEC and subsequently allowed the Community itself, instead of the Member States, to be held liable by possible lenders.

Other significant economic developments such as the facility of balance of payments as it stands today are also "children" of the flexibility clause[28]. Even Regulation (EC) 1103/97, concerning certain provisions, relating to the introduction of the Euro and Regulation (EC) 2595/2000 amending Regulation 1103/97, were actually based on the flexibility clause.

This limited historical review reveals that this is not the first time that the flexibility clause is being deployed in the broader field of the EMU. Indeed, as the Commission argues in the explanatory memorandum[29] which accompanies its proposal, the flexibility clause as each time formulated in the Treaties has repeatedly in the past upheld the evolution of monetary and economic integration in the EU and has been a significant "way-out" in times of crisis.

1.2 Conditions for the use of Art 352 TFEU

The Lisbon Treaty brought changes in the text of the flexibility clause. From a substantive perspective the use of the flexibility clause was disconnected from the precondition of the accomplishment of the common market[30]. Nevertheless, this textual division between the common market and other community objectives had long before already been overpassed by the CJEU. In its case law the Court has adopted an "expansive" and purposive interpretation, considering the flexibility clause as covering Union objectives as a whole and not just that of completing the common market[31]. On this

[28] See Regulation (EEC) 1969/88, based on Art 235 EEC Treaty and ex Art 108 EEC Treaty (current Art 143 TFEU), which established a single facility providing medium-term financial assistance to Member States. Later in 2002 the balance of payments facility was reformed, taking the shape that exists today by Council Regulation (EC) 332/2002, based upon Art 308 EC Treaty (current Art 352 TFEU)

[29] See p. 5

[30] Art. 235 EEC: "If any action by the Community appears necessary to achieve, *in the functioning of the Common Market*, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions."

[31] See, C. Lebeck, "Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties", Journal of Transnational Law & Policy / 17, No. 2 (2008): p. 316; Dashwood, "Article 308

basis, De Witte and De Burca had already since 2001 advocated in favor of the removal of the sentence "in the functioning of the common market" from the text of the article[32]. Pursuant to the present Art 352 TFEU, recourse to the flexibility clause is allowed under four basic substantive conditions, three formulated positively and one negatively: (1) the action by the Union must be necessary, (2) the relevant measure must fall within the framework of policies as defined by the Treaties, (3) it must be aimed at attaining one of the objectives of the Treaties, (4) and the necessary powers for the accomplishment of this action must not be provided elsewhere in the Treaties. Two additional substantive limitations are included in paragraphs 3 and 4 which require that the relevant measure must not entail harmonization of laws, where the Treaties do not allow for it, and that the clause cannot be used in the field of common foreign and security policy. Under these circumstances, in relation to the proposal of the Commission for the integration of ESM into the EU legal order, there are three major issues that arise regarding the use of Art 352 TFEU: The first issue concerns the condition of "attaining an objective of the Treaties". Specifically, it must be established if the objectives of the EMF Regulation are connected to one of the objectives of the Treaties and subsequently if Art 352 can serve as a legal basis for attaining the specific objectives. Secondly, it must be examined to what extend the condition of necessity is fulfilled in the present case. As derives from the above categorization of the conditions (conditions (1) and (4)), "necessity" in Art 352 TFEU has a double aspect. More concretely, it is imperative to ensure both that the measure of integrating the ESM into the EU legal order is necessary as such, and that recourse to the flexibility clause as a legal basis is also necessary because no other explicit legal basis exists in the Treaties, upon which the proposed Regulation could have been based. Thirdly, it must ultimately be diagnosed whether the incorporation of a body, with the mission and the powers of the ESM, falls within the framework of policies as circumscribed and defined by the Treaties or if the EU will actually be exceeding its conferred powers.

1.2.1 Attaining one of the objectives set out in the Treaties

The objective of the present proposal of the Commission can be conceptually classified under the overall objective of establishing-completing the EMU and safeguarding its stability[33]. Within this context the transformation of the ESM

EC as the Outer Limit of Expressly Conferred Community Competence", in Barnard, Catherine, and Okeoghene Odudu (eds) "The Outer Limits of European Union Law", Oxford: Hart Pub, (2009), p.43

[32] G De Bùrca and B De Witte, "The Delimitation of Powers between the EU and its Member States", Robert Shuman Centre Policy Papers Series on Constitutional Reform of the European Union, WP 2001/03. EUI, 19, (2001)

[33] Recital (14) of EMF Regulation reads: "Given the strong interconnections between Member States whose currency is the euro, severe risks to the financial stability of those Member States could put at risk the financial stability of the euro area as a whole. Therefore, the EMF should provide financial stability support to Member States whose currency is the euro where it is indispensable to safeguard the financial stability of the euro area or its Member States."

into an EU body, according to the explanatory memorandum of the proposal[34], aims to serve three basic "inner" goals: (1) to enhance the financial stability not only of the Euro but potentially of the whole EU, by providing a fiscal backstop for the Single Resolution Board (SRB) (2) to promote and safeguard access to justice and (3) to increase transparency and accountability in the function of the ESM. As regards the first objective, the planned EMF will create new synergies within the EU[35] by "participating" in the structure of the banking union, which extends beyond the frontiers of the Eurozone. Indeed, except from the Single Rulebook that already applies to all MS, the SRM and SRB Regulations provide to non-Eurozone MS with the chance to participate in the banking union on the basis of the establishment of a "close cooperation" between their respective national supervisory authorities and the ECB[36]. The EMF will constitute a last-resort backstop to the SRF, which will be able, due to its capacity, to provide enhanced confidence to the markets[37]. As for the second "inner" goal, the subjection of the ESM to EU legal order will remedy the inefficiencies in access to justice caused by the fragmentation of its current intergovernmental status. The complex system of parallel legal orders will be simplified so that the actions and decisions of the ESM will clearly constitute acts of EU law falling under the jurisdiction of CJEU and thus phenomena of gaps in judicial review that were noticed in the past[38] will be eliminated. Finally, as regards the third "inner" objective, the new enhanced accountability framework for the planned EMF includes the annual submission to the European Parliament, the Council and the Commission of a report on the execution of its tasks, hearings of the Managing Director by the competent committees of the European Parliament, as well as confidential oral discussions behind closed doors between the Managing Director and the Chair and Vice-Chairs of the competent committees of the European Parliament[39].

[34] See explanatory memorandum p.2-4
[35] Ibid.
[36] See, Art 7 of Council Regulation (EU) 1024/2013 and Art 4 of Regulation (EU) 806/2014 of the European Parliament and the Council. See also Decision of the ECB of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5)
[37] See Art 22 EMF Statute
[38] Within the 8 years of the operation of ESM and its predecessors (EFSM, EFSF) and especially before the introduction of the "two-pack", the placement of ESM and EFSF outside the EU legal order made judicial protection against the conditionality requirements attached to financial assistance impossible on the basis of EU law. See e.g T-541/10 and T-215/11, ADEDY and others v. Council Supported by the Commission, Orders of the General Court of 27 Nov. 2012; C-128/12, Sindicato dos Bancários do Norte, Order of 7 Mar. 2013; C-264/12, Sindacato Nacional dos Profissionais de Seguro v. Fidelidade Mundial, Order of 26 June 2014; T-38/14, Kafetzakis v EL, Council, EP, Commission, ECB Judgement of the GC of 10 July 2014. For thorough analysis of the "crisis" jurisprudence see C. Kilpatrick and B D Witte, "Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges", EUI Department of Law Research Paper No. 2014/05 (22 April 2014), available at SSRN: https://ssrn.com/abstract=2428855 or http://dx.doi.org/10.2139/ssrn.2428855
[39] Art 5 EMF Regualtion

In the *Pringle* case[40] the CJEU held that the ESM's objective[41] is indeed included in the broader objective of establishing an economic and monetary union, since it falls within the ambit of economic policy. Specifically, according to the Court the establishment of the ESM is an economic policy measure, because the latter constitutes a financing mechanism which aims at confronting financial crises and safeguarding the stability of the euro area[42]. As already said the primary function of the EMF will remain the confrontation of financial crises through the provision of financial support to Eurozone Member States, just like the ESM. Under these circumstances, it is undeniable that the proposal does indeed aim to attain the objective of the Union enshrined in Art 3(4) TEU, and in particular falls within the ambit of economic policy[43].

However, the crucial question, which subsequently emerges at this point, is whether this objective can be pursued on the basis of the flexibility clause. Although the CJEU has been constantly broadly interpreting the notion of objectives in Art 352[44], one of the two Declarations on Art 352 TFEU, which were adopted during the intergovernmental conference for the adoption of the Lisbon Treaty[45], would appear to raise obstacles. As already said, the Lisbon Treaty following the case law of the CJEU, erased the precondition of a connection with the objective of completing the common market and now Art 352 refers generally to "one of the objectives set out in the Treaties". Nevertheless, Declaration 41 which provides insight for the reference to "objectives of the Treaties" in Art 352, mentions precisely: "*The Conference declares that the reference in Article 352(1) of the TFEU to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the TFEU.*". Consequently, Declaration 41 excludes from the ambit of Art 352 the field of the EMU, which as an objective has been enshrined in Art 3(4) TEU. Should this mean that Art 352 cannot be used as a legal basis for the present proposal of the Commission?

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[40] Case C-370/12, Thomas Pringle v. Government of Ireland, Ireland, The Attorney General, Judgment of the Court of Justice (Full Court) 27 November 2012

[41] That is providing stability support, under strict conditionality, to MS if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. See Art 3 of ESM Treaty

[42] Supra n. 40 Par. 56

[43] Ioannidis, M., "Towards a European Monetary Fund – Comments on the Commission's Proposal", EULawAnalysis, 31/01/2018, available at: http://eulawanalysis.blogspot.de/2018/01/towards-european-monetary-fundcomments.html.

[44] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms, 1996

[45] Declarations 41 and 42 on Art 352 TFEU along with the rest of the declarations annexed to the Lisbon Treaty were signed by the intergovernmental conference on 13 December 2007. Available at https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_5&format=PDF

In order to answer this question, it is important to delve into the legal nature of the Declarations. Despite the fact that Art 288 TFEU, which enumerates the sources of EU law, does not refer to them at all (either as hard law or as soft law), some scholars do classify them as a form of soft law[46]. Pursuant to Art 31 of the Vienna Convention of the Law of Treaties of 1969, declarations serve as a means of interpretation of a Treaty. According to Malcolm Shaw, the decisive element for the status of declarations annexed to international treaties is the intention of the parties to be bound or not[47]. As regards the EU Treaties' Declarations, what is certain is that the CJEU has never attributed to them any legal significance and has never treated them as sources of law, as for example is the case with the Protocols annexed to the Treaties. Consequently, from a judicial point of view these Declarations have never been considered in anyway as binding themselves or as providing binding interpretation of the Treaties[48]. This conclusion is underlined by the fact that they are not subject to ratification[49] and nor does their alteration require adherence to the procedure of amending the Treaties[50]. Therefore, the prevailing view seems to be that these Declarations have a rather political value[51] and that in any case they are not legally binding[52].Under these circumstances, the fact that the objective of the establishment and completion of the EMU provided in Art 3(4) TEU is not mentioned in Declaration 41 on Art. 352 TFEU, might play a role during the political ferment for the adoption (or not) of the proposal, but it does not seem to legally preclude the usage of Art 352 as a legal basis for the present proposal of the Commission.

1.2.2 The necessity condition

As already said the necessity requirement has a double aspect. The integration of the ESM into the EU legal order must as such be an action that is necessary to be undertaken by the Union in order to attain an objective of the Treaties and at the same time adherence to Art 352 TFEU must also be necessary due to the lack of any other legal basis explicitly provided in the Treaties.

The second aspect entails less ambiguity and is fulfilled in the present case. The principle of necessity has been used by the CJEU in order to materially

[46] H. Mangel, "The Need for and the Blessings of Soft Law: Hybridity of Law and New Governance" p.115, in The Institutional Functioning of the EU Volume II Maastricht Centre for European Law Faculty of Law Maastricht University (2011-2012) p.115-122

[47] Malcolm N. Shaw, "International law", Cambridge Univ. Press 4th ed. (1997) 634-36

[48] See on that A.G. Toth, "The Legal Status of Declarations Annexed to the Single European Act", 23 Common Market Law Review (1986) p. 803, 811

[49] J. Lonbay, "The Single European Act", 11 B.C. Int'l & Company Law Review 31 (1988), at http://lawdigitalcommons.bc.edu/iclr/vol11/iss1/3

[50] A declaration is altered simply with a new declaration

[51] See "The declarations and protocols annexed to the Treaty", Summaries of EU legislation https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=LEGISSUM:xy0021

[52] Lebeck, supra n. 31, Beuckers supra n.20; Terpan, classifies them under the normative genus - "No legal form". See F. Terpan, "Soft Law in the European Union - The Changing Nature of EU Law" p. 26, European Law Journal, Wiley, (2015), 21 (1), p.68-96

limit adherence to the flexibility clause[53]. The use of the flexibility clause as a legal basis should be only subsidiary in the sense that if another legal basis in the Treaties provides the necessary powers for the accomplishment of a specific objective (lex specialis), recourse to the implied powers of the flexibility clause (lex generalis) is forbidden. In its early case law, the CJEU adopted a rather flexible interpretation of this rule by allowing the usage of the flexibility clause even in circumstances where other articles of the Treaties could have served as legal bases[54]. Nevertheless, in its later case law the Court has been permanently accepting a more straightforward interpretation, allowing recourse to the flexibility clause only when no other legal basis has been available[55].

In any case, the specific condition is certainly fulfilled as regards the proposal of the Commission. In the landmark *Pringle* judgement the CJEU held that the provisions of the TEU and TFEU do not contain any specific legal basis which enables the Union to establish a stability mechanism such as the ESM[56]. In this instance, of course, the bell tolls mostly for Art 122 TFEU which in the past was used as the legal basis of Regulation 417/2010, which established the EFSM[57]. However, in *Pringle,* the Court ruled out the possibility of establishing a permanent stability mechanism such as the ESM on the basis of Art 122 TFEU[58]. The reasoning behind such a conclusion can be summarized in two main arguments. Firstly, the Court considered that Art 122 confers upon the Union the power to grant only *ad hoc* financial assistance because of its exceptional character[59], which as such contradicts the establishment of a mechanism with permanent character such as the ESM. Secondly, according to the Court, the discrepancy between the facts that the ESM provides financial assistance if indispensable to safeguard the financial stability of the Euro Area as a whole, while Art 122 refers to financial assistance to a specific Member State, also renders Art 122 inappropriate as a legal basis. Another possible legal basis could be the “euro-classic” Art 136 TFEU. Indeed, this article has been repeatedly used for measures of deeper integration into the Eurozone, among which one could conceptually classify also the creation of an EMF. In fact, Art 136 now recognizes explicitly the necessity of the existence of a stability mechanism. Nevertheless, in *Pringle* the CJEU actually dealt specifically with this article and its third paragraph, and still it unequivocally declined the existence of any explicit legal basis.

[53] Konstantinides supra n. 23, p.232
[54] Case 8/73 Massey-Ferguson (1973) ECR 897
[55] Case 45/86 Commission v Council (Tariff Preference) (1987) ECR 1493; Case C-300/69 Commission v Council (Titanium dioxide) (1991) ECR I-2867; Case C-155/91 Commission v Council (1993) ECR 1-939.
[56] Supra n. 40, par. 64
[57] EFSM had a lending capacity of €60 billion and aimed to provide financial assistance to Member States facing "exceptional occurrences beyond their control". See Council Regulation (EU) 407/2010 of 11 May 2010, Art 1
[58] Supra n. 40, par. 65
[59] The wording of Art 122 provides for “exceptional occurrences”

Despite that the reasoning of the Court has not escaped criticism, especially as regards Art 122[60], the fact that the CJEU held in a very clear and straightforward way that no explicit power for the establishment of a mechanism such as the ESM is contained elsewhere in the Treaties, certainly satisfies the above-mentioned condition for subsidiary recourse to Art 352 and opens wide the road for the use of the flexibility clause as a legal basis.

On the other hand, the first aspect of necessity, which relates to the question whether the integration of ESM into the EU legal order is necessary as a measure, is much more ambiguous and controversial. In the specific case, the controversy around necessity for action by the Union does not regard only the classical formulation of a subsidiarity test[61], meaning whether the proposed action could be better achieved through "unilateral action" on the level of Member States or through "collective action" on Union level, but focuses on a conceptually even earlier point. The crucial and controversial element in this point is the fact that the ESM is an already existing (intergovernmental) body which has already been serving the same main purpose with the planned EMF since 2012. In this context it has been argued that since the existing ESM performs a function almost identical to that of the planned EMF, the establishment of the latter by means of an EU Regulation is no longer necessary and consequently recourse to the flexibility clause is not allowed[62]. In other words, why is another stability mechanism necessary since we already have the ESM?

At this point, a conceptual clarification, which the above mentioned opinions seem to ignore, needs to be made. The present proposal of the Commission is not a proposal for the creation of a mechanism to supplement the already existing and operating ESM; it is rather a proposal of integration of the ESM into the corpus of EU law and of its succession by the EMF which will constitute an EU body. Consequently, as has been rightly pointed out[63], the action that must be assessed against the necessity requirement of Art 352 TFEU is not the existence or the establishment of another stabilization fund, but rather the integration of the ESM into the EU legal order and the ownership by the EU of such a body. In other words, in the specific case there is no need to prove that it is necessary to establish a stability mechanism for the Eurozone, because of course such a mechanism already exists, but rather that it is necessary that this mechanism be integrated into the EU legal order.

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[60] See, S. Adam, and F.J.M Parras, "The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle", p.9, European Law Review -Monthly Edition- 38, no. 6 (2013): 848-65; See also Beuckers and De Witte supra n. 17 p. 833-834

[61] Lebeck argues that subsidiarity and the implied powers of Art 352 TFEU have a close structural similarity as they both rely on a test of necessity. Supra n. 31, p. 314

[62] Dr. Bert Van Roosebeke for the Centum fur Europaische Politik, "European Monetary Fund", cep PolicyBrief No. 2018-13, (2018); Kevin Körner for Deutsche Bank Research, "The Commission's Saint Nicholas" EMU package – no real surprises", Deutsche Bank Research (8 December 2017), available online at www.dbresearch.com.

[63] Ioannidis, supra n. 43

Ignoring this fundamental conceptual clarification will subsequently prevent us from taking under consideration, during our necessity assessment, the "inner" objectives of the Commission's proposal that were mentioned above. Specifically, the objective of safeguarding the stability of the euro area might indeed be, conceptually, the overall objective of the proposal; nevertheless, it is only one side of the coin. The other side includes, as already mentioned, the "inner" objectives of enhancing access to justice, subjecting the ESM to democratic accountability at EU level and bolstering the banking union. It is precisely these goals that are identified by recitals 8, 9, and 15 of the EMF Regulation as the motivating force for the adoption of the proposed Regulation and of course they too must be measured during our necessity assessment.

The counter-argument here could be that the proposal does not bring any major changes to the already existing framework. Specifically, as regards the objective of access to justice, it could be argued that the insertion of the "Two Pack" and specifically of Regulation 472/2013 in 2013, has already closed the gaps in judicial review[64] and consequently renders the proposed integration unnecessary from that perspective. Moreover, as regards the objective of enhancing democratic accountability, it has been argued that the proposal is also unnecessary because the National Parliaments are already exercising democratic control over the ESM according to the national law[65].

However, as an overall remark, it must be pointed out that neither Art 352 nor the case law of the CJEU require the proposed action to bring earth-shattering changes, but it is enough that this action is somehow necessary. As regards the objective of enhancing access to justice, the adoption of Reg. 472/2013 was meant to serve two main goals. The first one was to clothe the MoU conditions with the (increased) enforcement power of EU law. The second relates, indeed, to the current discussion for access to justice and can be easily understood if we examine it contextually with the landmark *Ledra adv* case[66]. After the *Ledra* judgment, the door of judicial review for conducts of EU institutions in the context of the ESM might have been opened for actions for damages[67], but direct judicial review, in terms of actions for annulment, remains closed[68]. It is this gap in judicial review which, even the reasoning of the Ledra judgement has not managed to close, and which Reg. 472/2013 is

[64] Under the enhanced surveillance procedure, the measures contained in MoUs are transposed to a Macroeconomic Adjustment Program which is embodied in a Council Implementing decision, which certainly constitute "EU law" falling under the jurisdiction of CJEU. See Art 7

[65] Dr. Bert Van Roosebeke for the Centum fur Europaische Politik, "European Monetary Fund", cep PolicyBrief No. 2018-13, (2018)

[66] C-8/15 P, Ledra Advertising v Commission and ECB Judgment of the Court (Grand Chamber) of 20 September 2016

[67] The Court accepted its jurisdiction and the admissibility of actions for damages, concerning non-contractual liability of EU institutions emanating from conducts in the context of ESM Treaty. See par. 55 of the Judgment.

[68] See Infra n. 69 *Mallis et al*. line of case

supposed to fill. Nevertheless, two things must be mentioned here. Firstly, Reg. 472/2013 may indeed have facilitated access to justice, at least indirectly, but on the other hand the problem of fragmentation and ununiformed implementation of judicial protection, caused by the existence of an intergovernmental mechanism parallel to the EU legal order, still remains and has rendered access to justice at EU level so labyrinthine that it can even be considered ineffective[69]. The fact that actions against the implementing decisions of the Council have not reached the CJEU, not even through preliminary questions, might be a precise indication of this intricate and ineffective system. Secondly, one should bear in mind that the implementing Decisions based on Regulation 472/2013 are adopted *post factum*, meaning when the austerity measures have already been agreed and signed between Troika and the Member States. This, from a substantive point of view, reveals that the genuine decision making is not adopted, discussed and formulated under the EU legal framework and the procedural guarantees that the latter provides. This subsequently entails, that the CJEU still does not have the competence to unfold its full judicial review over the procedural legality of the formulation of these conditionality measures, and consequently the terms and conditions, under which these measures are originally determined, remain judicially unchecked at EU level.

This, of course, also connects with the necessity of enhancing accountability. Arguing that the proposal of integration of the ESM is unnecessary, in terms of accountability[70] because democratic control is already exercised according to national law, is nihilistic. In theory it is generally accepted that intergovernmental structures lack transparency and accountability since their operation is characterized by strict confidentiality and weak parliamentary control[71]. The European Parliament has repeatedly expressed serious concerns about the lack of parliamentary control and scrutiny over the actions of Troika[72] and about the fact that the Eurogroup is *de facto* turning into a decision making body in the governance of the EMU, without being an EU institution[73]. In front of these democratic deficiencies, voices in European Parliament have long been calling for the integration of the ESM into the EU legal order and the replacement of the intergovernmental structure by an EU system accountable to the European Parliament[74].Although the EP is not

[69] See e.g Joined Cases C-105/15 P to C-109/15, Konstantinos Mallis and Others v European Commission and European Central Bank (ECB), Judgment of the Court (Grand Chamber) of 20 September 2016; Case T-531/14, Leïmonia Sotiropoulou and Others v Council of the European Union, Judgment of the General Court (Second Chamber) on 3 May 2017

[70] Supra n. 62

[71] Hinarejos, Supra n. 10 p.95

[72] Parliament Resolution of 13 Mar. 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area program countries, 2013/2277(INI)

[73] European Parliament Resolution of 12 Dec. 2013, on constitutional problems of a multitier governance in the European Union 2012/2078(INI), par. 33

[74] MEPs call for dismantling of EU bailout 'troika', EUobserver 16. Jan. 2014, 09:58. Accessed at https://euobserver.com/economic/122738

going to have a "major say"[75] in the granting of financial assistance, parliamentary scrutiny will thereon reach the EMF from two directions. The direct road is the one provided in Art 5 EMF Regulation as analyzed above. The indirect road, which might prove even more effective politically, is the classical road of control over the Commission, which, however, will now be acting inside the EU legal order. The engagement of the latter in the conduction of MoUs and more importantly its new obligation to conduct prior social impact assessments[76] could become strong springboards of democratic control and political pressure, scrutinizing the conduct of the Commission during the negotiations for conditionality and "indirectly" the EMF's decisions. Consequently, the EP will probably be able to exercise stronger scrutiny in the field of conditionality. It must be nonetheless welcomed that the ESM is going to be subject to an accountability mechanism which explicitly involves the European Parliament. The fact that thereon the decisions concerning financial assistance in the Eurozone, which is a genuine "EU creature", will be finally taken under the EU legal framework with all the checks and balances that the latter implies, already *prima facie* enhances the accountability of the ESM, and from that perspective it is necessary.

Additionally, a third element included in the "inner" objectives of the proposal which the aforementioned opinions oversee and is also crucial for our necessity assessment, is the new function of the planned EMF within the Banking Union.[77]. The severe repercussions that the Eurozone experienced during the economic crisis, due to the well-established link between sovereign debt and bank debt, revealed that the soundness not only of public finance but also of the banking systemic is an indispensable element for the financial stability of the euro area[78]. Unfortunately, the Banking Union remains incomplete as the EU still lacks the third pillar of the Banking Union (EDIS), mostly because of the political controversy that surrounds the topic, since such a measure constitutes a genuine step towards risk sharing. At the same time, the SRF, which still remains an intergovernmental form of cooperation[79], is ultimately destined to reach an amount of 55 billion Euros in 2024, which amounts to only 1% of the covered deposits in Eurozone. This implies that the

[75] Such as a veto or consent power
[76] See Art 13(3) EMF Statute
[77] The creation of a backstop for the Single Resolution Fund ("SRF") was already politically agreed by Member States in 2013, see Statement of Eurogroup and Economic and Financial Affairs Council Ministers on the Single Regulation Mechanism backstop, 18 December 2013
[78] Schoenmaker relates financial stability to systemic risk, which he defines as "the risk that an event will trigger a loss of economic value or confidence in a substantial portion of the financial system that is serious enough to have significant adverse effects on the real economy". D. Schoenmaker, "The Financial Trilemma" (10 February 2011), Economics Letters Vol. 111, (2011), p. 57-59, available at SSRN: https://ssrn.com/abstract=1340395 or http://dx.doi.org/10.2139/ssrn.1340395. See also Rosa Maria Lastra, "Systemic Risk, SIFIs and Financial Stability" Capital Markets Law Journal 197, (2011) p. 207–8
[79] See Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, Brussels, 14 May 2014, 8457/14 available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT

SRF might be able to respond in cases of individual failing banks, but in cases of a full-scale and generalized financial crisis it will, most probably, lack the capacity to support multiple failing banks at the same time. These facts reveal the necessity for the existence of a body with the capacity of the ESM that would act as a fiscal backstop and would provide confidence to the markets[80]. Simultaneously, by using a body with the capacity of the ESM as a fiscal backstop to the SRF, the downsides of the still missing third pillar of the Banking Union are automatically balanced, since the likelihood of the need to activate the EDIS is nonetheless significantly minimized. Last but not least, as already said, the Banking Union, contrary to the ESM, was not designed to be restrained within the limits of the Eurozone[81], because, simply speaking, the banking market is not restrained in the Eurozone. Consequently, the transformation of the ESM into an EU body and its new function within the Banking Union is necessary in order to open a much wider horizon, one where the partial objective of safeguarding the financial stability of the Eurozone will be supplemented by the more generic objective of safeguarding the financial stability of the EU, at least as far as the EU banking system is concerned. Under these circumstances, the "participation" of ESM in the Banking Union would indeed seem from many angles necessary in order to shield the financial stability not only of the Eurozone but potentially also of the rest of the EU, since the EMF can become both a fiscal backstop to the SRF providing confidence to the markets and at the same time evolve into a "silent third pillar" of the Banking Union by minimizing the downsides of the still missing EDIS. Finally, it has been argued that, despite the aforementioned facts, the backstop function of the new EMF might have opposite results because it will increase and incentivize moral hazard on behalf of the banks[82]. In this context it should be noted that the EMF Regulation and Statute make clear that the EMF will constitute only a "last resort backstop" to the SRF. This means that the basic principles of resolution[83] will continue to apply and as a result private solutions and "bail-in" are still to be preferred. Only after the fall of the last "Chinese wall" (the SRF) might the EMF step in to prevent systemic

[80] See A. Sapir, D. Schoenmaker, "The Time is Right for a European Monetary Fund", Bruegel Policy Brief, 2017/4, available at: http://bruegel.org/wpcontent/ uploads/2017/10/PB-2017_04.pdf

[81] Romania was the first country to express its willingness to join the SSM. An analogous declaration was made by the government of Bulgaria, which sent a letter to the Eurogroup in July 2018, requesting to participate in ERM II and expressing its commitment to enter into a close cooperation agreement with the Banking Union. (See, "Statement on Bulgaria's path towards ERM II participation", available at http://www.consilium.europa.eu/en/press/press-releases/2018/07/12/statement-on-bulgaria-s-path-towards-erm-ii-participation/; and Letter of July 2018, available at http://www.consilium.europa.eu/media/36111/letter-by-bulgaria-on-erm-ii-participation.pdf.). The Danish government has also expressed interest in establishing a close cooperation with the ECB and announced in April 2015 its intention to join the banking union. (See "Denmark moves closer to joining EU banking union", Reuters 30 April 2015, accessed at https://uk.reuters.com/article/uk-eu-banks-denmark/denmark-moves-closer-to-joining-eu-banking-union.

[82] Luis Pablo, "A European Monetary Fund: an Old, Bad Idea" (5 January 2018) available at https://guests.blogactiv.eu/2018/01/05/an-european-monetary-fund-an-old-bad-idea

[83] As designated in the SRB Regulation Arts 15 and 22

danger. Under these circumstances, it is hard to see how the EMF backstop will "add" to moral hazard.

1.2.3 Falling within the framework of policies as defined by the Treaties

The third issue concerns the condition that the action "must fall within the framework of policies as defined by the Treaties", which implies that recourse to Art 352 TFEU cannot result in exceeding the powers conferred upon the EU. Highly important in this instance is the landmark Opinion 2/94 of the CJEU. The Court ruled that the flexibility clause cannot be used as a tool to expand the competences of the EU beyond the Treaties framework, because that would be tantamount to an unlawful amendment of the Treaties[84]. Thus, the principle of conferral constitutes the outer limit of Art 352. Any use of that clause cannot go beyond the powers that have been conferred upon the EU. In fact, during the Lisbon Treaty negotiations, the Member States, in order to highlight the significance of this dictum, reiterated it in the text of Declaration 42 on Art 352 TFEU. Consequently, it is important to examine in the present case whether the EU has, in the context of its implied powers, the competence, in terms of conferral of powers, to establish the planned EMF or whether this falls totally outside the framework of policies as defined by the Treaties.

According to Art 5 TFEU the Union's competence in the field of economic policy is limited only to the coordination of Member States' policies. Coordinating competences is a creature of the Lisbon Treaty. The fact that they have not been classified as either exclusive or shared or ancillary competences, under Arts 3, 4, or 6 respectively, has caused controversy in theory over their nature and limits. On the one hand, it has been argued that since coordination of economic policies is not listed in Arts 3 or 6 TFEU, it must be considered as a shared power[85]. The contrary opinion is that, since the wording of Art 5 TFEU renounces "the Member States" as the actor for the coordination of policies, the EU has no power to coordinate economic policies, but this is actually left to the Member States themselves[86]. The middle ground suggests that the coordinating competences lie somewhere between the shared and supporting competences, accepting that in any case the EU is not able to establish an "independent" general economic policy, in terms of, for example, general taxation, welfare system or allocation of resources within the state budget[87]. In our case, this controversy is reflected directly on the "new" paragraph 3 of Art 136. It could be argued that the wording of the paragraph[88] implies that the competence of establishing a stability mechanism

[84] Lebeck, supra n. 31, Konstantinides supra n. 23
[85] K. Lenaerts and Van Nuffel, "European Union Law" Sweet & Maxwell, (2011), p. 128
[86] See A.G. Kokott's View on the Pringle Case, par. 93
[87] Hinarejos, supra n. 10 p. 73-74
[88] "*The Member States* whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

lies with the Member States and not with the Union. Under such a premise, the present proposal of the Commission would certainly be 'unconstitutional'.

Nevertheless, such an interpretation does not seem convincing. The fact that Art 136 renounces the "Member States" as the actor does not preclude that the ESM could have been established as a Union body. Another closer look at *Pringle* might be yet again enlightening. As already examined above, the CJEU had indeed been clear on the fact that "*the provisions of the EU and FEU Treaties do not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/19*"[89]. On the other hand, the Court was more enigmatic on the possibility of the EU legislature to use Art 352 TFEU. The Court held precisely that "*As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act*"[90]. Consequently, although the Court does not explicitly respond positively to the above question, nothing in its reasoning seems to exclude in principle the possibility to use Art 352 TFEU as a legal basis for the creation of the planned EMF[91]. In fact, the wording of the judgment that the Union has *not yet* used its powers under that article seems to logically entail that at least such powers exist. Furthermore, the mere reference to MS in Art 136 (3) should not be perceived as a subsequent exclusion of the Union's competences. Along with Art 5 (2) TFEU, plenty of articles concerning economic policy refer to "Member States" as the actors of the provided actions. Art 120 TFEU also starts by referring to "Member States", but coordination of economic policies happens "within the context of the Union". Art 121 TFEU also starts by referring to "Member States", but the broad economic guidelines are adopted by the Council, which means "within the context of the Union". If we were to interpret these articles as precluding the Union's competence in this field, then ultimately there is no reason to refer to economic policy as a "Union competence" at all. There is no reason for Art 136(3) to be interpreted as an exception. Nothing in the case of Art 136(3) precludes that "the Member States" whose currency is the euro may establish a stability mechanism *within the framework of the Union*. Consequently, it can be argued that the reference to MS, in the whole field of economic policy, does not seek to place economic policy outside the ambit of EU competences framework, but rather it seeks to clarify that in the field of economic policy the predominant actors are the Member States, through the action of the Council[92].

[89] Supra n 40 Par. 64
[90] Supra n 40 Par. 67
[91] See Adam and Parras, supra n. 60 p. 9; Hinarejos, supra n.10 p.106-107
[92] Indeed, if one looks at the EDP (Art 127) and BEG (Art 121), he will notice that the "King in the Parliament" in terms of decision making on economic policy is the Council

Additionally, a further element that needs to be assessed in order to establish, whether the conferred competences of the EU permit the establishment of a stability mechanism such as the ESM, is the "strict conditionality" that accompanies the financial assistance of ESM. Conditionality implies that financial assistance can only be made available if the Member State commits to undertake and implement far reaching macroeconomic reforms. In *Pringle* the Court considered conditionality as an indispensable element for the compliance of the granting of financial assistance with Art 125 TFEU and its *ratio* to incentivize MS to follow sound budgetary policies[93]. Subsequently, the crucial question here is to what extent a body, whose operation entails the imposition of far reaching economic and fiscal reforms and obligations, would be in conformity with the simply coordinative kind of powers that the EU has in the field of economic policy. It has been argued that the Court has adopted a rather restrictive interpretation of EU's coordination powers in Pringle[94], which subsequently would not allow the establishment of the ESM as an EU body, because of the macroeconomic reforms that it entails. Nevertheless, this interpretation does not seem to be solidly founded in the reasoning of the Court. As already said the CJEU ruled only that there exists no specific legal basis which could enable the establishment of an EMF; however, it never rejected in general the competences of EU on this field. Furthermore, there is another element worth noting on this point: the conditionality measures that accompany the financial assistance of ESM must already be consistent with the EU economic policy coordination and the SGP. Art 13(3) ESM Treaty mandates that the MoUs "*shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of [EU] law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned*". What is more, according to Regulation 472/2013, the Council has been delegated the power to adopt implementing Decisions, addressed to Member States receiving financial assistance, which practically contain the austerity measures already agreed between the ESM and the relevant MS, thus transforming obligations contained in MoUs into secondary EU law. Consequently, if we were to assume that strict conditionality is by essence incompatible with the competence of the Union in economic policy, then we logically would have to accept two things. Firstly, that either the MoUs are already not consistent with the measures of economic policy coordination, and consequently the consistency clauses of ESM Treaty are simply not working in practice, or that the SGP (as reformed by the Six-pack) is already exceeding the competence of the Union in economic policy; and secondly that Regulation 472/2013 and subsequently the implementing Decisions of the Council are certainly incompatible with the competence of the Union in economic policy. Such a

[93] Supra n 40 Par. 111
[94] K. Tuori and K. Tuori "the Eurozone Crisis: A Constitutional Analysis" CUP (2013).

position seems rather excessive since both the Six-Pack and the Two-Pack regulations have long remained unchallenged in front of the CJEU. What must be clarified here is that the ESM - and equally the planned EMF - is not an organ destined to create economic policy coordination; rather it is supposed to follow it and act within a framework of consistency[95]. Consequently, any possible competence overrunning in the field of economic coordination should be rather sought in the aforementioned instruments and not in the ESM.

From the analysis of the conditions of Art 352, it derives that the issues of "pursuing an objective of the Treaties" and "the absence of an explicit legal basis", in the light of Pringle judgement, are quite clear and the relevant conditions are fulfilled. On the other hand, the issues, of how necessary the establishment of an EMF is, and ultimately, if such an action is within the competence of the Union in economic policy, are more ambiguous. However, pursuant to the above analysis, there is no finding which would indicate that recourse to the flexibility clause is not possible in the present case.

CHAPTER 2: The legal status of EMF

2.1 Legal status, structure and decision making of the new EMF

Having analyzed the multiple aspects of the legal basis issue, our assessment of the constitutionality of the Commission's proposal now turns to the issue of the new legal status of the EMF. According to Art 1 of the EMF Statute, which is annexed to the proposed Regulation, the planned EMF will constitute an EU entity with its own legal personality. As such the EMF will not be subjected to the administrative structure of an already existing EU institution or other EU body, but it will be established as a separate legal entity under EU law. As to the structure and governance of the EMF, the proposed Statute does not bring notable changes. The structure of the new EMF will continue to consist of the Board of Governors, the Board of Directors, and the Managing Director. The Board of Governors remains the main decision making body as its competence extends from significant administrative and budgetary issues[96], to decisions relating to the provision of financial support to Members States, including the approval of the conditions as provided in the memoranda of understanding[97]. As for the Board of Directors, according to Art 5 EMF Statute, it remains in charge of running the EMF on a day to day basis in

[95] This is totally in conformity with the reasoning of the Court in Pringle, which designates strict conditionality as a way to ensure compliance with Art 125 TFEU and the coordinating measures adopted by the Union, and not as a way to create economic coordination among the Member States. See Pringle (C-370/12) par. (111)
[96] E.g. increase or decrease the minimum lending capacity Art 8(6) EMF Statute; make capital calls Art 9(1); increase the authorized capital stock Art 10(1)
[97] Art 13(3) EMF Statute

accordance with the EMF Regulation and the EMF rules of procedure. In general the current financial and institutional structures of the ESM are essentially preserved[98], and the proposed Statute of the EMF is principally similar to the ESM Treaty.

On the other hand, significant novelties can be detected at the stage of decision making. These novelties focus on two points: changes in the decision making within the Board of Governors, with a view to promote faster decision-making of the EMF and changes regarding the involvement of the Council in the decision making process, with a view to ensure legal consistency with the EU legal framework.

As regards the first category, the four types of voting rules existing in the ESM Treaty, namely mutual agreement (unanimity)[99], reinforced qualified majority (of 85%), qualified majority (of 80%), and simple majority, are retained. However, what is new is that although decisions concerning the financial and budgetary status of the EMF (e.g. decisions on the lending capacity, on capital calls not urgently needed) will continue to be taken by unanimity, decisions concerning the granting of financial support and the release of disbursements to EMF Members will now be taken with reinforced qualified majority (85%) instead of unanimity[100]. Despite the fact that the 85% majority is still high enough to guarantee a "veto vote" to the three largest contributors of the EMF, namely Germany, France and Italy, this change is expected to raise controversy and political objections during the discussions for the adoption of the Regulation, considering that the granting of financial support is, of course, the core and most significant task of the ESM.

As regards the second category, the proposed Regulation provides for the engagement of the Council in the procedure of production of legal acts. All the discretionary decisions taken by the Board of Governors and the Board of Directors[101] will have to be previously approved by the Council in order to enter into force and produce legal effects[102]. Some practical repercussions of this engagement of the Council are worth mentioning. The fact that the EMF BoG is to decide by an 85% majority, while the approving decision of the Council will be taken by a 55% majority, (comprising at least 65% of the

[98] Explanatory memorandum p.5

[99] According to Art 4 (3) of ESM Treaty the adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. In the EMF Statute the term "mutual agreement" does not exist, only the term "unanimity" is used (compare Art 4 (2) EMF Statute and Art 4 (2) of ESM Treaty). It must be considered that the two terms are used with the same meaning

[100] Art. 5(7) EMF Statute

[101] Decisions that are not considered discretionary and thus are not subject to the approval of the Council are e.g.: decisions concerning changes to the distribution of capital among EMF Members and the calculation of such a distribution in case of a new EMF Member (Art 11(3)), decisions concerning change in the pricing policy and pricing guideline for financial assistance (Art 20) and all the decisions referred in Art 5(8) concerning organizational issues of ESM

[102] Art 3(1) EMF Regulation

population of the Member States)[103], reveals two legally possible scenarios of controversy. On the one hand it is possible that a decision which has the support of 85% of BoG may not be backed by the minimum of 11 Member States required in the Council. This reveals that the Council's approval can become a stage of essential scrutiny instead of a simply confirmatory act. Simultaneously, on the other hand, it is also legally possible that the "veto" right of one of the big contributors inside the BoG, could become "a voice crying in the wilderness". Despite not being the subject of the present thesis, it is worth noting that it would be interesting in this context to monitor the implications of this possibility in relation to the national constitutional law and especially the jurisprudence of the *Bundesverfassungsgericht*[104]. Consequently, the engagement of the Council and the discrepancy in the voting majorities, on the one hand ensure that the Council will have the chance to essentially review the constitutionality of the EMF's decision and the legal power to rebut it, but on the other hand certain "dark spots" are hidden that may raise controversy in terms of national constitutional law. In any case, from a legal perspective, the rationale behind the subjection of the decisions of the EMF organs that entail exercise of discretion to the prior approval of the Council is, as already said, to safeguard consistency with the EU legal framework and specifically with the Meroni case law of the CJEU.

Last but not least, reference must be made to the new decision making-procedure for the initiation of the backstop. According to Art 22(4) EMF Statute the Board of Governors decides unanimously on the "financial terms and conditions" of the support to SRB, while the Board of Directors adopts, based on those conditions, general guidelines for implementing the backstop with a majority of 80%[105]. Interestingly, the decision on drawdown of the credit line or the provision of guarantees on liabilities of the SRB lies with the Managing Director.

2.2 Agencification of EMU 3.0?

The Commission has provided no further insight in relation to the status of the EMF, except for the fact that it will have its own legal personality, and the proposed Regulation along with the EMF Statute avoid any classification of the EMF as either an agency, or a body or an office[106]. Despite the fact that

[103] The Council decides with qualified majority as defined in Art 238(3) TFEU. See Art 3(4) EMF Regulation

[104] See Bundesverfassungsgericht, 2 BVR 1390/12, Judgment 18 March 2014, available in English at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/rs20140318_2bvr1390 12en.html. In this case the German Constitutional Court found the ESM Treaty compatible with the Constitution but at the same time held that the principle of popular sovereignty mandates that the Bundestag must always retain control of its budgetary powers and competences. Under these circumstances, the Bundestag must always have the chance to agree, or not, to the transferring of sums within the ESM. However, under the above described legally possible scenario, another collusion of the German Court with the principle of primacy of EU law might be at the gates.

[105] Art. 23 (3)

[106] See enumeration in Art 263 TFEU

the Regulation remains silent, the structure of the new EMF, in essence, seems to reflect all the fundamental elements that characterize an agency. The clarity of categorization is not only of theoretical but also of great practical and constitutional importance. For example, certain provisions of the EUCFR provide protection only against acts of EU "institutions", while others include acts of EU bodies and/or agencies[107]. In the absence of a definition of what constitutes an agency in EU law, most scholars refer to agencies as decentralized bodies that enjoy a certain amount of autonomy in performing their tasks, in terms of at least not being subject on one hand to the administrative structure of an EU institution and on the other hand to the direct control of Member States[108]. Although agencies seem to form part of the broader EU executive, they have been characterized as "in-betweners"[109] between EU institutions and Member States, thus describing their "hybrid nature"[110] which lies somewhere between a "pure" administrative body and an intergovernmental political formation[111]. Ronald van Ooik[112] identifies three core characteristics of an agency: Firstly, the entity must be established with an act of EU institutions (usually a Regulation); secondly, it must be vested with a certain degree of autonomy which is usually reflected on the acquisition of a separate legal personality; and thirdly, it must have a "sophisticated" organizational structure where several organs interact. EU agencies may also be vested with the competence to adopt legally binding acts, although this is not a necessary precondition in order to classify an entity as an EU agency[113]. The planned EMF certainly fulfills the aforementioned characteristics.

During the period of the financial crisis the EU legislature has repeatedly adhered to the creation of independent legal entities/agencies with the aforementioned characteristics[114]. The first step came with the creation of the

[107] E.g. compare Art 41 (1) and (4) EUCFR. Nevertheless, it must be noted that at least in the field of non-contractual liability such concerns have been addressed, as the Ledra judgment has helped to disconnect liability from the legal status of the EU entity. See T-680/13, Chrysostomides, K. & Co. and Others v Council and Others Judgment of the General Court (Fourth Chamber, Extended Composition) of 13 July 2018 pars. 106-112

[108] Wettenhall R., "Agencies and Non-departmental Public Bodies – The Hard and Soft Lenses of Agencification Theory", Public Management Review, 7, 4, (2005) p. 615–35

[109] M. Everson, C. Monda and E. Vos (eds.), "European Agencies in-between Institutions and Member States", Alphen a/d Rijn: Wolters Kluwer, (2014)

[110] M. Everson, "Agencies: The 'Dark Hour' of the Executive?", in H.C.H. Hofmann & A. Türk (eds.), "Legal Challenges in EU Administrative Law. Towards an Integrated Administration", Cheltenham: Edward Elgar, (2009), 131.

[111] E.Vos, "Reforming the European Commission: What Role to Play for EU Agencies?" Common Market Law Review, Vol. 37, (2000) p. 1113–34

[112] R.H Van Ooik, "The Growing Importance of Agencies in the Eu. Shifting Governance and the Institutional Balance" p.134-135, in R.H Van Ooik , D.M Curtin, and R.A Wessel "Good Governance and the European Union Reflections on Concepts, Institutions and Substance", Intersentia (2005) available at https://www.uva.nl/binaries/content/.../o/o/.../asset.

[113] E. Vos, "EU agencies on the move: challenges ahead", SIEPS, Report No. 7, (December 2017), p.16 available at www.sieps.se

[114] E. Vos identifies crises as a main reason for the creation of an agency, see ibid p.17. Similarly, Egeberg and Trondal speak of "contingent events", see M. Egeberg and J. Trondal, "Agencification of the European Union administration: Connecting the dots", ARENA Working Paper 3/2016 (March 2016) p.4

European Supervisory Authorities (EBA[115], ESMA[116] and EIOPA[117]) whose mission it is to contribute to the uniform implementation of a common regulatory framework for the EU banking system[118] and to the harmonization of the supervisory practices in the EU Member States. This outmost significant task is carried out mostly through the adoption of standards which are later embodied in implementing Regulations adopted by the Commission, and thus transposed into secondary EU law. The second step came with the establishment of SRM[119] as the second pillar of the banking union. The SRM has been entrusted with ensuring efficient resolution of failing banks at minimum costs to the tax payer and the real economy. Once a bank is identified as failing or likely to fail the SRM is in charge of assessing whether the resolution of the bank is in the public interest and, if so, to adopt a resolution scheme. This scheme is later approved by the Commission and enters into force[120]. The planned EMF can be placed within this context of "agencification of the EMU" since, in terms its legal status, governance and decision making, it bears a great resemblance to the aforementioned entities. In addition to their independent legal personality and ownership of organizational structure, there is another significant element common to all these bodies that characterizes their status and function. This is the mandatory involvement of EU institutions in the course of the production of their legal acts, which entail exercise of discretion. Just as in the case of the EBA and SRM, where their decisions must be approved by the Commission before entering into legal force, similarly in the case of the EMF the proposed Regulation provides for the prior approval by the Council of a series of decisions taken by the Board of Governors and the Board of Directors. Pursuant to Art 3(1), EMF Regulation all the decisions of the Board of Governors and the Board of Directors, that entail the exercise of discretion must be transmitted to the Council after their adoption, along with the reasons upon which they are based, and may enter into force only after their approval by the Council. This "close institutional supervision" is an inherent characteristic of EU agencies and is mandated as already said by reasons of consistency with the EU Treaties and conformity with the Meroni case law of the CJEU. Consequently, in order to diagnose whether the proposed status and decision making powers of the planned EMF are compatible with EU primary law it is necessary to delve deeper into the case law of CJEU.

[115] Regulation (EU) No. 1093/2010
[116] Regulation (EU) No. 1094/2010
[117] Regulation (EU) No. 1095/2010
[118] The so-called Single Rulebook
[119] Regulation (EU) No. 806/2014
[120] Art 18 (7)

2.3 From Meroni to ESMA

Delegating or conferring[121] powers to entities other than EU institutions, such as EU agencies, has been a major challenge in EU law making. The problems emanate from what has been called the "constitutional neglect"[122] of EU agencies or in the words of A.G. Jaaskinen from "the absence of treaty based criteria for the conferral and delegation of powers so as to ensure respect for institutional balance"[123]. The absence of EU agencies from the system of delegation of powers to the executive, as established in Arts 290, 291 TFEU, and the absence of a norm which will set the boundaries of such delegation of powers to agencies, create serious questions of core constitutional nature related to democratic legitimacy and the separation of powers, or, to use the term of the Treaties, the institutional balance[124]. Can agencies be delegated powers at all, since they have been neglected from the system of Arts 290, 291 TFEU? If yes, how far can this delegation go and what kinds of powers can these entities exercise?

In face of these fundamental questions the CJEU developed, early on, important jurisprudence which has acquired a doctrinal nature[125] and has been applied strictly by the EU institutions. In the landmark Meroni case the Court dealt with the delegation of powers from the Commission to a private body governed by Belgian private law. Most of the literature concurs[126] that the Meroni doctrine consists of the following conditions:

- the delegating authority cannot delegate more powers than it possesses;
- only executive powers may be delegated;
- discretionary powers cannot be delegated, but the conditions of their exercise must be explicitly, clearly and strictly determined in advance;
- the judicial control over the entity's decisions must in any case be safeguarded; and
- the exercise of the delegated powers must remain under the permanent supervision of EU institutions.

[121] Conferral differs from delegation in that the powers may not be transferred from EU institutions to the new entity but are originally vested in the new entity. See in this regard: Legal Service of the Council, Opinion on the Proposal for a Council Regulation on the Community Trade Mark (5837/85) June 6, 1985, p.6. The CLS rejected the notion of delegation to describe the empowerment of the OHIM, because "this specific case concerns the conferring of new powers, i.e. powers which have not at the moment been vested in any Community institution…"
[122] Vos, supra n. 113, p. 22-25
[123] Opinion of A.G. Jääskinen in Short-selling (C-270/12) September 12, 2013 par. 72
[124] Art 13 (2) TEU
[125] See K. Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community', European Law Review 18, no. 1 (1993) p 41
[126] Vos, supra n.113 p.28; Schneider J.-P., "A Common Framework for Decentralized Eu Agencies and the Meroni Doctrine" Administrative Law Review 61 (2009): p. 29-44; M. Chamon, "The Empowerment of Agencies Under the Meroni Doctrine and Article 114 Tfeu: Comment on United Kingdom V Parliament and Council (short-Selling) and the Proposed Single Resolution Mechanism.", European Law Review 39, no. 3 (2014): p. 380-403

All these conditions are destined to safeguard the undisturbed application of the aforementioned constitutional principles of institutional balance and democratic legitimacy. Later on, in the Romano case the Court retained the same strict line and ruled that "…a body such as the administrative commission[127] may not be empowered by the Council to adopt acts having the force of law."[128] Whilst the Meroni case concerned an entity outside EU law, the "universal" applicability of the doctrine has been generally accepted and reaffirmed in the later case law of CJEU[129].

Under the strict conditions of Meroni, it would be hard to accept the conformity of the proposed EMF with the Treaties. Specifically, the proposed EMF would enjoy decision making powers that certainly entail a significant amount of discretion. The procedure of granting financial assistance is the most profound example. According to Art 13 EMF Statute, following a request for financial assistance by a MS, the Chairperson of the Board of Governors shall request the Commission and the ECB to assess 1) the existence of a risk to the financial stability of the euro area as a whole or of its Member States, 2) whether public debt of the relevant MS is sustainable, as well as 3) the actual or potential financing needs of the MS concerned. Based on this assessment, the Board of Governors "*may decide"* to grant, in principle, stability support[130]. Consequently, it is profound that the decision of the EMF to grant financial support (or not), entails a significant amount of discretion, since albeit the BoG is obliged to take under consideration the assessment of the Commission and the ECB, it is definitely not obliged to follow it. Another example of discretionary powers would be the new function of providing credit lines or guarantees to the Single Resolution Board (SRB) ("backstop"). As already noted the power to adopt and formulate the financial terms and the conditions of the support to the SRF, as well as the power to increase the ceiling of EUR 60.000 million, lies in the hands of the BoG. As in the case of the granting of financial support, neither the proposed Regulation nor the Statute contain any conditions which would circumscribe this power. The BoG is free to decide these terms at its own discretion. It is therefore clear that the EMF enjoys significant discretion in its decision making, which as such would seem contrary to the strict conditions as formulated in Meroni.

However, in its latest case law, the CJEU moved towards a "lighter" interpretation of Meroni, loosening the abovementioned strict conditions. In

[127] The administrative Commission has no relation to the Commission but it was an entity established pursuant to Art 80 of Council Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the community

[128] Case 98/80 J Giuseppe Romano v Institut national d'assurance maladie-invalidité. - Reference for a preliminary ruling Judgment of the Court (First Chamber) of 14 May 1981, par. 20

[129] Joined Cases C-154/04 and C-155/04, Alliance for Natural Health and Others [2005] ECLI:EU:C:2005:449, par. 90

[130] Art 13(2), underlining is mine

the Short-selling case[131], the Court ruled upon the compatibility of ESMA's power to issue legally binding measures[132], (prohibit or impose conditions) in relation to short-selling, against financial institutions of the Member States, with its Meroni case law[133]. Among others, the two main arguments that the UK invoked against Art 28 of Regulation 236/2012, were the aforementioned issue of "constitutional neglect" and specifically the fact that since the system of delegation of powers enshrined in Arts 290, 291 TFEU does not provide for delegation of powers to agencies, delegating or conferring powers to ESMA was contrary to the Treaties; and secondly that Art 28 Regulation 236/2012 entailed a wide discretionary power which as such was contrary to the Meroni doctrine. The Court rejected both pleas and upheld the legality of ESMA's powers. According to the reasoning of the Court, the fact that Art 263 TFEU does provide for judicial protection against acts of agencies that produce legal effects vis-à-vis third parties, logically presupposes that agencies can be vested with the powers to produce such acts and that the system of delegation of Arts 290, 291 is not exhaustive but that there are other systems for delegating powers to Union agencies to which the Union legislature may adhere[134]. With this pragmatic reasoning, the Court answers affirmatively the fundamental constitutional question of, whether the EU legislature can delegate powers to EU agencies as part of the EU executive[135]. As regards the second plea, the Court at first point reaffirmed the applicability of the Meroni doctrine and focused its assessment on whether the delegation "*involves clearly defined executive powers… or whether it involves a discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*"[136]. The Court then went on to distinguish ESMA, contrary to the Meroni case, as an EU entity established under EU law[137]. Additionally, the CJEU found that the exercise of ESMA's powers was not limitless but was still subject "to various conditions and criteria"[138]. Under these circumstances, the Court ruled that the powers of ESMA are precisely delineated and amenable to judicial review so as to be compatible with the Meroni doctrine[139]. It has been pointed out that if the Court had applied its

[131] Case C-270/12 United Kingdom v European Parliament and Council of the European Union Judgment of the Court (Grand Chamber), 22 January 2014
[132] Art 28 Regulation 236/2012
[133] For thorough analysis of the case see: T. Tridimas, "Financial Supervision and Agency Power: Reflections on ESMA", in N. Nic Shuibhne and L. Gormley (eds), "From Single Market to Economic Union: Essays in Memory of John A. Usher", Oxford: Oxford University Press, (2012) p.55-83
[134] Supra n 131, par. 86
[135] H. Marjosola, "Bridging the constitutional gap in EU executive rulemaking: the Court of Justice approves legislative conferral of intervention powers to the European Securities and Markets Authority", European Constitutional Law Review 10 no. 3 (2014): p. 500–527.
[136] Supra n 131, par. 41
[137] Supra n 131, par. 43
[138] Supra n 131, par. 45
[139] Supra n 131, par. 53

Meroni case law by the letter, it would have found ESMA's powers illegal[140]. However, as analyzed, the CJEU opted for a new interpretation by "mellowing" Meroni[141].

Subsequently, the crucial question that emerges is whether the proposed EMF complies with the new, "lighter" Meroni doctrine. The Short-selling case law, indeed, allows the delegation of a certain amount of discretionary powers. From that perspective, vesting the EMF with discretionary powers is indeed possible. However, the challenge remains that these powers must be "precisely delineated" so as not to imply "a wide margin of discretion" equal to "the execution of actual economic policy". In this instance, one might notice some crucial differences between ESMA and the EMF. In the case of ESMA the Court identified several conditions included in Regulation 236/2012 that substantially channeled the decisions of ESMA and limited its discretion. In the case of the EMF however, such circumscription seems to be absent both from the Regulation and the proposed new Statute. As already said, the decision to provide financial support is left to the discretion of the BoG and the Regulation or the Statute itself do not provide any conditions under which the BoG "*should*" or "*should not*" decide the granting of financial support. But what would such discretion delimitation look like? In this instance it is suggested that the Regulation could be equipped with explicit principal "guidelines" that would channel the discretionary decisions of the EMF organs. Concretely, these "guidelines" should be associated with benchmarks of systemic danger, which would subsequently be determined on the basis of two parameters. The first one is the already known assessment that the Commission and the ECB conduct prior to the decision of granting (or not) financial assistance. The second parameter entails a role for the "newly" established European Fiscal Board. Fiscal boards, as independent fiscal institutions, are precisely destined to provide impartial assessment of governments' macroeconomic and budgetary projections and outcomes, as well as to detect behaviors that detract from budgetary targets, which may eventually develop into an economic crisis[142]. If one were to combine the aforementioned mission of EFB, with the fact that it is in close cooperation with national fiscal boards, we would end up with a body that can provide solid and most importantly impartial assessments of MS finance. Consequently, if these two assessments (parameters) concur that the situation in one (or more) MS reaches the benchmark of systemic danger for the Eurozone and they ascertain that financial support should be deployed, the EMF should

[140] M. Chamon, "The Empowerment of Agencies Under the Meroni Doctrine and Article 114 Tfeu: Comment on United Kingdom V Parliament and Council (short-Selling) and the Proposed Single Resolution Mechanism." p. 6, European Law Review 39, no. 3 (2014): p. 380-403

[141] J. Pelkmans and M. Simoncini, "Mellowing Meroni: How ESMA can help build the single market", CEPS commentary, 18 February 2014

[142] See on that Michal Horvath, "Giving some teeth to Europe's budgetary watchdogs" available at https://www.euractiv.com/section/euro-finance/opinion/giving-some-teeth-to-europes-budgetary-watchdogs

subsequently follow them or at least state sufficient reasons if intending to differentiate. However, such or any other circumscription is, as already said, absent from the proposed Regulation. Should this mean, then, that the proposal is incompatible with the case law of CJEU and particularly with the requirement for "precisely delineated" powers?

It must be noted that this is not the first time such questions have arisen in the field of the EMU after the *Short-selling* case. Similar concerns have been expressed in the literature regarding the powers of the SRB[143]. In this case, the discussion mostly focuses on the power of the SRB to assess and decide whether the resolution of a bank is in the public interest or not, which by definition entails wide discretion. Nevertheless, no such case has emerged (until now at least) and no plea of breach with the Meroni doctrine has ever reached the Court. The element that keeps the discretionary decision making, both of SRB and of the planned EMF, in line with the Meroni doctrine, must be sought in the involvement of EU institutions in the procedure of production of legal acts. As already mentioned, the proposed Regulation establishes a most crucial role for the Council, similar to that of the Commission in the case of the SRB. Every decision of the BoG or of the BoD, that entails the exercise of discretion, and among them, of course, the decision to provide financial support, must firstly be approved by the Council in order to enter into force. Under these circumstances, the absence from the proposed Regulation of a system of conditions that would circumscribe the discretion of the EMF organs, seems to be neutralized by the fact that the decision of the EMF will in practice acquire the status of a preparatory act, which only after the approval of the Council will come into legal force and produce legal effects. In this way, ownership and responsibility of the act are ultimately assumed by an EU institution. Consequently, the fact that the Council will have the final say in every discretionary decision of the EMF organs is consistent with the essence of the "new" Meroni doctrine, which is, ultimately, no other than to keep the exercise of core politics with the EU institutions.

CONCLUSION

This thesis has started with the aim to examine the compatibility of the proposal of the Commission for the integration of the ESM into the EU legal order and the creation of an EMF with the EU primary law. As regards the first axis of constitutional concerns, namely the legality of the legal basis of Art 352 TFEU, we saw that the adherence to the flexibility clause is no historical novelty but, on the contrary, Art 352 and its predecessors have been deployed multiple times in the field of economic and monetary integration and

[143] Supra n. 140

have been used *ad nauseam* for the creation of EU agencies. Within this context, it was also argued that the notion of "flexibility" is inseparably linked with the EMU and in fact the very establishment of the latter is perhaps the strongest indication of flexibilization in EU law. As for the essential requirements for recourse to Art 352 TFEU, in the aftermath of the Pringle judgment, these appear to be fulfilled. In this context, the picture for the conditions of pursuing one of the objectives of the Treaties and of subsidiary recourse to Art 352 (lack of another explicit legal basis) is rather clear. On the condition of the extent to which this integration of the ESM into the EU legal order is a necessary action, negative opinions have been expressed. In any case, it must be noted here that the decision of whether this action is necessary or not is primarily a political one and has limited legal aspects. This means that as soon as the Council considers the adoption of the Regulation to be necessary, there are no legal reasons for the Court to devalue this political choice. Finally, the issue of the legal basis ultimately turns into an issue of EU competence. This may well constitute the major legal and constitutional concern in relation to the legal basis of Art 352, since the competence of the EU on economic policy has been long debated. Nevertheless, as analyzed above, the CJEU has never rejected the possibility of establishing the ESM as a Union body, but only reaffirmed that no explicit legal basis exists for such an action. Consequently, recourse to the implied powers of the flexibility clause remains open.

As to the legal status of the EMF, the proposal of the Commission provides, in general, little insight. A comparative analysis of the EMF with the ESAs and particularly the SRB reveals that its overall characteristics approach those of a decentralized EU agency. Of course, in face of the silence of the Regulation this is not inscribed in stone. It can be argued that the EMF would more greatly resemble a body such as the EIB; and indeed from a structural and functional perspective this sounds logical.[144] Nevertheless, the fundamental, as designated above, involvement of the Council in the procedure of production of legally binding decisions, signals a "close institutional supervision"[145], which is hard to match with the notion of independence in decision making that characterizes the EIB[146]. On reading the Regulation, it becomes apparent that compatibility with the Meroni doctrine, as has been reshaped in the latest case law of the CJEU, is a priority and a major constitutional challenge. Accordingly, in this context, the most controversial element would be the poor level of delineation of powers existing both in the Regulation and the EMF Statute. Nevertheless, the fact that, ultimately, it is the Council that must approve every decision of the BoG or BoD that entails

[144] It is true that both bodies' capital is divided into shares held by the MS and they both borrow money on capital markets and lend it on favourable terms
[145] See above p.26
[146] See Art 308, 309 TFEU and Protocol 5

the exercise of discretion is the element that keeps the EMF in line with Meroni doctrine.

The road to the adoption of the EMF Regulation, as a genuine risk sharing measure, is expected to be a long one. In this course, according to Art 352 TFEU, the Council will also have to obtain the consent of the European Parliament. To date, the few developments in the adoption procedure have been positive. The Opinion of the European Economic and Social Committee has warmly welcomed the transformation of the ESM into the EMF, supporting the view that the institutional anchoring proposed will further increase confidence in the EU's ability to respond to future financial and economic crises[147]. At the same time, the Italian Parliament has already communicated its reasoned opinion on subsidiarity which also speaks in favor of the adoption of the proposal[148].

As a closing remark, improvements to the proposed Regulation could be inserted, especially in the context of conformity with the Meroni doctrine and enhancing accountability. In this context it was suggested that the prior assessment of the Commission and the ECB, along with the possible involvement of the EFB, can become safe indicators of systemic danger with which the EMF would have to conform. In the field of financial (banking) stability, the structure of the banking union has been already largely based upon the detection and determination of systemic danger; maybe the establishment of the EMF and the need for circumscription of its discretion is a chance to insert this mentality also into the field of public (sovereign) finance stability. Nevertheless, the truth is that crises are not caused by expected occurrences but by unexpected ones. Therefore, at a secondary level if the introduction of such principal "guidelines", into the Regulation, which would channel the discretionary decisions of the EMF organs, is not feasible, because of the crisis management character of the EMF, attention should be turned to accountability. A procedure such as the attainment of the EP's opinion, before the approving decision of the Council, would certainly add democratic legitimacy to the function of the EMF in times of crises.

However, the above suggestions are not meant to put into question the 'constitutionality' of the present proposal. Overall the present analysis has led to the estimation that the proposed Regulation is in conformity with the Treaties and must be welcomed. The Eurozone is an EU creation. Subsequently, the ESM as a body that serves the needs and supplements the objectives of the Eurozone should be subject to the same legal context. The fact that the intergovernmental method was chosen for its establishment, was

[147] See Opinion of the European Economic and Social Committee on Proposal for a Council regulation on the establishment of the European Monetary Fund (COM(2017) 827 final — 2017/0333 (APP)) et.al, EESC 2017/05489

[148] Italian Parliament, Resolution adopted by the Senate budget committee on 24 January 2018 on EU proposals (COM 2017 825 final) and (COM 2017 827 final)

an “anomaly” caused by the reasons analyzed above and primarily because adherence to the union method was not yet politically and legally ripe. From this perspective, the incorporation of the ESM into the EU legal order must be viewed as the rule and not as the exception.

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