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Law

Master Working Paper

2020/3

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**From economic crisis to existential crisis and back: How has
the role of the European Stability Mechanism in the reformed
EMU been shaped through economic challenges?**

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Published in Maastricht, November 2020

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This paper is to be cited as MCEL Master Working Paper 2020/3

ABSTRACT

The European Stability Mechanism (ESM) has been the object of many discussions since its inception. Particularly known for its unique legal status and the political sensitivity attached to its functioning, the ESM's role in the Economic and Monetary Union (EMU) was marked by the difficult economic environment in which it was created. As such circumstances became less apparent, some of its core characteristics had to be revisited in order for it to fit the EMU post-crisis' version of economic governance. After dealing with an economic crisis, the ESM was now facing an existential one. It is in this context that both EU institutions and Member States proposed amendments to the ESM Treaty. However, before any formal change to its legal status was enacted, the Mechanism found itself dealing with yet another economic crisis, the recession caused by the COVID-19 pandemic. The present Master Thesis aims to assess how the ESM's fate has been reshaped through the economic challenges it went through. In an attempt to shed light on its very adaptive nature, this work discusses the legality of the institutional and functional modifications foreseen for the ESM. The conclusion of this research observes that although its legal status remained unchanged, the role of the ESM and the way it is to fulfil its purpose in the EMU post-crisis have significantly shifted. From a simple bail-out fund, the ESM is growing to become a comprehensive stability mechanism.

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INTRODUCTION

“Neither a borrower nor a lender be,
For loan oft loses both itself and friend”¹

William Shakespeare

As W. SHAKESPEARE elegantly put it, lending is an ungrateful business, as the lender risks losing both friendship and money. Whereas the latter is of no concern to the European Stability Mechanism (ESM)², the ESM surely lost some friends along the way. While the economic crisis in which the Mechanism emerged justified its particular characteristics, the stabilisation period that followed gave rise to a questioning of the ESM’s role in the Economic and Monetary Union (EMU) post-crisis. Features such as its international status, the bailing-out function it rigorously exercised during the euro-crisis, or the lack of accountability mechanisms available to hold it responsible, had to be adapted to fit the reformed version of EMU economic governance. From economic crisis, the ESM went to undergo an existential crisis. It is in this context that two possible outlooks were envisaged for the ESM Treaty. These outlooks, namely, its incorporation into the legal framework of the Union, or its revision under international law, are examined in the first part of this study. As we shall see, either of them entails changes in the way the ESM is to achieve its purpose. In a second part, regard will be had to the impact of the COVID-19 pandemic on these developments. Though the corona outbreak has brought the ESM back where it is most relevant, an economic crisis, the way the ESM has been put to use as part of the EU-crisis response contrasts with its euro crisis debut. Whether this revamped role can be attributed to an existential crisis, or to the fear of losing more friends, the ESM’s transformation ought to be acknowledged. This work intends to assess the legality of the ESM’s institutional and functional adaptations along the crises it went through.

¹ W. SHAKESPEARE, *Hamlet*, Act-I, Scene-III, Lines 75-77.

² ESM Treaty, Recital 13.

PART I: FROM CRISIS-MANAGEMENT TO CRISIS-PREVENTION, THE ESM'S SEARCH FOR PURPOSE IN THE CONTEXT OF THE EMU REFORM POST-CRISIS

After the economic fallouts of the crisis somewhat stabilised and offered a glimpse of sunlight on the EMU landmark, it was now “time to fix the roof”³ and take stock of the lessons learned during the euro-crisis. A rethinking of the ESM's role constituted an important part of the agenda. Two solutions were proposed to reform the Mechanism. While these proposals – the European Monetary Fund (EMF) Commission Proposal (Chapter 1) and the revision of the ESM Treaty (Chapter 2) – would have led to formally different outcomes, they should not be perceived as diametrically opposed. Together, they translate the paradigm shift in how the ESM's is to fulfil its purpose in the EMU post-crisis. From an international organisation functionally and institutionally distinct from the European Union (EU), the ESM is adapting into a mechanism increasingly integrated into the Union legal framework, with an ever-more versatile toolbox.

Chapter I: Integration of the ESM into EU law – The EMF Commission Proposal

The Proposal for a Council Regulation “on the establishment of the European Monetary Fund” is part of the package proposed by the Commission in December 2017 on the completion of the EMU⁴. The idea to establish an EMF was first contemplated by economists in 2010⁵. The 2017 proposal focusses on bringing the current ESM into the institutional framework of the Union (Section 1). This attempt, as well as the potential reasons for its failure (Section 2), will be the object of this chapter.

Section 1: Features of the European Monetary Fund

The EMF Commission Proposal carries with it the objectives of the Commission to reinforce unity, efficiency and democratic accountability in the EMU governance⁶. It aims to address some core problems of the ESM by changing its legal status. It also seeks to widen the scope of action of the Mechanism by entrusting it with a new function, being a backstop to the Single Resolution Fund (SRF).

³ European Commission, Deepening Europe's Economic and Monetary Union, 6 December 2017, https://ec.europa.eu/commission/news/deepening-europes-economic-and-monetary-union-2017-dec-06_en.

⁴ European Commission, Communication on further steps towards completing the Economic and Monetary Union, COM (2017) 821 final, 6 December 2017.

⁵ D. GROS, T. MAYER, “How to Deal with Sovereign Default in Europe: Create the European Monetary Fund Now!”, *CEPS Policy Brief*, No. 202, 2010.

⁶ Commission President J.-C. JUNCKER'S State of the Union Address 2017, 13 September 2017.

Subsection 1: Legal status of the EMF

Under the proposal, the ESM would become the EMF, a separate EU entity⁷ established by a Regulation adopted under art. 352 TFEU. Such a change is far reaching, since, contrary to the Treaty on Stability Coordination and Governance⁸, the ESM Treaty does not foresee its incorporation into EU law. Although the proposal is silent on the exact status of the EMF, the fact that the explanatory memorandum emphasizes the observance of the *Meroni*⁹ doctrine hints at the idea that the ESM would take the form of an agency. The EMF would maintain the role of lender of last resort to governments. In addition, it is to provide a safety net to the SRF. Regarding its structure, the proposed EMF will preserve its organs and “shall succeed to and replace the [ESM] including its legal position and assuming all its rights and obligations”¹⁰. Looking beyond this rather vague provision¹¹, the proposal leaves the institutional structure of the ESM relatively unchanged. The Board of Governors (BoG) would remain the principal decision-making body of the EMF. It would nonetheless enjoy new powers in the negotiating and signing of the Memorandum of Understanding (MoU) as well as in the adoption of the financial terms and conditions of credit lines to the SRF¹². The Board of Directors (BoD) is to retain its daily management tasks. To accommodate its new position within the EU legal order, the Managing Director would now be appointed by the Council, as opposed to the Board of Governors¹³, after consultation of the European Parliament (EP)¹⁴.

From a functional perspective, financial assistance from the EMF would still be subject to strict conditionality. The granting of financial support under the EMF would be adopted by a reinforced majority of 85%, instead of unanimity¹⁵. While replacing unanimity can be seen as opening the door to the community method, the practical impact of the new voting rules would not be ground-breaking. As the respective voting weight of EMF members remains unchanged, the power of the purse would still enable the three biggest economies to veto any decision to grant assistance. The

⁷ European Commission, Proposal for a Council Regulation on the establishment of the European Monetary Fund, 6 December 2017, COM(2017) 827 final, art. 1.

⁸ Treaty on Stability Coordination and Governance, signed on 2 March 2012 in Brussels, art. 16.

⁹ Case C-9/56, *Meroni v Haute autorité*, ECLI:EU:C:1958:7.

¹⁰ EMF Commission Proposal, art. 2.

¹¹ For a study of the potential succession procedures, see M. MEGLIANI, “From the European Stability Mechanism to the European Monetary Fund: There and Back Again”, *German Law Journal*, 21, 2020, pp. 679-684.

¹² EMF Statue, art. 22(4).

¹³ ESM Treaty, art. 7(1).

¹⁴ EMF Statue, art. 7(1).

¹⁵ EMF Statue, art. 5(7).

proposal also contributes to remedy some of the accountability gaps of the ESM. For instance, while the roles assigned to the European Commission and European Central Bank (ECB) are essentially the same, the Court of Justice of the European Union (CJEU) would now exercise its full scrutiny over the EMF. Cooperation with the European Parliament (EP) would be strengthened as well. By “repatriating” the ESM into the EU legal order, the proposal constitutes a first step towards shaping the EU’s economic policy from within, as future amendments to the EMF legal position and functioning would be adopted according to EU procedures. The proposal is welcome from the point of view of the unity of the legal order, as it aspires to put some order in the “patchwork of decisions taken to face an unprecedented crisis”¹⁶.

Subsection 2: A common backstop to the SRF, the EMF as key player in the Banking Union

As was emphasized earlier, the ESM was initially created for the management of sovereign debt crises. The euro-crisis revealed how vicious the link between banks and sovereigns was, and the following years have seen an increasing need for an instrument able to sever that link. As the integration of the banking sector into an integrated regulatory system slowly evolved into today’s Banking Union, EU leaders decided to alleviate some of the pressure off national budgets by creating a supranational financing instrument, to help banks recover, or smoothly disappear¹⁷. Involving the ESM in this process was first envisaged in 2014, by expanding its toolbox to include a bank recapitalisation instrument¹⁸. The same year, the Single Resolution Mechanism (SRM) was adopted¹⁹, and with it was established the SRF²⁰. The idea to provide a safety net to ensure the Fund’s liquidity was conceived as a way to guarantee the effectiveness of the SRM²¹. The Fund, composed of national banks’ contributions, would be supplemented by a source of funding that could double its initial target size if implemented. A first suggestion to use the ESM as backstop to

¹⁶ EMF Commission Proposal, explanatory memorandum, p. 4.

¹⁷ Euro Area Summit statement, 29 June 2012 confirmed by all EU leaders in European Council conclusions, 28–29 June 2012, para. IV(a).

¹⁸ ESM Treaty, art. 15.

¹⁹ Regulation (EU) N°806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, 30 July 2014, *O.J.*, L. 225/1.

²⁰ Agreement on the transfer and mutualisation of contributions to the single resolution fund, signed on 14 May 2014.

²¹ C. HADJIEMMANUIL, “Bank Resolution Financing in the Banking Union”, *LSE Law, Society and Economy, Working Papers*, 6/2015, pp. 20-23.

the SRF was made in the Five Presidents' Report in 2015²². In its 2017 proposal, the Commission finally fleshed out the specificities of the backstop.

In concrete terms, the proposed regulation entrusts the EMF with the task of providing financial support to the Single Resolution Board (SRB). Under this regime, the proposed EMF would issue a credit line to the SRF²³, providing last resort funding in case the bank contributions to the SRF are insufficient to bear large scale resolutions. Bridging the gap between the ESM and the Banking Union can be seen as a breakthrough both for the efficiency and unity objectives of the EMU reform. The two mechanisms would now be regulated from within the EU legal framework²⁴. As a result, the purpose of the now EMF of safeguarding the financial stability of the euro area would be further guaranteed by its involvement in the Banking Union. For the purpose of our research, we can read this increase in the ESM's responsibilities as a first step towards entrusting the Mechanism with a new role, the prevention of cross-contamination between the banking sector and governments.

Subsection 3: Accountability and transparency of the EMF

Contrary to the ESM Treaty, the proposed EMF Regulation contains provisions specific to accountability²⁵. This inclusion is welcome, as it addresses one of the main drawbacks of the ESM, and of EMU governance in general. It is worth remembering that ESM BoG members meet as representatives of their government, over which, as a rule, National Parliaments have scrutiny. These are the same ministers who meet in the Eurogroup. The informal status of the Eurogroup shields their actions from direct challenges²⁶. When they meet in the context of the ESM, they escape the oversight mechanisms provided by EU law²⁷. What is more, their decisions are often prepared within the Eurogroup, and adopted in the framework of the ESM²⁸. The lack of transparency and accountability stemming from this "double-hatting" phenomenon is

²² J.-C. JUNCKER, D. TUSK, J. DIJSSELBLOEM, M. DRAGHI, M. SCHULZ, "Completing Europe's Economic and Monetary Union", 22 June 2015, p. 11.

²³ *Ibid.*, art. 67.

²⁴ For both mechanisms to be entirely submitted to EU law, the Treaty establishing the SRF would have to be repatriated into the Union legal framework as well.

²⁵ EMF Commission Proposal, art. 5.

²⁶ Case C-105/15 P, *Mallis and Malli v Commission and ECB*, ECLI:EU:C:2016:702, paras. 46-50.

²⁷ For instance, transparency rules such as Access to Documents Regulation, European Ombudsman, Court of Auditors, Anti-Fraud Office, European Data Protection Supervisor, the EU Staff Regulations do not apply to ESM activities.

²⁸ B. BRAUN, M. HÜBNER, "Vanishing Act: the Eurogroup's accountability", *Transparency International EU*, 2018, p. 27.

well documented²⁹, but has yet to be addressed. The 2017 Proposal foresees that the EMF would be democratically accountable to the EP and the Council. Even though the explanatory memorandum reads that such a change will occur without affecting the existing accountability arrangements with National Parliaments, the proposed Regulation formally limits their role to information rights³⁰. For some National Parliaments, e.g. the *Bundestag* or the Finnish Parliament, this change, along with the mandatory approval of strategic decisions by the Council³¹, would entail the loss of their *de facto* veto rights over BoG decisions³².

The current democratic accountability of the Finance Ministers to their National Parliaments will be supplemented by a new accountability framework. This regime will consist in annual submissions of EMF reports, annual accounts and financial statements to the EP, the Council and the Commission, as well as hearings of the Managing Director by the EP. The latter's role might not be as decisive as it might have hoped³³, but the Proposal finally grants it the possibility to exercise some form of scrutiny over conditionality decisions. The planned EMF will also have to respect EU transparency rules, and perhaps more importantly, it will be subject to the full scrutiny of the CJEU. As an agency, annulment actions against the EMF would be possible under art. 263 TFEU. Although applicants will still have to meet the strict standing requirements for direct actions³⁴, the transformation of the ESM into an EU body constitutes a tremendous improvement for judicial protection.³⁵

Section 2: Limitations

Like many integrationist innovations, the novelties introduced by the EMF Commission Proposal are offset by its limitations. They range from legal red flags to

²⁹ *Ibid*, p. 14 ; see also, C. BAN, L. SEABROOKE, "From Crisis to Stability, How to make the European Stability Mechanism transparent and accountable", Transparency International EU, 2017 p. 8.

³⁰ EMF Commission Proposal, art. 6.

³¹ EMF Commission Proposal, art. 3(1).

³² C. SCHEINERT, "Establishment of a European monetary fund (EMF)", *EPRS*, European Parliament, 2019, p. 6.

³³ ECON Report on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, PE 526.111v02-00, 2014, pt. 106.

³⁴ On the admissibility hurdles traditionally faced by individual applicants in austerity cases, see e.g. Case T-541/10, *Adedy, Papaspyros and Iliopoulos v. Council*, ECLI:EU:T:2012:626, documented by E. PSYCHOGIOPOULOU, "Welfare Rights in Crisis in Greece: The Role of Fundamental Rights Challenges" in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (ed. by C. KILPATRICK, B. DE WITTE), *EUI Working Papers*, LAW 2014/05, pp. 5-18.

³⁵ For an overview of the recurrent gaps in judicial protection across Member States during the euro-crisis, see the complete paper by C. KILPATRICK, B. DE WITTE, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, *op. cit.*.

political barriers. This section offers an overview of the difficulties attached to the Proposal.

Subsection 1: Controversial legal basis

The EMF Regulation was proposed under art. 352 TFEU, which requires specific conditions to be met. Namely, Union action must be necessary to attain an EU objective, it must fall within the policies defined by the Treaties, and no other Treaty provision must be able to accomplish such action. In *Opinion 2/94*³⁶, the CJEU added an unwritten condition, i.e. the flexibility clause cannot serve “as a basis for widening the scope of [Union] powers”. As was confirmed in *Opinion 2/13*³⁷, art. 352 TFEU cannot have the effect of a Treaty amendment. Whereas two of the three traditional conditions are undoubtedly met, the condition of necessity and the unwritten condition are more problematic. Indeed, the need to establish a permanent mechanism to attain the EU objective of safeguarding the financial stability of the euro area was fulfilled in 2012, with the creation of the ESM. The objective of the Proposal has to be set out accordingly. That is, the EMF should be necessary to attain the objective of integrating the ESM into EU law. Such an objective has yet to be set out in the Treaties.³⁸

With regards to the condition set up by the CJEU, the EMF would grant the Union the responsibility to safeguard financial stability in the euro area. As of today, EU competences in that field are limited to the coordination of economic policies³⁹. There is little doubt that such extension goes beyond mere supplementation of the Treaties. This was echoed by the Court itself, when it found that “the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism”⁴⁰. Given its constitutional implications, a proposal aimed at integrating the ESM into EU law cannot be based on the flexibility clause. This subject is highly disputed, but the author’s view is that such action requires an amendment of the Treaty, shifting the discussion from art. 352 TFEU to art. 48 TEU.⁴¹

³⁶ C- 2/94, *Opinion of the Court of 28 March 1996*, EU:C:1996:140, para. 30.

³⁷ C-2/13, *Opinion of the Court of 18 December 2014* ; EU:C:2014:2454, para. 38.

³⁸ M. IOANNIDIS, “Towards a European Monetary Fund: Comments on the Commission’s Proposal”, *EU Law Analysis*, published on 31 January 2018, <http://eulawanalysis.blogspot.com/2018/01/towards-european-monetary-fund-comments.html>.

³⁹ TFEU, art. 5(1).

⁴⁰ Case C-370/12, *Pringle*, EU:C:2012:756, para. 110.

⁴¹ H. HOFMEISTER, “From ESM to EMF and Back: A Critical Analysis of the Euro Area Reform Proposals”, *Swiss Review of International and European Law*, vol. 29, no. 3, 2019, p. 383.

Subsection 2: Name, purpose and legal status

Starting with its name, including “monetary” in the name of a mechanism which the CJEU itself⁴² deemed to be of an economic nature “could be misleading”⁴³, to say the least. As the ECB argued, nothing in the objectives or tasks of the ESM suggest that it is directly involved monetary policy. In addition, the ECB supported the maintaining of the ESM’s name as it currently stands for clarity and consistency for the public. Critics also pointed out the Proposal’s amendment of the purpose of the ESM, shifting from safeguarding “the financial stability of the euro area as a whole and of its Member States”⁴⁴ to that of safeguarding “the financial stability of the euro area or of its Members”⁴⁵. These small changes in the wording of the Mechanism’s objectives could prove significant if they were to trigger financial assistance where the financial stability of a single Member State is at stake. Read in light of *Pringle*, the compatibility of this amendment with the first limb of art. 125 TFEU is questionable. Indeed, one of the conditions set by the Court for financial assistance not to breach the no bail-out clause is for such assistance to be indispensable for the stability of the euro area as a *whole*^{46, 47}.

Although the Proposal does not define the precise status of the EMF, several elements indicate that it would take the form of an agency, as remarked previously. If that were to be the case, problems could arise regarding its conformity with EU law on agencies. Under the traditional version of the *Meroni* doctrine, agencies must meet several conditions in order to ensure their democratic legitimacy and respect the institutional balance between EU bodies⁴⁸. Continuous scrutiny by EU institutions⁴⁹ seems to be the only condition that the proposed Regulation fulfils. Other conditions relating to the containment of the agency’s discretionary powers will certainly pose problem. For instance, under art. 3(1) EMF Commission Proposal, no BoG decision may enter into force without the approval of the Council. Even if we consider this provision to be a sufficient constraint on the EMF’s powers, it implies that the objective

⁴² *Pringle*, paras. 53 to 74.

⁴³ European Central Bank, Opinion of the European Central Bank of 11 April 2018 on a proposal for a regulation on the establishment of the European Monetary Fund, 25 June 2018, O.J. C 220/2.

⁴⁴ ESM Treaty, art. 3.

⁴⁵ EMF Commission Proposal, art. 3 and 12(1).

⁴⁶ Case C-370/12, *Pringle*, EU:C:2012:756, para. 136, emphasis added.

⁴⁷ M. IOANNIDIS, “Towards a European Monetary Fund: Comments on the Commission’s Proposal”, *EU Law Analysis*, published on 31 January 2018, <http://eulawanalysis.blogspot.com/2018/01/towards-european-monetary-fund-comments.html>.

⁴⁸ Case C-9/56, *Meroni v Haute autorité*, ECLI:EU:C:1958:7.

⁴⁹ EMF Commission Proposal, art. 5.

of safeguarding the stability of the euro area would be granted to the Council. This is prevented by the *Meroni* doctrine, but even more so by primary law, as the Council's power in that area is limited to coordinating Member States' economic policies⁵⁰. Even under a more flexible approach to *Meroni*⁵¹, the limit imposed by the Court on agencies requires that the EMF does not exercise "actual economic policy"⁵². In light of what we know on the substance of ESM adjustment programmes, it is difficult to see the EMF meeting such a condition.

Subsection 3: Political challenges

From a political perspective, art. 352 TFEU requires the Council to adopt the Proposal by unanimous decision, after having received the consent of the EP. While the latter, along with most EU institutions, has always supported the incorporation of the ESM into EU law, gathering unanimity in the Council is a more difficult task. Indeed, Member States are reluctant to trade the comfort of their intergovernmental configuration for the slower, much more transparent EU framework. The traditional divide between Northern and Southern Member States exacerbates this debate. National parliaments too emitted reservations. As the case of the French *Assemblée Nationale* illustrates, Member States' oppositions range from the ambiguous name of the EMF to the unsatisfactory changes in the decision-making and the poor role foreseen for the Commission. Given the political obstacles it anticipated, the French lower house even encouraged the revision of the ESM Treaty⁵³. Such a reaction might not be so surprising when we consider the lessening of the role attributed to National Parliaments in the proposed EMF. German MP H. HIRTE held that the Proposal could not be adopted without a Treaty revision, to which National Parliaments will naturally have to consent⁵⁴. This goes to show the divide between EU institutions and Member States, which even within their internal levels of powers struggle to find common ground⁵⁵.

Regardless of its shortcomings, the Proposal's aim to integrate the economic pillar of the EMU by incorporating one of its key players led to a rethinking of the ESM's

⁵⁰ TFEU, art. 121.

⁵¹ Case C-270/12, *United Kingdom v Parliament and Council (Short selling)*, ECLI:EU:C:2014:18.

⁵² *Ibid.*, para. 41.

⁵³ Assemblée Nationale, Résolution européenne relative à la gouvernance de la zone euro, Session ordinaire du 23 juin 2018, para. 14-16.

⁵⁴ H. HIRTE, The Future of the European Monetary Fund: Essentials, Expectations and Beyond, IIEA, available on Youtube: <https://www.iiea.com/eu-affairs/emu-reform-and-the-proposed-european-monetary-fund-essentials-expectations-and-beyond/>

⁵⁵ This question was also debated during the SECG Interparliamentary Committee Meeting of the Committee on Economic and Monetary Affairs, on 18.02.2020.

toolbox and purpose. As we shall see, it influenced the revision of the ESM Treaty. Seen under that light, we can argue that the Proposal's *rationale* may very well survive its failure, and perhaps even inspire future proposals. For future purposes however, the legal status of a potential EU-ESM should take into account the limits established by the case law on agencies and build safeguards accordingly. Alternatively, it has been suggested that the EMF should morph into a body similar to the EIB⁵⁶. This format would make more sense given the ESM's broad mandate and the autonomy it requires to perform its tasks. In the meantime, since the political and legal landscapes have yet to accommodate its incorporation into EU law, the ESM will retain its legal position, with some notable changes, nevertheless.

Chapter II: Maintaining the *status quo* – The revision of the ESM Treaty and its maintenance as an *inter se* agreement

Parallel to the EMF debate, discussions were held in the Eurogroup for a revision of the ESM Treaty⁵⁷. Under this “intermediate solution”⁵⁸, the format of the ESM Treaty as an intergovernmental agreement is to be preserved. This chapter will examine the main amendments to the Treaty (Section 1) as well as some of the legal challenges they might present (Section 2).

Section 1: A refined ESM?

The legal format might be different, but the narrative has not changed. The ESM, still facing an existential crisis, needs to adapt in order not to become redundant in the EMU post-crisis. This section will review the reform of the ESM Treaty in light of its three underlying goals: the establishment of a common backstop to the SRF, the refinement of the precautionary instruments, and the enhanced cooperation with the European Commission. Together, they illustrate the shift in the ESM's role, from a crisis management mechanism withdrawn in Luxembourg, to a resourceful stability mechanism, developing preventive tools and growing ties with Brussels.

⁵⁶ M. MEGLIANI, “From the European Stability Mechanism to the European Monetary Fund: There and Back Again”, *op. cit.*, p. 683.

⁵⁷ See Term sheet on the European Stability Mechanism reform, which was already established on 4 December 2018.

⁵⁸ Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank European, *Deepening Europe's Economic Monetary Union: Taking stock four years after the Five Presidents' Report*, Euro Summit, 12 June 2019, p. 9.

Subsection 1: A common backstop to the SRF, keeping the ESM linked to the EU legal order by giving it a role in the Banking Union, even as an outside actor

As we have seen in the previous chapter, the creation of a backstop to the SRF was introduced as early as 2015⁵⁹. Despite the fact that the terms of the backstop were initially set out in the EMF Commission Proposal, it is in the context of the reform of the ESM that the function of providing a backstop to the SRF has been attributed to the ESM⁶⁰. In observance of the SRM Regulation⁶¹, the design of the backstop shall take the form of a revolving credit line under which the loans will be provided⁶². Such loans shall only be granted as a last resort and to the extent that they are fiscally neutral in the medium term⁶³. The loans are capped to an amount of €68 billion⁶⁴. The ESM will thus act as a lender of last resort to the SRF, in case the national banks' contributions to the Fund are insufficient to finance large scale resolutions.

One of the aims of the common backstop is to provide “enhanced confidence to all parties concerned with regard to the credibility of the actions to be taken by the SRB”⁶⁵. By merely “knowing it is there if needed”, market trust in the banking system is strengthened by the existence of the backstop⁶⁶. Importantly, by providing that last resort funding, the ESM contributes to finalising the completion of the second pillar of the Banking Union, even as an external actor. The ESM credit line thus increases the SRF's capacity to face large scale resolutions, which in turn reduces necessity for potential state aid measures. Seen under that light, the ESM becomes a key player in achieving one of the SRM's main goals, to sever the link between banks and sovereigns. As the current COVID-19 crisis threatens to disrupt the banking sector, the need to establish the backstop could precipitate the adoption of the revised ESM Treaty. According to the President of the Eurogroup, the backstop can be expected to be in place as early as 2021⁶⁷. This timeline contrasts with the rather slow progress made in completing the Banking Union, where full contribution from national banks to the SRF is not expected before the end of 2023⁶⁸, and as a common deposit insurance

⁵⁹ J.-C. JUNCKER, D. TUSK, J. DIJSSELBLOEM, M. DRAGHI, M. SCHULZ, “Completing Europe's Economic and Monetary Union”, 22 June 2015, p. 11.

⁶⁰ Draft on revised ESM Treaty, art. 18A.

⁶¹ SRM Reg., art. 74.

⁶² Draft on revised ESM T, art. 18A(2).

⁶³ Draft on revised ESM T, art. 12(2).

⁶⁴ European Stability Mechanism, “When will the common backstop be in place?”, in the frequently asked questions section on the ESM website: <https://www.esm.europa.eu/content/when-will-common-backstop-be-place-0>.

⁶⁵ EMF Commission Proposal, explanatory memorandum, p. 4.

⁶⁶ J. DESLANDES, C. DIAS, M. MAGNUS, “Completing the Banking Union”, IPOL, PE 574.392, 2019, p. 4.

⁶⁷ Speech of M. CENTENO at European Parliamentary Week 2020, 18 February 2020.

⁶⁸ Pre-COVID-19 estimation.

scheme still lacks the political impetus needed to come to fruition⁶⁹. While everyone agrees on the pressing need to create a European deposit scheme⁷⁰, no consensus has been found on the exact terms of the EDIS⁷¹.

Subsection 2: Refining the ESM toolbox, new conditions for precautionary assistance

The attention given to precautionary tools in the context of the reform indicates the will to entrust new responsibilities on the ESM. By assigning it with preventive tools, the reform ensures that the Mechanism remains useful in non-crises situations. In contrast, the current conditions of ESM precautionary instruments have led many to doubt their usefulness. The stigma attached to the mandatory conclusion of an MoU has until now deterred countries from considering precautionary assistance. The vagueness and lack of transparency of the conditions of “fundamentally sound financial situation”⁷² hinder access to such instruments. As we will see in the second part of this work, accessibility to the ESM toolbox is all the more important considering that ESM assistance is necessary to the deployment of the ECB’s Outright Monetary Transactions (OMT) programme⁷³. Under the current Treaty, precautionary financial assistance may be provided via a Precautionary Conditioned Credit Line (PCCL) or an Enhanced Conditions Credit Line (ECCL)⁷⁴. These instruments are available provided the eligibility criteria detailed in the Guideline on Precautionary Financial Assistance⁷⁵ are met⁷⁶. In case an ESM Member is not eligible for a PCCL, it should be able to request an ECCL. For both instruments, financial assistance is possible if the ESM Member aligns itself with policy conditions negotiated with the Commission⁷⁷. The terms embodying this strict conditionality are detailed in an MoU.

⁶⁹ J. DESLANDES, C. DIAS AND M. MAGNUS, “Completing the Banking Union”, *op. cit.*, p. 3.

⁷⁰ D. SCHOENMAKER, “Building a stable european deposit insurance scheme”, published on the Bruegel website on 19 April 2018, <https://www.bruegel.org/2018/04/building-a-stable-european-deposit-insurance-scheme/>.

⁷¹ On this, see the contrasting proposals made on the one hand by European Commission in its 2015 proposal, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM(2015) 586 final, and the other by O. Scholz in 2019 non-paper, BMF non-paper, “Position paper on the goals of the banking union”, published on 6 November 2019 on the Financial Times website, <http://prod-upp-image-read.ft.com/b750c7e4-ffba-11e9-b7bc-f3fa4e77dd47>.

⁷² European Stability Mechanism Guideline on Precautionary Financial Assistance, art. 2.

⁷³ European Central Bank, “Technical features of Outright Monetary Transactions” Press release published on 6 September 2012, https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html;

⁷⁴ European Stability Mechanism Guideline on Precautionary Financial Assistance, art. 2.

⁷⁵ European Stability Mechanism Guideline on Precautionary Financial Assistance, art. 2(2).

⁷⁶ C. DIAS, A. ZOPPÈ, “The 2019 proposed amendments to the Treaty establishing the European Stability Mechanism”, IPOL, PE 634.357, 2019, p. 4.

⁷⁷ ESM Treaty, art. 13(3).

Although this form of *ex ante* conditionality differs from the one attached to the infamous “bail-out” loans provided during the euro-crisis, the political cost of concluding an MoU makes most governments reluctant to even consider this option.⁷⁸ The ongoing debate in Italy regarding the potential use of ESM precautionary assistance during the corona crisis illustrates this quite well⁷⁹.

The reform of the ESM Treaty aims to make precautionary assistance more accessible and transparent. The draft on the revised Treaty introduces precise eligibility criteria for granting a PCCL⁸⁰. Under this regime, once an ESM Member meets the eligibility criteria, it is no longer required to conclude an MoU. Strict conditionality is thereby replaced by a simplified conditionality, documented in a Letter of Intent (LoI), instead of an MoU. Such conditionality consists in a pledge of “continuous respect of the eligibility criteria”⁸¹ and statement of policy intentions. In practice, the difference between the substance of an LoI and an MoU is still unclear⁸². What is clear is that it will now be for the ESM Member alone to draft the LoI, before submitting it to the Commission and to the BoG. The Commission only assesses “whether the policy intentions [...] are fully consistent with the measures of economic policy coordination provided for in the TFEU”⁸³. In case an ESM Member does not fulfil the eligibility criteria, it can still apply for an ECCL. According to art. 14(3) of the draft Treaty, the conclusion of an MoU remains applicable for granting an ECCL, along with the strict conditionality accompanying it.⁸⁴

The refinement of the conditions for precautionary assistance is necessary to reinforce the transparency and predictability of ESM programmes⁸⁵. This increase in transparency is desirable, as it corresponds to one of the main goals of the reform. However, another objective of the ESM Treaty revision was to make precautionary assistance more accessible. From that standpoint, it has been reported that the new

⁷⁸ G. CLAEYS, A. M. COLLIN, “Does the Eurogroup’s reform of the ESM toolkit represent real progress?” published on 13 December 2018 on the Bruegel blog: <https://www.bruegel.org/2018/12/does-the-eurogroups-reform-of-the-esm-toolkit-represent-real-progress/>.

⁷⁹ Euractiv, “Italians still puzzled over EU bailouts”, published on Euractiv on 1 July 2020, https://www.euractiv.com/section/all/short_news/italians-still-puzzled-over-eu-bailouts/.

⁸⁰ Draft on revised ESM Treaty, art. 14 *juncto* Annex 3

⁸¹ Draft on revised ESM Treaty, art. 14(2).

⁸² C. DIAS, A. ZOPPÈ, “The 2019 proposed amendments to the Treaty establishing the European Stability Mechanism”, *op. cit.*, p. 5.

⁸³ Draft on revised ESM Treaty, art. 14.

⁸⁴ C. DIAS, A. ZOPPÈ, “The 2019 proposed amendments to the Treaty establishing the European Stability Mechanism”, *op. cit.*, p. 4.

⁸⁵ Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank European, *Deepening Europe’s Economic Monetary Union: Taking stock four years after the Five Presidents’ Report*, Euro Summit, 12 June 2019, p. 10.

criteria are in fact more constraining than the former⁸⁶. The preciseness of the revamped eligibility criteria allows to grasp the difficulty of meeting them. Favouring transparency over accessibility is a risky choice, as it might prevent ESM Members from considering precautionary assistance. Some have argued that such a choice gives preference to countries with sound economies, protecting them from contagion in case crises occurred in weaker Member States⁸⁷. The stakes are especially high considering the loss of a potential OMT programme that could result from it. The corona situation makes this debate even more relevant, as precautionary assistance could prove critical for ESM Members coping with the fallouts of the COVID-19 crisis.

Subsection 3: Enhanced cooperation with the Commission

The interplay between the ESM and the EU institutions has always been a controversial issue. The exact involvement of the Commission in ESM processes was only specified at a later stage, in an MoU agreed in April 2018⁸⁸. Building on that instrument, the Commission and the ESM have attempted to clarify their relationship in a joint position prior to the December 2018 Euro Summit⁸⁹. These documents elaborate on their respective tasks and areas of cooperation. The joint position is to be fully incorporated in a memorandum of cooperation when the revised Treaty enters into force^{90,91}. The joint statement provides the possibility to organize informal meetings, and to share financial information. The amendments transfer numerous tasks previously exercised by the Commission to the ESM, with the notable difference that the latter performs them “from the perspective of a lender”⁹². Setting a clear framework for their cooperation is proof of the growing interconnections between the ESM and the EU legal order. It is even more welcome considering the poor collaboration the two have demonstrated so far⁹³. In particular, laying down the terms of their relationship will clarify the question of the ownership of some of the far-reaching reforms designed in the drafting of adjustment programmes. Finally, it

⁸⁶ S.VALLÉE, J. COHEN-SETTON, P. DE GRAUVE, S. DULIEN, “Why the European Stability Mechanism reform should be postponed”, published on 11 December 2019 on LSE website: <https://blogs.lse.ac.uk/eurocrisispress/2019/12/11/european-stability-mechanism/>

⁸⁷ G. GIAMPAOLO, “The Reform of the ESM and Why It Is So Controversial in Italy”, *Capital Markets Law Journal*, Volume 15, Issue 2, 2020, p. 5.

⁸⁸ Memorandum of Understanding on the working relations between the European Commission and the European Stability Mechanism, 27 April 2018.

⁸⁹ Joint position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018.

⁹⁰ Draft on the revised ESM Treaty, art. 13(8).

⁹¹ Draft on the revised ESM Treaty, Recital 5B.

⁹² *Ibid.*

⁹³ D. BEACH, S. SMEETS, “Collaborative leadership in EMU deepening reforms”, Paper prepared for the 2017 European Union Studies Association Fifteenth Biannual Meeting, Miami, 2017, pp. 15-22.

enhances transparency in a process which until this day largely escapes the scrutiny of EU courts.

The Commission's role will be strengthened in the preparatory, negotiating and monitoring phases. Importantly, the Commission will no longer sign the MoU "on behalf of the ESM"⁹⁴, but on an equal footing with the ESM Managing Director⁹⁵. This change in the signatories is welcome, as it raises interesting questions with regards to the judicial review of MoUs. Namely, EU courts called to rule on annulment actions initiated against the Commission could be faced with a potential solution to their previous (and perhaps convenient) problem of the Commission's lack of authorship of the challenged act⁹⁶. By becoming the co-author of the MoU, there is an argument to be made that the Commission should not be able to escape judicial review under art. 263 TFEU when it acts within the confines of the ESM. As we will see in the following section, this argument could be a game changer when it comes to the accountability of EU institutions in the context of conditionality decisions. Finally, the ESM's views on the economic and budgetary goals of the MoU will now only be "taken into account" by the Commission when it forms its intention, which also signals a strengthened role for the Commission.⁹⁷

Section 3: Limitations

These modifications were welcomed by most ESM Members, which were expected to sign the draft in December 2019. However, due to political difficulties⁹⁸, the signature was postponed⁹⁹. The euro area Finance Ministers nevertheless reached an agreement "in principle", which has yet to be formally sanctioned and ratified. This section examines difficulties of another nature, namely, the legal challenges that could arise from the adoption of the amendments.

⁹⁴ ESM Treaty, art. 13(4).

⁹⁵ Joint position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018, pt. 4.

⁹⁶ On this issue, see case T-291/13, *Eleftheriou and Papachristofi v Commission and ECB*, ECLI:EU:T:2014:978, para. 44 ; among the five other cases dismissed by the General Court on the same formal grounds.

⁹⁷ H. HOFMEISTER, "From ESM to EMF and Back: A Critical Analysis of the euro area Reform Proposals", *Swiss Review of International and European Law*, vol. 29, no. 3, 2019, p. 374.

⁹⁸ Euractiv, "Italy's Conte rebukes opposition as debate over ESM reform heats up", published on Euractiv on 3 December 2019: <https://www.euractiv.com/section/economy-jobs/news/italys-conte-rebukes-opposition-as-debate-over-esm-reform-heats-up/>.

⁹⁹ For a comprehensive analysis on the Italian hurdles with the amendment to the ESM Treaty, see G. GIAMPAOLO, "The Reform of the ESM and Why It Is So Controversial in Italy", *op. cit.*, pp. 2-9.

Subsection 1: Duty of loyal cooperation

A first remark should be made as to the timing of the Treaty revision. It was discussed in international fora at the same time as the Commission pushed for the ESM's integration into EU law. As the text of the revised Treaty is somewhat reminiscent of the EMF Commission Proposal, some have argued that this timing might be in breach of the principle of loyal cooperation¹⁰⁰. In its *PFOS* judgement¹⁰¹, the CJEU found that "Member States are subject to special duties of action and abstention [where] the Commission has submitted [a proposal which represents] the point of departure for [EU] action"¹⁰². The question is whether this finding has any bearing on the duties of Member States acting as ESM Members. On the one hand, the Court clearly sets out a duty of abstention for them not to act in the international sphere when the Commission has issued a proposal. From that perspective, the fact that key features of the Commission Proposal (e.g. common backstop to the SRF) are also found in the revised ESM Treaty could be indicative of a "disloyal" behaviour. On the other hand, the ESM was well-established before the EMF Commission Proposal came about, and it was to the ESM that was initially assigned the task of providing a common backstop to the SRF. Also, contrary to the established case law on the duty of loyal cooperation between EU institutions, the extent to which art. 13(2) TEU limits Member States' action *vis à vis* the EU has yet to be clearly defined by the CJEU. More importantly, as was clarified several times, the ESM Treaty revision is an intermediate solution. Since it is only a first step towards the long-term goal to integrate the ESM into EU law, it could be seen as going in the same direction as the Commission Proposal, only at a different pace.¹⁰³

Subsection 2: Compatibility with the Pringle ruling

The revision of the ESM Treaty has to be in line with the case law relevant to the establishment of the ESM. In its landmark *Pringle* judgement, the CJEU emphasized the requirement that ESM assistance be subjected to strict conditionality. This principle, enshrined in EU primary law¹⁰⁴, is also part of the ESM governing

¹⁰⁰ J.-P. KEPPELNE, T. MAXIAN RUSCHE, L. ESTRELLA BLAYA "An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution", in *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection* (ed. by D. FROMAGE, B. de WITTE), Maastricht University Working Paper series, n°03, 2019, p. 42.

¹⁰¹ Case C-246/07, *Commission v Sweden (PFOS)*, EU:C:2010:203.

¹⁰² *Ibid.*, para. 74.

¹⁰³ J.-P. KEPPELNE, T. MAXIAN RUSCHE, L. ESTRELLA BLAYA "An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution", *op. cit.*, p. 43.

¹⁰⁴ TFEU, art. 136(3).

principles¹⁰⁵. Strict conditionality is a constitutional requirement intended to ensure that the activities of the ESM are compatible with *inter alia* article 125 TFEU and the coordinating measures adopted by the Union¹⁰⁶. Observance of the no bail-out clause is critical in order to prevent the moral hazard resulting from the creation of a mechanism such as the ESM. In light of this, one could question the conformity of the new PCCL with the Court's emphasis on strict conditionality. Indeed, it would be interesting to see how simplified the simplified conditionality accompanying a PCCL really is. An approach to ESM financial assistance that would be too lenient could be problematic in light of *Pringle*, regardless of its goal to increase accessibility. This is especially true in the COVID-19 context, as we will examine in the second part of this thesis.

In the same vein, the stronger role given to the Commission in the context of the reform should also be carefully delimited. In *Pringle*, the Court authorized the entrustment of tasks on EU institutions outside the Union framework only in so far as "those tasks do not alter the essential character of the powers conferred on those institutions by the [...] Treaties"¹⁰⁷. With this in mind, questions arise as to the legality of the strengthened role of the Commission in the conclusion of MoUs. In particular, one might ask whether the signature of the Commission in its own name alters the essential character of its powers. At first sight, nothing suggests that the essential character of the powers conferred on the Commission by art. 17(1) TEU are altered by this amendment. As guardian of the Treaties, the Commission is still expected to promote the general interest of the Union in the conclusion of MoUs¹⁰⁸, even if such decisions concern only euro area Member States. The follow-up question is then whether this enhanced role grants the Commission the power to make decisions of its own. If that were to be the case, such decisions would be likely to produce effects in the EU legal order, as they would commit the Commission, along with the ESM¹⁰⁹. Here, it is the author's view that the ESM remains the final decision-maker when it comes to conditionality. Although the Commission is now called upon to (co-)sign MoUs, the strategic decisions are ultimately adopted by the BoG¹¹⁰. Seen under that light, the Commission's role in the conclusion of the MoU merely reflects its revamped

¹⁰⁵ ESM Treaty, art. 12(1).

¹⁰⁶ Case C-370/12, *Pringle*, EU:C:2012:756., para. 111.

¹⁰⁷ *Ibid.*, para. 158.

¹⁰⁸ Case C-370/12, *Pringle*, EU:C:2012:756., para. 164.

¹⁰⁹ *Ibid.*, para. 161 ; T. BEUKERS, B. DE WITTE, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*", *Common Market Law Review*, 50, 2013, p. 846.

¹¹⁰ P. DERMINE, "The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework", *E.C.L.R.*, vol. 13, Issue 2, 2017, p. 378.

involvement in the preparatory and negotiating phases. Consequently, it does not entail decision-making powers of its own. Different is the question of the Commission's accountability when it acts in ESM processes.

Subsection 3: Accountability and transparency

Decision-making in the ESM is notorious for enjoying a broad degree of impunity. More precisely, the degree to which the Finance Ministers composing the BoG, acting as Member States' representatives, are held accountable is suboptimal¹¹¹. From the point of view of political accountability, while other institutions have been "borrowed"¹¹² in some way or another, the European Parliament was largely forgotten from the ESM Treaty. According to the ESM Managing Director, the accountability of the BoG members to their National Parliaments is sufficient. In his opinion, the ESM does not suffer from a democratic accountability deficit, since it relies on the Member States' budgets, and not on the EU's¹¹³. The same reasoning was echoed by the BVerfG when it recognized the indirect accountability of the BoG members to their National Parliaments¹¹⁴. However, this argument is fragile from the perspective of the principle of democratic governance¹¹⁵. Indeed, ESM assistance goes beyond fiscal measures. The policy conditions set out in MoUs range from drastic measures in social policy to reforms in labour law, investment and even the administrative restructuring of the State¹¹⁶. The far-reaching role of the ESM in restructuring EU Member States' economies entails political powers, which call for better accountability mechanisms. "With great political powers (should) come great accountability"¹¹⁷. This is the only way for citizens to feel some degree of ownership over the way in which

¹¹¹ D. HOWARTH, A. SPENDZHAROVA, "Accountability in Post-Crisis Eurozone Governance: The Tricky Case of the European Stability Mechanism", *J.C.M.S.*, Vol. 57, Issue 4, 2019, p. 12.

¹¹² S. PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework", *E.C.L.R.*, Volume 9, Issue 1, p. 70.

¹¹³ Speech of K. REGLING, "What comes after the Euro Summit? The role of the ESM in a deepened monetary union", Representation of the State of North Rhine-Westphalia to the EU, Brussels, 29 January 2019.

¹¹⁴ Bundesverfassungsgericht, Order of 14 January 2014 - 2 BvR 2728/13.

¹¹⁵ J. TOMKIN, "Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy", *German Law Journal*, Vol. 14, issue 1, 2013, p. 180 ; M. RUFFERT, "The European Debt Crisis and European Union Law", *Common Market Law Review*, vol. 48, issue 6, 2011, p. 1790.

¹¹⁶ Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, signed in Brussels on 19 August 2015.

¹¹⁷ F. PENNESI, "The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?", *European Papers*, Vol. 3, n°2, 2018, p. 514.

their societies are run¹¹⁸. From this perspective, one could hope for a greater involvement of the institution elected to represent Europe's citizenry.

From the perspective of legal accountability, the euro-crisis gave rise to an extensive body of case law which reveals how difficult it is for a Court to review the ESM's actions, let alone for individuals to challenge them. While the ESM Treaty grants the CJEU jurisdiction to settle disputes¹¹⁹, such procedure is only available for litigation between ESM Members or between them and the ESM. At Member State level, the case law has shown how limited the say of national courts is when it comes to such high-level decisions¹²⁰. EU law provides little help when it comes to ensuring accountability in ESM processes. Its status as an international entity shields the ESM from direct challenges before the EU judiciary, despite its decision-making body being composed of the Eurogroup members. Even in their quality as Eurogroup members, they are formally excluded from EU scrutiny under art. 263 TFEU¹²¹. For conditionality decisions to be reviewed by the Union judiciary, the discussion has to shift to the accountability of EU bodies when they act outside EU law. That way, the EU's non-contractual liability can be engaged by the Commission, the ECB, or even by the Eurogroup¹²². Alternatively, EU secondary law¹²³ offers an interesting route to challenge the substance of conditionality decisions by initiating a direct action against the Union-translation of the MoU, the Macroeconomic Adjustment Programme, which is adopted by the Council¹²⁴.

The added value of the reform proposed is quite limited with regards to accountability. It is unlikely that the co-signing of the MoU by the Commission leads to a relaxation of the admissibility assessment of EU Courts faced with annulment actions initiated against the Commission. Indeed, signature should not be confused with authorship.

¹¹⁸ M. DAWSON, F. DE WITTE, "Constitutional Balance in the EU after the Euro-Crisis", *The Modern Law Review*, Vol. 76, No. 5, 2013, p. 835.

¹¹⁹ ESM Treaty, art. 37(3).

¹²⁰ R. CISOTTA, D. GALLO, "The Portuguese Constitutional Court Case Law on Austerity Measures: A Reappraisal" in *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges* (ed. by C. KILPATRICK, B. DE WITTE), *EUI Working Papers*, Law 2014/05, 2014, p. 91

¹²¹ On the informal character of the Eurogroup, see case C-105/15 P, *Mallis and Malli v Commission and ECB*, ECLI:EU:C:2016:702, paras. 46-50.

¹²² Case C-8/15 P, *Ledra Advertising v Commission and ECB*, ECLI:EU:C:2016:701, para. 55, 64, 67 ; concerning the Eurogroup, see Case T-680/13, *Chrysostomides et al v Council et al*, ECLI:EU:T:2018:486, para. 206.

¹²³ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJL 140, 27 May 2013, art. 7.

¹²⁴ P. DERMINE, "The End of Impunity? The Legal Duties of 'Borrowed' EU Institutions under the European Stability Mechanism Framework", *op. cit.*, pp. 378-381.

As the ultimate decision-maker, the ESM BoG remains the only actor committed by the MoU, and its legal accountability is left unchanged by the reform. From the perspective of political accountability, the draft limits references to the EP to a minimum. It merely acknowledges the dialogue between the Managing Director and the EP¹²⁵, which was established informally over the years¹²⁶. The only other reference mandates the BoG to make its annual report accessible to the supreme audit institutions of ESM Members, to the European Court of Auditors and to the EP¹²⁷. None of the recommendations made by the Court of Auditors were adopted¹²⁸. Likewise, the EP resolution for establishing a Memorandum of Cooperation with the ESM¹²⁹ has also been forgotten. Nevertheless, fostering institutional dialogue through an *ad hoc* agreement does seem to be the correct approach, as including it in the Treaty could slow down its adoption even more in addition to potentially lacking the flexibility that may be required. The Commission and the ESM have foreseen the adoption of a “mutual agreement on transparency and accountability”¹³⁰. The exact involvement of the EP in the process of drafting such agreement has yet to be determined. Sadly, as long as the calls for enhancing democratic accountability of EMU governance¹³¹ are met with the Council’s contentment regarding the current state of affairs, the EP will not be granted any effective oversight prerogative other than the possibility to instigate a “dialogue”¹³² with those that take the decisions.

Subsection 4: Autonomy of EU law

Finally, as the common backstop to the SRF will create new relationships between the ESM and the EU legal order, this cooperation between an EU body and the ESM will have to respect certain safeguards. For instance, as Union officials, SRB members are subject to a specific confidentiality regime¹³³. The SRM Regulation specifically prevents members of the Board from disclosing confidential

¹²⁵ Draft on revised ESM Treaty, recital 7.

¹²⁶ On 16 May 2013, K. Regling was invited, the Conference of Presidents of the European Parliament. He also took part in workshops between 2013 and 2016.

¹²⁷ Draft on revised ESM Treaty, art. 30(5).

¹²⁸ European Court of Auditors, “Opinion, 2/2018: The audit and accountability considerations concerning the proposal of 6 December 2017 for the establishment of a European Monetary Fund within the Union legal framework”, 8 October 2018.

¹²⁹ European Parliament resolution of 14 March 2019 on the proposal for a Council Regulation on the establishment of the European Monetary Fund, P8_TA(2019)0218.

¹³⁰ Joint position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018.

¹³¹ European Commission, Recommendation for a Council Recommendation on the economic policy of the euro area, 17 December 2019, COM(2019) 652 final, Recital 16.

¹³² Council of the European Union, Draft Explanatory note - Accompanying document to Council recommendation on the economic policy of the euro area 2020, 10 February 2020, 5687/20, p. 2.

¹³³ TFEU, art. 339.

information¹³⁴. By providing a credit line to the SRF, the ESM will inevitably get acquainted with information relevant for the common backstop. In practice, it means that BoG and BoD members will come to discuss confidential matters regarding the resolution. This could be problematic, as neither these members, nor the ESM are mentioned in the list of the authorities allowed to participate in the information flow provided by the Regulation¹³⁵. Moreover, the revised ESM Treaty provides that additional representatives of participating Member States shall also be invited to participate, as observers, in meetings regarding to the common backstop¹³⁶. The SRM Regulation might have to be amended in order for this bank-related information to be shared lawfully between the many new participants.¹³⁷

The issue of information-sharing could be even more worrying if it were to compromise the entire resolution process. This could be the case if some ESM Members were to share that information with their National Parliaments, in accordance with their constitutional law. The German example immediately comes to mind. As was established by the BVerfG, Germany's participation in the decision-making of the ESM is conditional upon the prior involvement of the *Bundestag*¹³⁸. If such logic were to be followed for the decisions regarding the common backstop to the SRF, National Parliaments would become key players in the resolution process, becoming able to second-guess the decisions proposed by the SRB¹³⁹. A different, yet equally problematic issue of second-guessing would happen if the ESM's assessment of the repayment capacity of the SRF were to compromise the resolution. As the backstop is to be "granted [...] to the extent that it is fiscally neutral in the medium term"¹⁴⁰, the ESM will have to make sure that the loan it provides to the SRF will be repaid in the medium term. In conducting its analysis, the ESM might jeopardise the SRB's decision in case it deems the banking sector incapable of repaying the loan in due time. These issues are unavoidable in any relationship between the EU legal order and external actors. They are especially worrying in the context of the Single

¹³⁴ SRM Reg., art. 88(1).

¹³⁵ *Ibid.*, art. 88(6).

¹³⁶ Draft on the revised ESM Treaty, art. 3(4), 6(3).

¹³⁷ J.-P. KEPPELNE, T. MAXIAN RUSCHE, L. ESTRELLA BLAYA "An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution", *op. cit.*, p. 44.

¹³⁸ Bundesverfassungsgericht, Order of 18 March 2014 - 2 BvR 1390/12.

¹³⁹ J.-P. KEPPELNE, T. MAXIAN RUSCHE, L. ESTRELLA BLAYA "An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution", *op. cit.*, p. 44.

¹⁴⁰ Draft on the revised ESM Treaty, art. 12

Resolution Mechanism, since autonomy of EU law is an essential condition for the resolution process to be effective.

A lot has been said during this time of existential crisis, although no formal amendment has been enacted yet. The questions for now are how the return of an economic crisis will affect these changes in the ESM's role, and to what extent the ESM will take these developments into account when dealing with the COVID-19 crisis?

PART 2: THE COVID-19 PANDEMIC, THE OPPORTUNITY FOR THE ESM TO GAIN A NEW MEANING IN THE EMU POST-CRISIS?

Two observations have been made in the first part of this work. First, that though the legal position of the ESM as an “EU law outsider” is to be maintained, cooperation between the Mechanism and the EU legal order tightened as a result of the reform of the EMU. Second, that the ESM is adapting its toolbox through the development and refinement of crisis prevention instruments, which in turn affects the functions it holds in the EMU. The second part of this essay will study the impact of the COVID-19 crisis on these evolutions. This will be done by first analysing the role the ESM has played in the EU crisis response (Chapter 1). We will then concentrate on the instrument adopted by the ESM to deal with the crisis (Chapter 2).

Chapter 1: A new role for the ESM? From last resort option to front line of EU solidarity

In addition to the sanitary challenges it presents, the economic fallout of the COVID-19 pandemic announces a dire future for the global economy. The sudden contraction of the euro area Member States economies is expected to cause a negative growth of -7.7 % GDP, instead of the initial +1,2%¹⁴¹. Member States reacted mostly individually at first. An EU “crisis response” was then swiftly designed to complement the far-reaching interventions of the ECB. The Eurogroup in its inclusive format drafted a coordinated strategy to establish safety nets for workers¹⁴², businesses¹⁴³,

¹⁴¹ European Commission, Pandemic Crisis Support Eligibility Assessment conducted by the Commission services in preparation of any evaluation pursuant to Article 6 Regulation (EU) No 472/13, Article 13(1) ESM Treaty and Article 3 of ESM Guideline on Precautionary Financial Assistance, 6 May 2020, Annex 1, pt. 6.

¹⁴² European Commission, Proposal for a Council Regulation on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, COM/2020/139 final.

¹⁴³ European Investment Bank, “EIB Board approves €25 billion Pan-European Guarantee Fund in response to COVID-19 crisis”, published on the European Investment Bank website on 26 May 2020, <https://www.eib.org/en/press/all/2020-126-eib-board-approves-eur-25-billion-pan-european-guarantee-fund-to-respond-to-covid-19-crisis.htm>.

and sovereigns of the euro area. It is in that latter context that recourse to the ESM was envisaged, by building on its existing facilities to create a credit line dedicated to help ESM Members deal with the crisis. On 9 April 2020, the Eurogroup agreed on the establishment of a tailored instrument, the Pandemic Crisis Support (PCS), which would take the form of an ECCL¹⁴⁴. The PCS was finalised and made available on 15 May 2020¹⁴⁵.

The COVID-19 crisis has led to an interesting turn of events for the ESM. The pressing need for liquidity in some Member States indicated how incomplete the economic leg of the EMU still was. Against this background, the Eurogroup was quick to channel its efforts through the ESM, capitalising on its capacity to work fast and take decisions outside EU processes. It is not the first time Member States take the intergovernmental route to arrive to their destination, the difference being that this time their path to ESM assistance was not motivated by bad fiscal policy. While some scholars proposed to resurrect the EMF Commission Proposal and create an entirely new instrument¹⁴⁶, the ESM was able to design, in record time, the only readily available instrument that satisfies the requirement set by Northern Member States that there be no immediate transfers to other Member States. By designing this credit line, the Eurogroup sidestepped the political hurdles inherent to the issuing of grants as well as the legal challenge they pose with regards to art. 125 TFEU. In practice, the PCS must be seen as an insurance policy¹⁴⁷. The fact that it is available, and even requested, does not mean that funds will be drawn. Accordingly, it must be valued in terms of the comfort it gives, rather than for the likelihood of its triggering. This is the purpose of precautionary instruments, the effects of which are similar to those of the OMT announcement.

Before studying the PCS in more details, we should take a step back and appreciate how the COVID-19 crisis has affected the role of the ESM. The initial *raison d'être* of the ESM is to provide assistance on terms or in circumstances that would not be provided by ordinary markets¹⁴⁸. It is primarily known as a crisis resolution

¹⁴⁴ Eurogroup, Report on the comprehensive economic policy response to the COVID-19 pandemic, 9 April 2020, pt. 16.

¹⁴⁵ European Stability Mechanism, "ESM Board of Governors backs Pandemic Crisis Support", published on the ESM website on 15 May 2020, <https://www.esm.europa.eu/press-releases/esm-board-governors-backs-pandemic-crisis-support>.

¹⁴⁶ L. GARICANO, "the COVID-19 bazooka for jobs in Europe" in *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes* (ed. by R. Baldwin, B.Weder di Mauro), A VoxEU.org Book, CEPR Press, 2020 p. 136.

¹⁴⁷ European Stability Mechanism, "ESM Pandemic Crisis Support", <https://www.esm.europa.eu/content/europe-response-corona-crisis>.

¹⁴⁸ P. CRAIG, "Pringle- Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative Law*, 2013, p. 8.

mechanism. Until this point, assistance from the ESM was limited to last resort help, entailing far reaching reforms. The PCS is a testimony of the ESM's ability to diversify its toolkit according to the particular needs of a given time. At a moment where the bailing-out function of the ESM was becoming redundant¹⁴⁹, the ESM shifted its capacity from contingency plan to preventive tool, without any amendment to its constitutional Treaty being enacted. In doing so, ESM assistance literally went from requiring Member States to cut expenses in healthcare¹⁵⁰, to funding it with a dedicated credit line and the issuance of social bonds. Who, in 2015 Greece, would have guessed the ESM would incorporate the Environmental, Social and Governance criteria into its operational activities by becoming a signatory Party to the UN Principles for Responsible Investments¹⁵¹? The COVID-19 outbreak has constituted for the ESM the opportunity to introduce the notion of social purpose into its mandate¹⁵². Finally, the fact that it was the first operational instrument put forth under the label of "EU solidarity" signals the central role the ESM still plays in the EMU post-crisis.

Chapter 2: Legal assessment of the Pandemic Crisis Support

The PCS is based on an ECCL. It enables euro area Member States to borrow up to 2% of their GDP until December 2022. This credit line differs in many ways from traditional ESM instruments, including standard ECCLs. To name only a few of its distinct features, the fees and margins of the ESM have been significantly lowered to make the credit line more attractive. Surveillance of the Member States having received assistance has also been reduced to a streamlined monitoring from the Commission¹⁵³. Finally, conditionality is to take the form of "standardised terms agreed in advanced", which only require that ESM funds be spent on direct and indirect costs relating to the health crisis. These terms are summarised in a "Template

¹⁴⁹ S. JOURDAN, "Time to transform the ESM before it dies", published on Positive Money Europe website on 25 May 2020, <https://www.positivemoney.eu/2020/03/transform-esm/>.

¹⁵⁰ Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece, signed in Brussels on 19 August 2015, pt. 2.5.2.

¹⁵¹ See articles by European Stability Mechanism, "Kalin Anev Janse in interview with Börsen-Zeitung (Germany)" and "ESM becomes signatory of United Nations Principles for Responsible Investment", published on the ESM website on 27 February 2020, <https://www.esm.europa.eu/interviews/kalin-anev-janse-interview-börsen-zeitung-germany-2> and <https://www.esm.europa.eu/press-releases/esm-becomes-signatory-united-nations-principles-responsible-investment>.

¹⁵² European Stability Mechanism, "ESM readies to issue social bonds" published on the ESM website on 25 June 2020, <https://www.esm.europa.eu/press-releases/esm-readies-issue-social-bonds>.

¹⁵³ European Commission, letter addressed to the Eurogroup President on 7 May 2020, https://ec.europa.eu/info/sites/info/files/economy-finance/letter_to_peg.pdf

Response Plan” and are uniform to all Member States¹⁵⁴. As the next sections will illustrate, this “pandemic version” of ESM assistance goes a long way from its euro crisis debut.

Section 1: Is the Pandemic Crisis Support legal?

Before addressing the issue of strict conditionality, other potential points of contention deserve to be raised. One of them is the reducing of ESM costs from 2 to 3 times what they are for regular precautionary credit lines¹⁵⁵. According to an ESM insider, PCS fees “are there merely to cover [its] operational and administrative costs”¹⁵⁶. While this is certainly true, it is important not to forget that fees and margins also contribute to mitigate the moral hazard inherent to ESM assistance. Indeed, EU law and the ESM Treaty¹⁵⁷ have been interpreted by the CJEU as requiring that ESM assistance amounts to the creation of a new debt, the amount of which “is to include an appropriate margin”¹⁵⁸. This remark alone cannot call into question the legality of the PCS, but the “appropriateness” of ESM costs should not be overlooked. Similarly, by using the ECCL facility, one would expect that the PCS displays features that approximate those of an ECCL. The reality is quite different. For instance, the requirement that the terms of an ECCL should be embedded in an MoU is simply disregarded for (obvious, yet insufficient) political reasons¹⁵⁹. Also, the fact that enhanced surveillance by the Commission is to be replaced by a soft monitoring stands in contrast with what is prescribed by the applicable guidelines¹⁶⁰.

With this in mind, we can now tackle the issue of conditionality. Strict conditionality is the cornerstone of financial assistance between Member States. It is a constitutional requirement under the TFEU and the ESM Treaty¹⁶¹. The significance of strict conditionality was emphasized by the CJEU¹⁶², and is considered the ultimate benchmark against which ESM assistance is to be measured¹⁶³. In addition to its political undertone, this concept legally ensures that Member States sustain sound budgetary policies. Strict conditionality is also relevant for monetary purposes. From

¹⁵⁴ C. DIAS, A. ZOPPÈ, “the ESM Pandemic Crisis Support”, EGOV, PE 651.350, 2020, p. 2.

¹⁵⁵ *Ibid.*, p. 4.

¹⁵⁶ K. ANEV JANSE, “Out of the Box: A new ESM for a new crisis”, published on the ESM website on 3 June 2020, <https://www.esm.europa.eu/blog/out-box-new-esm-new-crisis>.

¹⁵⁷ ESM Treaty, art. 20(1).

¹⁵⁸ Case C-370/12, *Pringle*, EU:C:2012:756, para. 139.

¹⁵⁹ ESM Treaty, art. 14(2).

¹⁶⁰ Guideline on Precautionary Financial Assistance, art. 2(4) *juncto* art. 5(1).

¹⁶¹ TFEU, art. 136(3) ; ESM Treaty, art. 3, 12(1).

¹⁶² Case C-370/12, *Pringle*, EU:C:2012:756, paras. 108-112.

¹⁶³ P. LEINO-SANDBERG, “Constitutional Constraints meet Political Pressure”, published on Verfassungsblog on 12 May 2020, <https://verfassungsblog.de/constitutional-constraints-meet-political-pressure/>.

that perspective, the PCS's "standardised terms agreed in advance" could prove problematic considering the underlying reason to participate in an ESM programme is to enable the ECB to launch its OMT programme. Indeed, except for a handful of them¹⁶⁴, the PCS assistance itself is not ground-breaking for Member States. Given the current low interest rates¹⁶⁵ and the fact that ESM resources are finite, requesting a credit line is only interesting insofar as it could lead to a potential unlimited bond purchasing programme by the ECB. The OMT debate might become decisive if the BVerfG's feud with the ECB¹⁶⁶ were to discontinue the ECB's PEPP interventions¹⁶⁷. In the unlikely¹⁶⁸ event the fallouts of the *PSPP* judicial saga were to impact the PEPP's legality¹⁶⁹, the ECB would be left with its ultimate, still unused, OMT alternative, the legality of which was accepted by the BVerfG¹⁷⁰. The question then would be whether the PCS satisfies the criteria for an OMT programme? It is through those lenses that we will take a closer look at conditionality.

To answer this question, we need to first consider whether the ECB intended for an ECCL to be among the ESM programmes susceptible to lead to an OMT programme. This is a disputed issue¹⁷¹, but the author's view is that a euro area country having

¹⁶⁴ K. ANEV JANSE, "Out of the Box: A new ESM for a new crisis", *op. cit.* mentions 11 Member States, which contrasts with the EGOV estimation of 7 Member States (GR, IT, SP, CY, MT PT and SK) for which the PCS would be attractive from the perspective of interest rates, see C. DIAS, A. ZOPPÉ, "the ESM Pandemic Crisis Support", *op.cit.*, p. 6.

¹⁶⁵ G. CORSETTI, A. ERCE, "Maturity, seniority and size: Make sure the ESM's pandemic crisis support is fit for purpose!", published on the VOX website on 29 April 2020, <https://voxeu.org/article/make-sure-esm-s-pandemic-crisis-support-fit-purpose>.

¹⁶⁶ BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -.

¹⁶⁷ M. POIARES MADURO, "Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court", published on Verfassungsblog on 6 May 2020, <https://verfassungsblog.de/some-preliminary-remarks-on-the-pspp-decision-of-the-german-constitutional-court/>.

¹⁶⁸ The dispute will likely de-escalate as the ECB seems somewhat receptive to the German attack, see also P. NICOLAIDES, "Op-Ed: "The ECB is Responding to the Federal Constitutional Court of Germany: A Comparison of Monetary Policy Accounts", published on EU Law Live website on 29 June 2020, <https://eulawlive.com/op-ed-the-ecb-is-responding-to-the-federal-constitutional-court-of-germany-a-comparison-of-monetary-policy-accounts-by-phedon-nicolaides/>.

¹⁶⁹ The BVerfG noted in its press release No. 32/2020 that its decision did not call into question the legality of the PEPP, though it does so *ipso facto*, see also D. KYRIAZIS, "The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango" published on Europeanlawblog on 6 May 2020, <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/>.

¹⁷⁰ M. VAN DER SLUIS, "Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)", *Legal Issues of Economic Integration* 46, no. 3, 2019, p. 264.

¹⁷¹ P. DERMINE, M. MARKAKIS, "The EU Fiscal, Economic and Monetary Policy Response to the COVID-19 Crisis", published on EU Law Live, Weekend Edition No 11, p. 11 ; C. DIAS, A. ZOPPÉ, "The 2019 proposed amendments to the Treaty establishing the European Stability Mechanism", *op. cit.*, p. 6 ; G. CLAEYS, A. M. COLLIN, "Does the Eurogroup's reform of the ESM toolkit represent real progress?", *op. cit.*.

been granted an ECCL is eligible for an OMT programme. This is supported by the argument that the OMT press announcement expressly mentions ESM precautionary assistance, the ECCL in particular. But more fundamentally, though there is little doubt that the “strict and effective conditionality” referred to in the press release is the one attached to ESM loans, nothing suggests that an ECCL could not fulfil that condition as well. Contrary to the PCCL (which is omitted from the announcement), granting an ECCL normally entails the adoption of policy conditions¹⁷². In its traditional form, the conditionality attached to an ECCL could very well be “strict and effective” enough to enable the ECB to launch its OMT scheme. What remains to be seen however is whether the conditionality attached to the PCS effectively does, as it differs significantly from a standard ECCL.

The second part of our answer captures the entire PCS controversy. It essentially consists in determining whether this exceptional instrument respects the principle of strict conditionality. The main precedents when it comes to conditionality in the EMU are *Pringle* and *Gauweiler*. These rulings emphasise the constitutional significance of strict conditionality¹⁷³. A narrow reading of these judgments would lead to excluding the PCS from the ESM programmes eligible to launch an OMT programme on the ground that the “standardised terms agreed in advance” do not meet the “strictness” of the conditionality requirement traditionally attached to ESM assistance, nor the “country-specific conditionality” referred to in the OMT announcement. However, drawing such a conclusion would amount to conflate strict conditionality with macroeconomic adjustment programmes. Taking a closer look at *Gauweiler*, one notices that the ultimate purpose of strict conditionality is to prevent moral hazard. In other words, strict conditionality ought to be seen as a means to incentivize Member States to maintain sound budgetary policy, rather than an end in and of itself. Macroeconomic adjustment programmes were the only means that seemed valid during the euro crisis, which is far from being the case in today’s context. Indeed, the crisis that resulted from the pandemic does not find its origin in Member States’ fiscal behaviours. Hence, it is not appropriate to measure the PCS’s compliance with the principle of strict conditionality on the basis of the reforms it entails, or lack thereof. How then should conditionality be assessed in today’s context?

¹⁷² European Stability Mechanism Guideline on Precautionary Financial Assistance, art. 2(4).

¹⁷³ Case C-370/12, *Pringle*, EU:C:2012:756, paras. 108-112 ; Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400, para. 120.

Section 2: How the COVID-19 context has changed the functioning of ESM assistance

The paradigm that emerged during the euro crisis cannot be applied when financial assistance is granted in the context of a symmetric shock. The exogenous character of the present crisis is the very reason why the standards previously applicable to ESM assistance cannot apply *mutatis mutandis* to the PCS. Contrary to what the ESM has been conceived for, the economic crisis which results from the coronavirus is not related to a particular Member State's bad fiscal policy. Submitting it to a macroeconomic adjustment programme and intense monitoring only makes sense when such measures are aimed at correcting fiscal laxity. Hence, it seems logical to exclude this form of strict conditionality in the present context¹⁷⁴. As the Eurogroup President correctly pointed out, “[the] features of this instrument [...] need to be consistent with the external, symmetric nature of the COVID-19 shock. This is also true for any attached conditionality.”¹⁷⁵. The origin of the crisis is also relied on by the Commission, when it concludes that because “Member States do not experience [...] difficulties of an *internal origin* with respect to their financial stability, [...] a streamlined monitoring framework is warranted”¹⁷⁶. This surely explains the reasons behind the procedural differences between the PCS and a standard ECCL. Proposing the PCS under the ECCL label essentially enabled to quickly design a tailored instrument out of an existing one¹⁷⁷. By considering the *rationale* of the principle of strict conditionality, i.e. preventing moral hazard, we are able to recognize the appropriateness of standardised conditionality in the COVID-19 circumstances.

Indeed, replacing macroeconomic adjustment programmes by an allocation usage condition does not suppress strict conditionality, but adapts it¹⁷⁸. Standardised conditionality ensures that Member States hit in a similar fashion apply terms that are unspecific to their situation. In that way, ESM pandemic assistance is “strictly” linked

¹⁷⁴ R. BALDWIN, B. WEDER DI MAURO, “Introduction” in *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes* (ed. by R. Baldwin, B. Weder di Mauro), A VoxEU.org Book, CEPR Press, 2020, p. 19.

¹⁷⁵ Eurogroup, “Remarks by Mário Centeno following the Eurogroup videoconference of 24 March 2020”, 24 March 2020, <https://www.consilium.europa.eu/en/press/press-releases/2020/03/24/remarks-by-mario-centeno-following-the-eurogroup-meeting-of-24-march-2020/>.

¹⁷⁶ European Commission, letter addressed to the Eurogroup President on 7 May 2020, emphasis added, https://ec.europa.eu/info/sites/info/files/economy-finance/letter_to_peg.pdf.

¹⁷⁷ B. WEDER DI MAURO, “A Covid Credit Line for Europe”, published on VOX website on VOX on 24 March 2020, <https://voxeu.org/content/covid-credit-line-europe>.

¹⁷⁸ L. BOONE, A. SANTOS PEREIRA, « Europe must act now to prepare the aftermath of the pandemic crisis » published on VOX on 27 April 2020, <https://voxeu.org/article/europe-must-act-now-prepare-aftermath-pandemic-crisis>.

to pandemic costs¹⁷⁹. The legal framework in which the ESM currently operates does not prevent such a flexible approach to conditionality. On the one hand, the adjustable character of strict conditionality is enshrined in art. 12 ESM Treaty, which reads that conditionality is “appropriate to the [...] instrument” and can “range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions”. This provision suggests that conditionality is best seen as a spectrum, and the strictness of the terms embodying it may vary depending on the instrument, which itself varies in relation to the situation. This reading is confirmed by Recital 5A of the draft revised Treaty which emphasises the role of conditionality and reads that “the exact terms need to be adapted to each instrument”. On the other hand, picking the ECCL as instrument of choice presents the advantage of having a soft law instrument as procedural legal basis. The guidelines applicable to precautionary assistance instruments are indeed non-binding and adjustable by the BoD¹⁸⁰.

To conclude, the legality of the PCS cannot be called into question solely because the terms under which it is to be granted differ from those that were attached to ESM assistance during the euro crisis. The issue of conditionality remains paramount, as it presents challenges for further interventions from the ECB. Looking beyond its inherent political sensitivity, this complex concept inspired from IMF practice is interpreted differently from one legal order to the next. Where the Netherlands would favour hard conditionality, France could settle for a lighter conditionality, while Italy would insist on no conditionality¹⁸¹. At the end of the day, the decisive factor for assessing the legality of the PCS is the degree to which it sufficiently prevents moral hazard. Such an assessment has to be comprehensive. For instance, it was noted that while the crisis affected all Member States in a symmetric manner, the fact that Member States are in different debt situations “risks rendering it asymmetric”¹⁸². To that, we might add that the fact that some Member States were already in somewhat difficult debt situations might constitute a ground for stricter conditionality, or at least some form of individualised conditionality. This last caveat shows how tricky this discussion can be. The corona crisis is an unprecedented event and will certainly lead to unprecedented changes in the way the ESM operates. Its occurrence at such a time of the reform, and more broadly, at a time of rethinking of the ESM’s role in the

¹⁷⁹ A. ERCE, A. GARCIA PASCUAL, T. ROLDÁN MONÉS, “The ESM must help against the pandemic: The case of Spain”, published on VOX on 25 March 2020, <https://voxeu.org/article/esm-must-help-against-pandemic-case-spain>.

¹⁸⁰ ESM Treaty, art. 14(4).

¹⁸¹ R. M. LASTRA, K. ALEXANDER, “The ECB Mandate: Perspectives on Sustainability and Solidarity”, in *The ECB’s Mandate: Perspectives on General Economic Policies*, IPOL, PE 648.814, 2020, p. 24.

¹⁸²A. DELIVORIAS, “Economic and monetary union”, EPRS, PE 651.994, July 2020, p. 3.

EMU post-crisis, could be the catalyst for reinforcing not only the Mechanism's legal position as an international organisation, but also its function as preventive tool as well its very functioning.

CONCLUSION

The ESM has proven capable to evolve since the euro-crisis. The so-called existential crisis it went through certainly influenced how the Mechanism reacted to the COVID-19 crisis. The fact that such reaction occurred with essentially the same legal framework as the one conceived during the euro crisis is compelling. While exceptional circumstances certainly call for exceptional measures, one cannot help but notice how reminiscent these measures are of the proposals studied in the first part of this study. For one, recourse to precautionary assistance reflects the reform's emphasis on the preventive function of the ESM. Its central position in the EU-crisis response, despite sitting outside the Treaties, testifies in favour of its integrated role in the EMU. While strict conditionality was not addressed by any of the proposals, the delaying of the adoption of the revised Treaty caused by the Italian aversion to debt restructuring indirectly signals how problematic the issue of strict conditionality still is. Could the post-COVID-19 ESM overcome this stigma? The adaptation of the PCS conditionality and the issuance of social bonds demonstrate the ESM's willingness to review even the core of its functioning. The existential crisis it underwent led to its transformation from simple bail-out fund to comprehensive stability mechanism. The corona crisis precipitated that shift. The fact that such a change occurred before any amendment to the ESM Treaty was enacted is even more striking. Although recurrent issues such as accountability and differentiation still need being addressed, the ESM was able to overcome existential threats and reinforce its legitimacy as an external actor in the EMU post-crisis. Considering how the ESM confirmed its relevance across economic circumstances, one might wonder if incorporating it into EU law will ever be possible.

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