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University of Kent | Brussels School of International Studies

LEGISLATING CRISIS

The European Central Bank in the Great Reformation of EU Economic Governance

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Thesis submitted for the degree of
Doctor of Philosophy in Law

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ABSTRACT

With every crisis does indeed come great opportunity. In the EU, nobody knows this better than the European Central Bank.

The first decade since the sovereign debt crisis saw the temporary alignment of governance interests between the power brokers at the time – the creditor member states and the European Central Bank (ECB). For the creditors, the reformation of EU economic governance was a means of exercising power over debtors in the form of investment insurance and as means for preventing future cross-border fiscal transfers. In practice, the reforms mimicked the discipline, which the ECB had sought to impose on national fiscal domains in the interest of successfully exercising its monetary policy mandate.

These events enabled the Bank's active participation in the legislative overhaul of EU economic governance, recalibrating its economic counterpart in the interests of securing price stability. As the EMU caught up with another round of economic integration, the Bank would also significantly expand its own competences into matters otherwise extracurricular to its mandate. The power of money recast crisis dynamics into a permanent state of affairs – a reinforced structure of hierarchical legal arrangements allocating shared sovereignties in the Union across the economic-monetary divide.

I describe the resultant unconventional phenomenon as *disciplinary constitutionalism* – a revival of the economic morality imbued with the Maastricht compromise recalibrated in proportion to the risks of contemporary economic integration. If markets could no longer be trusted to behave 'normally' and nor could Member States be relied on to behave 'responsibly,' then a legal framework was to be erected to substitute the disciplining potential of the sovereign bond market. Discipline would only prove constraining to those in need of discipline and so, the erosion of sovereignty emanating from the new measures would only affect fiscally profligate Member States.

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LIST OF ABBREVIATIONS

AGS – Annual Growth Survey
BEPGs – Broad Economic Policy Guidelines
BoP – Balance of Payment Assistance Facility
CAP – Corrective Action Plan
CJEU – Court of Justice of the European Union
CSR – Country Specific Reports
DBPs – Draft Budgetary Plans
EC – European Community
ECB – European Central Bank
EDP – Excessive Deficit Procedure
EFSF – European Financial Stability Facility
EFSM – European Financial Stabilisation Mechanism
EIP – Excessive Imbalances Procedure
EMU – Economic and Monetary Union
EPP – Economic Partnership Programme
ESA95 – The European system of national and regional accounts
ESI – European Structural Investment Fund
ESM – (Treaty Establishing) European Stability Mechanism
ESRB – European Systemic Risk Board
EU – European Union
IGs – Integrated Guidelines for Growth and Jobs
IMF – International Monetary Fund
LLR – Lender of Last Resort
MAP – Macroeconomic Adjustment Programme
MIP – Macroeconomic Imbalance Procedure
MS – Member State(s)
MTO – Medium Term Budgetary Objective
MoU – Memorandum of Understanding
NRP – National Reform Programme
OMC – Open Method of Coordination
RQMV – Reverse Qualified Majority Voting
SCP – Stability and Convergence Programme
SDP – Significant Deviation Procedure
SGP – Stability and Growth Pact
TFEU – Treaty on the Functioning of the European Union
TSCG – Treaty on Stability, Coordination and Governance in the Economic and Monetary Union

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INTRODUCTION

The Surveillance Union

The Economic and Monetary Union had always been a precarious enterprise because of its founding precarious compromise. Characterised by equal parts political enthusiasm and mutual distrust, Member States sought to maximise the benefits of a shared economy and single currency, while divesting themselves of any potential costs. The Maastricht Treaty had all the fundamental provisions necessary to make an asymmetric EMU tick, at least in theory. As the venture's architects had advocated, the macroeconomic equilibrium would be split between a hyper independent and price-stability oriented central bank guarding monetary policy (Art 127(1) and 130 TFEU), a framework of fiscal coordination and fiscal constraints as a functional equivalent to a real fiscal union (Art 121 and 126 TFEU), along with prohibitions on monetary financing and sovereign debt liability to discourage both profligate spending and irresponsible lending (Art 123 and 125 TFEU).

But as is often the case with the best laid plans, they go awry.

During its first two decades, the EMU operated almost in spite of itself. With political commitment to Treaty obligations waning, the economic union quickly fell behind the monetary. By 2010 everything that could go wrong, did go wrong. Under the pressures of deeper integration and the global financial crisis, an unwarranted transfer union was no longer a hypothetical threat, but a glaring reality. These, in turn, precipitated the quintessentially *European* sovereign debt crisis.

The European sovereign debt crisis was, most importantly, a legal crisis – it was borne of and managed through law. While the economics of the events were definite cause for alarm, they mattered all the more – if not exclusively – because the Union was precluded from action at great cost to all involved. In other words, EU law could not sustain its normativity in the face of very clearly failed expectations and dissonance with economic and political reality. The EU had arrived at the point 'where the law runs out.'[1] To that end, the CJEU in its reading in *Pringle* 'simply' changed the understanding of what was meant by the Treaty norms in question, emasculating the 'no bail-out' rule as but an expression of the newly discovered new higher norm of 'stability.'[2] The Eurozone crisis has stretched EU constitutional law to its limits, leading to an amalgam of supranational and intergovernmental rules and disciplines with tenuous legal justification.[3]

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[1] Joerges,'"Where the Law Runs Out": The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance, in S. Gerben et al. (eds.), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019), 167.

[2] Case C-370/12 *Thomas Pringle v Government of Ireland*, ECLI:EU:C:2012:756.

[3] See, among many others, Chiti and Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', (2013) 50 *Common Market Law Review* 683; Dawson and De Witte,

By that point, the EU political establishment had already identified the crisis as a product of a legal transgression – that of budgetary indiscipline. This allowed creditor governments to establish the moral higher ground and manage the resolution of the crisis on their own punitive terms. Moreover, by subduing the crisis within EU law, they seized the opportunity to regulate the risk away by recalibrating the EU economic governance framework with an eye to ensuring the higher objective of EU law – EMU stability.

Thus, the response to the Eurozone crisis consisted, on the one hand, in emergency measures at the very end of the law, and, on the other, in the Great Reformation – a legislative overhaul of EMU that sought to normalise exception by writing exceptional measures into 'normal' law. This was a grandiose expansion of European oversight into previously unregulated competence areas on the mere conjecture they represent a risk to the stability of EMU. In many ways, the Great Reformation renewed and intensified political commitment to the Maastricht compromise – a budgetary 'surveillance union' as the price to pay for the absence of a fiscal transfer union.[4]

The Bank

This dissertation traces the role of the European Central Bank in the ideational preparation and in the nitty-gritty of the legislative processes leading up to the Great Reformation. The ECB has been strangely neglected in studies of the reform of new economic governance arrangements, which have concentrated on the 'new intergovernmentalism' embodied by the role of the European Council, or on the marginalised European Parliament, or on the 'unexpected winner' of the Crisis, the Commission.[5] The ECB's 'legislative' role has also gone all but unnoticed in the constitutional

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'Constitutional Balance in the EU after the Euro-Crisis', (2013) 76 *Modern Law Review* 817; K. Tuori and K. Tuori, *The Eurozone Crisis- A Constitutional Analysis* (CUP 2014); Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of EU Law* (Oxford University Press 2015), 719; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); De Witte, 'Euro Crisis Response and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation', (2015) 11 *European Constitutional Law Review* 434; Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', (2016) 53 *Common Market Law Review* 1237; Th.Beukers, B. de Witte and C. Kilpatrick (eds.), *Constitutional Change through Euro-Crisis Law* (CUP 2017), A. Estella, *Legal Foundations of EU Economic Governance* (CUP 2018); D. Adamski, *Redefining European economic integration* (CUP 2018), and V. Borger, *The Currency of Solidarity- Constitutional transformation during the Eurocrisis* (CUP 2020).

[4] Hinarejos, 'Fiscal federalism in the European Union: Evolution and future choices for EMU', (2013) 50 *Common Market Law Review* 1621. See also J. Savage, *Making the EMU: The Politics of Budgetary Surveillance and the Enforcement of Maastricht* (OUP 2007).

[5] See, for example, Puetter, 'Europe's deliberative intergovernmentalism: the role of the Council and European Council in EU economic governance', (2012) 19 *Journal of European Public Policy* 161; Bauer and Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance', (2014) 36 *Journal of European Integration* 213; Rittberger, 'Integration without Representation? The European Parliament and the Reform of Economic Governance in the EU', (2014) 52 *Journal of Common Market Studies*

literature, which focuses almost exclusively on the ECB's 'executive' role in bail-outs and troika's, and, most importantly, its role in 'unconventional monetary policy.'[6]

It is a significant gap in our knowledge and understanding of these events, made all the more remarkable if one considers the extent of the ECB's openly hidden influence in these processes. As this study will demonstrate, the ECB – by virtue of its institutional role and expertocratic dominance[7] – has yielded enormous power and influence in the design of the Great Reformation. As the Court of Justice moved from 'no bail-out' to stability, so the Bank's discourse shifted from one anchored in 'credibility' to one centred on 'stability', free to reinterpret the rules 'by stealth.'[8]

The fact is, the Great Reformation proved a most advantageous occasion for the European Central Bank. As the institutional embodiment of monetary union, the Bank's own operations are inextricably linked to the condition of its economic counterpart. Further, it was constitutionally predisposed towards supporting the reform agenda of the political establishment, which just happened to commit national budgetary policy towards the fiscal consolidation needed in the interest of securing price stability. And lastly, and most importantly for our purposes, the ECB was constitutionally enabled to take part in the process.

The crisis provided two main channels for the dominant involvement of the ECB in the legal reconfiguration of the system: i) an informal advisory channel established during the legislative planning stages; ii) a formal legislative channel, based on ECB's right to be consulted under Articles

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1174; Dehousse, 'Why has EU macroeconomic governance become more supranational?', (2016) 38 *Journal of European Integration* 617; Bressanelli and Chelotti, 'The Shadow of the European Council. Understanding Legislation on Economic Governance', (2016) 38 *Journal of European Integration* 511; Bressanelli and Chelotti, 'The European Parliament and economic governance: explaining a case of limited influence' (2018) *The Journal of Legislative Studies* 72, and Schoeller, Magnus G., and Adrienne Héritier, 'Driving informal institutional change: the European Parliament and the reform of the Economic and Monetary Union', (2019) 41 *Journal of European Integration* 277.

[6] See e.g. Wilsher, 'Ready to do whatever it takes- The legal mandate of the European Central Bank and the Economic Crisis', (2013) 15 *Cambridge Yearbook of European Legal Studies* 503; Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', (2013) 50 *Common Market Law Review* 1579; Scicluna, 'Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis', (2018) 25 *Journal of European Public Policy* 1874; Tuori, 'Has Euro Area Monetary Policy become Redistribution by Monetary Means? "Unconventional" Monetary Policy as a Hidden Transfer Mechanism', (2016) 22 *European Law Journal* 838; Kilpatrick, 'Abnormal sources and institutional actions in the EU Sovereign Debt Crisis: ECB Crisis Management and the sovereign debt crisis', in M. Cremona & C. Kilpatrick (eds.), *EU Legal Acts* (OUP 2018), 70, and Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer', (2019) 26 *Maastricht Journal of European and Comparative Law* 94.

[7] '[T]he ECB enjoys unique authority in economic and financial matters. Other participants in meetings, whether at the technical or at the political levels of the Eurogroup, generally take the ECB's views as the last word on financial and monetary affairs.' Braun and Hübner, *Vanishing Act: the Eurogroup's accountability* (Transparency International 2019), 26.

[8] Schmidt, 'Reinterpreting the rules "by stealth" in times of crisis: a discursive institutionalist analysis of the European Central Bank and the European Commission,' (2016) 39 *West European Politics* 1032.

127(4), 282(5), and 126(14) TFEU. ECB legislative opinions issued under the Treaty are constitutional provisions for inter-systemic communications in the EMU. They are means for the Bank to secure the boundaries of the synthetic monetary-economic divide established with the Maastricht compromise, which also makes them instruments of constitutional communication. Moreover, when the Bank speaks, markets listen. And so ECB Opinions could also be usefully seen as instruments of communication between the political and financial spheres. The Bank exercises its consultative powers on its own initiative, should it consider that legislative undertakings in any field of national or EU competence affect the exercise of monetary policy. In other words, opinions are triggered whenever established boundaries are somehow challenged.

The ECB has very few channels of official communication. Within the scope of its official mandate, in conducting monetary policy, the Bank communicates by setting interest rates and inflation targets. Opinions, on the other hand, constitutionally secure the Bank's right to be heard on events developing outside the scope of its competences, but nonetheless related to it. In addition, and of its own accord, the ECB had taken to issuing Monthly Bulletins on all matters of institutional relevance. Its legislative opinions are both exhaustive and candid documents, which speak directly to the institutional mindset of the ECB regarding the Great Reformation of EU economic governance.

Legislative opinions are not mandatory. In theory, if it were not the Central Bank issuing them, they could easily be ignored. Their potential is conditioned upon the ECB's institutional authority and the extent of shared interests with its legislating counterpart.

It is in this context that this study argues the Bank's right to opine proved a most potent enabler of the ECB's enterprise for re-anchoring EMU when the Great Reformation of EU economic governance ensued. The ECB wielded significant unaccounted power with its legislative opinions by channelling its institutional policy preferences through the political processes and decision-making prerogative of the EU executive. In the process, the ECB would secure the regulatory toolbox to secure an economic counterpart to its monetary domain – one up to the required standards of a highly integrated single currency union. During this 'fast forwarding' of yet another round of economic integration, the Bank would also significantly expand its own competences into matters otherwise extracurricular to its mandate.

This claim will be demonstrated by tracing the role of the ECB in the legislative process involved with the Great Reformation through opinions, proposals, amendments and associated documents –from the informal negotiations, which set the parameters for the Great Reformation of EU economic governance, through its legislative opinions on the Commission's proposals, to final text. This 'desk research' methodology is premised on the *institutional* character of the ECB's policy

preferences. As Henning puts it, if the ECB sought to use the crisis to achieve its goals, '[t]his dynamic is nurtured, indeed necessitated, by the institutional architecture of the monetary union, its political fragmentation in particular.'[9] That is to say, the dissertation refrains from imputing specific political or ideological objectives to the ECB, and does not try to get 'behind' documented expressions of preferences.

The Dissertation

The overhaul of EU economic governance was a premeditated and comprehensive affair. It ensued with informal negotiations in the forum of the Council President's Task Force in the summer of 2010 and culminated the Great Reformation of EU economic governance into an integrated framework of crisis prevention through the regular cycle of EU economic governance and ESM financial aid.

In the process, the EU deliberately and methodically internalized, reformulated and legalized the crisis as the permanent and continuous threat of budgetary profligacy, establishing a normative parity between financial woes and legal transgression at the core of its value system. It cast adverse and arguably unpredictable environmental circumstances as wilful transgressions, or at the very least – severe negligence, by troubled Member States. Therein, the inability to cope became a sanctionable offense.

Even if instituted at different times through disparate legal measures, the new objectives and means for achieving those were conceived in unison, and therefore the crisis-reform catalogue of the Union must be analysed accordingly. Consequently, we must treat the series of economic and crisis governance reforms, which took place in the heat of the sovereign debt crisis (2010-2013) and unfolded through instruments of various legal nature, in concert, as a single framework oriented towards the same goal – EMU stability.

This study will develop in two sections – one focused on the constitutional underpinnings of the European sovereign debt crisis and subsequent push for reforms (Chapters 1 & 2), the other on tracing the ECB's legislative influence in the Great Reformation of EU economic governance. The narrative developed therein is complemented by an Annex on the latest legal developments on the EU crisis management framework, which – although pertinent to the discussion – are still a long time removed from the events of primary concern.

Chapter 1 will begin the study with the origins story of the Economic and Monetary Union – an attempt to factually and historically establish the alleged 'intent of the Treaties,' which served to

[9] Henning, 'The ECB as a strategic actor- Central Banking in a Politically Fragmented Monetary Union', in J.A. Caporaso & M. Rhodes (eds.), *The Political and Economic Dynamics of the Eurozone Crisis* (OUP 2016), 168, 190.

overcome the constitutional paradox presented by the Greek sovereign debt crisis. Not unlike the empirical analysis of Section II, Chapter 1 will use the legislative background documents to the Treaty of Maastricht in pursuit of the objectives and grounds behind the legal construct of EMU. The analysis will focus on the boundary-setting provisions, which defined the precarious balance between national fiscal policies, supranational monetary authority, and the markets (Articles 121, 126, 123 and 125 TFEU) and the underlying assumptions and necessary conditions for the successful operation of the EMU enterprise – convergence, compliance, and the global economy. This analysis will be utilised as a benchmark to evaluating the function and malfunction of various legal and economic instruments during the crisis and to contextualise the direction taken for reforming them in response to the crisis.

Enter crisis.

The chapter will then transition to an interrogation of the CJEU's judgment in *Pringle* – reconstituting the underlying normativities of EU law in the interest of preserving the Maastricht compromise. The generally accepted reading of the Court's decision will be compared with a reading supported by the previous section's dissection of the intent of Maastricht in an effort to draw attention to the legally compromising effects of the crisis and the dissonance between constitutional norm and economic reality. Thereafter, the analysis will focus on the consequences of the ruling and the economic context of the crisis at large, which collectively singled out the EU economic governance framework for a major overhaul.

To that end, Chapter 2 will begin with a brief study of the EU economic governance framework – the Stability and Growth Pact, as it stood on the eve of crisis. The analysis will pay due regard to the early dissonance between political enthusiasm for economic regulation and the underlying requirements for such a body of laws to guide the deepening integration of EMU.

Having examined the shortcomings of the SGP – distinguished as being at the core of the sovereign debt crisis, the analysis will then turn to the informal negotiations for its overhaul.

These took place in the forum of the Council President's Task Force, comprising of representatives from Member States, the Eurogroup, Commission and the ECB, who united around a number of reform-themes designed to realign the EMU to an originalist formulation of Maastricht and subdue the danger of a transfer union to a regulated risk, including: i) greatly expanding the supranational oversight of budgetary discipline with compliance enforced through intensified procedural and financial sanctions; ii) splitting the SGP economic cooperation and budgetary surveillance functions into separate procedures and transforming the former into a full-blown macroeconomic and competitiveness surveillance framework; iii) the introduction of the budgetary

rulebook onto the national level in an attempt to increase 'ownership' and compliance; and lastly, iv) the potential for a permanent crisis management framework to provide equal doses of financial aid and economic conditionality if all else fails. These boundaries of minimal accord would form the basis of the European Commission's subsequent legislative proposals at issue in this study.

It is in the context of this Blueprint that Chapter 2 will begin tracing the influence of the ECB in the Great Reformation of EU economic governance by comparing the Bank's independently published reform theme proposals with the final recommendations published in the Task Force Report. This process would allow us to establish institutional idea ownership and ascertain how much of the ECB's reform agenda had been incorporated into the Commission's proposals before the formal legislative process even began.

The legislative structure that has been put in place since the crisis is a sophisticated and, without doubt complicated, apparatus – an intricate 'catch-all' web spanning across European and international legal arrangements. It is, as well, a complete emanation of the Blueprint of European economic and crisis governance, which established the transformative influence of the ECB on the crisis-ridden preparatory stages of legal reform in the union.

Section II of this study will demonstrate the entirety of this Blueprint reform substance has been formalized into law – whether secondary EU law (the Six Pack and Two Pack legislation) or public international law (the ESM and TSCG), aided by the compelling involvement of the ECB during the formal legislative process. Thus, the work argues that a significant proportion of EU crisis law is, in effect, a manifest of ECB reform ideology through either (or both) formal and informal influence spanning from early reform consultations to final legislative acts.

The best means for understanding the global function of the new framework of EU economic and crisis governance and the ECB's involvement in its development is to approach the various legislation under scrutiny in accordance with the substance covered therein. Therefore, the following chapters will maintain the reform categorizations of the Blueprint period, organising legislative acts per theme across legislative packages and legal bases wherever necessary.

Before delving into the details of the legislative process behind the Great Reformation in Chapters 3-6, Section II will begin with an introductory review of the ECB's constitutional right to consultation in context. That will include brief reflections on the unsettled nature of opinions as legal instruments, a breakdown of the structure of these documents – as will be referred to throughout the analysis of the section, and, lastly, a consideration of opinions as means of constitutional communications.

Chapters 3 through 6 will then examine the evolution of the informal negotiation process of the Blueprint period into a formal legislative one, while tracing the influence of the ECB therein.

The work will begin with an overview of the reforms most pertinent to the SGP – the strengthening and expansion of legal procedure for supranational fiscal oversight and the budgetary rulebook in Chapter 3. The novel Competitiveness and Macroeconomic Imbalances Surveillance Framework and its peculiar legal reach across EU and national competences, across hard and soft law, will be at issue in Chapter 4. Chapter 5 will turn to examine the direct enforcement of budgetary policy on the Member State level, developing across three legislative acts, each more daring than the previous. Lastly, Chapter 6 will address the true pinnacle of the Great Reformation of EU economic governance – the framework for EU crisis management and financial assistance. The analysis of these reforms will bring the study full circle back to its beginnings with the enabling potential of crisis. It is only through understanding the crisis management and financial assistance framework laid out in Chapter 6 that the true extent of sovereign debt crisis reforms becomes visible. There is not a single piece of legislation enacted in this period, which does not tie into the complex hierarchy of rules, surveillance, and enforcement, ultimately designed to connect to crisis management without ever explicitly referring to it as such. What is more, this is a web which spans across legal regimes and beyond legal protections.

Throughout the analysis contained in these chapters the work will i) follow the influence of ECB reform ideology set out in its opinions, ii) consider the appropriation and reallocation of competences in EU law, and iii) scrutinise the transformation of sovereignty and power configuration in the European constitutional framework.

Opinions will greatly elucidate the ECB's methodology for utilizing the 'quantum leap' in economic governance for the attainment of a more balanced EMU. They allow us to follow through on the Bank's original reform proposals from the summer of 2010 to final legislation.

The primary concern of the study is establishing whether and how much of the ECB's preferences – one way or another, with or without opposition, with or without support, with or without a fight – have been instituted into law as a result of the European sovereign debt crisis. The Bank's influence will be evaluated based on the legal evolution of ECB reform proposals from Blueprint to law.

Indeed, the legislative processes reviewed in the following chapters are not watershed events, such as those which captured academia's and the public's imagination at the height of the crisis. The inter-institutional communications secured through Articles 127(4), 282(5), or 126(14) TFEU and the ECB's Monthly Bulletins are, rather, a death by a thousand cuts. They result in often small and

seemingly insignificant amendments, little triumphs for the ECB legal service, whose true gravity and impact on the EU framework of economic and crisis governance is only visible when examined as a whole.

SECTION I

CHAPTER 1

ECONOMIC AND MONETARY UNION
AN ORIGINS STORY

1. The 'Intent' of the Treaties

> 'It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.'[1]

Selective misrepresentation. That is how the Court of Justice of the European Union solved the constitutional challenge to the creation of a permanent crisis stability mechanism presented by one Mr Thomas Pringle. The final judgment is riddled with maverick proclamations, having caused plenty of discomfort to those in the legal academic profession since publication.[2] We are here interested in our own, where in the span but a few paragraphs (135-137 to be precise) the CJEU stumbled upon a revelation – the intent of the EU Treaties, upon which the European sovereign debt crisis would be managed and eventually come to be legalised and institutionalised. In its investigation into said intent of the EMU constitutional framework, though, the CJEU was rather selective in both what it chose to discern as well as what it chose to ignore.

Context matters.

The constitutional framework of the Economic and Monetary Union pre-programmed the impasse between economic reality and legal normativity that precipitated the European

[1] Case C-370/12 *Pringle* EU:C:2012: 756, para 135.
[2] Compare, for example, Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology', (2013) 20 *Maastricht Journal of European and Comparative Law* 3, with Beck, 'The Court of Justice, Legal Reasoning and the *Pringle* Case: Law as the Continuation of Politics by Other Means', (2014) 39 *European Law Review* 234.

sovereign debt crisis. Ironically, the torrent of legislative reforms unleashed by the crisis and endorsed by crisis litigation only served to reaffirm the same economic ideology and political agenda institutionalised at Maastricht in a bid to satisfy the 'intent of the Treaties.'[3]

That being the case, before this study can proceed, we must be sure to establish and understand what said 'intent' truly was. It is a mandatory prerequisite if we are to understand anything of consequence about its function or, for that matter, malfunction and associated legal remedies instituted with the crisis.

To this end, we shall turn to the Court's disclosed source – the draft Treaty on EMU,[4] and the greatly-credited source of that source – the report of the Committee for the Study of Economic and Monetary Union (1989) under the chairmanship of then-Commission President Jacques Delors.[5]

The following pages will draw a map of EMU legal architecture and re-assess the economic and political rationale of the principles which underpin it. These are vividly documented in the Delors Committee's Report and two particularly candid and pertinent contributions written by Alexandre Lamfalussy and Karl Otto Pöhl. The authors provide exhaustive rationalisations for the EMU Treaty framework alongside sombre warnings of its fragility.

We shall return to the CJEU's trailblazing crisis litigation and the EU establishment's general crisis response in the second section of this chapter, once we have firmly established how and why the EMU came about as it did.

1.1. Not Quite a Real Union

The intent of the Treaty of Maastricht was to establish an Economic and Monetary Union, pure and simple. An ultimately economic exercise, the bottom line was nevertheless political.

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[3] A most disconcerting conclusion follows that in the two decades between Maastricht and the crisis very little had changed in a what was hoped to become an ever closer union.

[4] Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, cited in paragraph 135 of *Pringle*, above, n.1. And yet, while containing important information, the Commission Communication and explanatory text of the Draft Maastricht Treaty contained therein, were only part of a much more substantial effort towards finalizing the details of EMU.

[5] See Bulletin Supplement, pp. 9-10. The conclusions of the Delors report had been endorsed on multiple occasions by the member states. In Rome in 1990 eleven governments 'agreed on an overall conception of EMU based closely on that arrived at in the Delors report and gave the go-ahead for the Intergovernmental Conferences,' which would eventually transpire into the Maastricht Treaty.

The deep distrust between community members created idiosyncratic restrictions, which would prove highly constraining on the structural design of the project. In particular, appalled at the prospect and political fallout of footing each other's bills, governments altogether precluded the existence of a real fiscal union. This decision would mutate into the economic curiosity that is the asymmetric Economic and Monetary Union in a precarious scheme to allow Member States to reap the benefits of the single currency common market without sharing in the risks of an open economy.

But how to go about it?

1.2. On the Road from Rome to Maastricht a German and a Frenchman Walk into a Bar

In the spring of 1989, under the chairmanship of then-Commission President Jacques Delors, the Committee for the Study of Economic and Monetary Union submitted its findings to the European Council.[6] The Delors Committee, as it became known, had been the latest wise men collective tasked with rebooting the EMU project, 'studying and proposing concrete stages leading towards' it.[7] Their report would come to define the principal features of the future EMU – of particular interest to the current study – and chart the course to Maastricht.

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[6] Set up at the European Council meeting in Hanover on 27 and 28 June 1988, the Delors Committee was no motley crew. Their Report was informed by the learned opinions of its members, some of them submitted in a collection of papers published alongside the final product. The names of most contributors would remain recognisable through the following decades of European integration history and well into the sovereign debt crisis. Among them were the future first (and compromise) President of the European Central Bank, Wim Duisenberg; the future father of the European Systemic Risk Board, Jacques de Larosière; Tommaso Padoa-Schioppa, at the time Vice-Director General of Banca d'Italia; then-president of the Bundesbank and aficionado of central bank independence and price stability Karl Otto Pöhl; Niels Thygesen, then Professor of Economics at the University of Copenhagen and the current chair of the awkward contraption of post-crisis economic governance reform that is the European Fiscal Board; and last, but not least, Alexandre Lamfalussy, then general manager at the Bank for International Settlements, due to become the first President of the European Monetary Institute, the precursor body to the ECB, and to develop the foundations of the European System of Financial Supervision based on his namesake committees.

[7] The inception of the idea had actually taken place two decades earlier with the rather idealistic Werner Report (1970). The latter having failed to advise against the endeavour, the only thing left to decide was how to go about it. Report to the Council and the Commission on the Realisation by stage of economic and monetary union in the Community, 'Werner Report,' supplement to Bulletin 11-1970 of the European Communities, Available at: https://ec.europa.eu/economy_finance/publications/pages/publication6142_en.pdf. For good general histories, see e.g. K. R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union* (Cornell UP 1998); K. Dyson and K. Featherstone, *The road to Maastricht: negotiating Economic and Monetary Union* (OUP 1999), and H. James, *Making the European Monetary Union* (Harvard UP 2012).

Deliberations were fraught with scepticism. The architects of EMU were clearly divided on the primacy of underlying conditions sufficient in achieving a functional version of the project.[8]

Some were of the opinion the enterprise was a nonstarter. Karl Otto Pöhl warned that monetary integration could only follow in the steps of genuine economic integration – a 'minimum of policy-shaping and decision-making in the field of economic and fiscal policy' on the supranational level. The alternative would be 'doomed to failure.'[9] At one point during negotiations, Pöhl – apparently in all seriousness – pleaded with his fellow committee members to call the whole thing off.[10]

But since they were being forced for a constructive contribution, the German-led 'economist' faction insisted the future EMU must be founded on the primacy of monetary policy, rooted in a price stability doctrine and guarded by an independent central bank, so as to resist any sovereign's corrupting influence that might lead to a backdoor transfer union.[11] Excessive government expenditure (with specific concern for the French and Italian cases at the time) would be neither tolerated nor accommodated. This was as much a genuine

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[8] 'The economist/monetarist divide... was also linked to very different views about how economic adjustment to imbalances and stabilization were best achieved. On the one hand, some architects, notably Triffin, stressed the importance of the international and European systemic levels. The essential requirements were liquidity provision and economic policy coordination at these levels, based on the mutual obligations of creditor and debtor states to the system. On the other hand, Ordo-liberals like Tietmeyer emphasized the overriding importance of Member States taking individual responsibility for putting their own house in order. Otherwise moral hazard would infect states, European monetary union, and the international framework. Despite an initial design that was closer to the domestic 'house-in-order' approach, a settled consensus about the mechanisms for economic adjustment and stabilization continued to elude the architects.' Dyson and Maes, 'Contributions, Legacies, and Lessons,' in K. Dyson & I. Maes (eds.), *Architects of the Euro: Intellectuals in the Making of European Monetary Union* (OUP 2016), 254, at 265. In fact, nothing besides the house in order approach was on offer with the final Delors Report. Although there is a notion of structural fiscal transfers from the Union to Member States, the final Maastricht Treaty never allowed for any such possibility with the double bailout default.

[9] Pöhl, 'The further development of the European Monetary System,' in *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 129, 131-2.

[10] 'At the end of the first meeting of the Delors Committee, Pöhl spoke quite bluntly and pleaded for a rejection of the utopian solutions of a hard currency union: Maybe we can save a lot of time if we concentrate on that, but we should tell the Heads of State and governments that we are of the opinion and we have agreed that for the time being there is no realistic chance for monetary union in the sense of the Werner Report. We should be honest and we should say that and we should stop all this talk by people like Helmut Schmidt and Giscard, etc.' James, 'Karl-Otto Pöhl- The Pole Position,' in K. Dyson & I. Maes (eds.), *Architects of the Euro: Intellectuals in the Making of European Monetary Union* (OUP 2016), 160, at 183. Perhaps most telling in this anecdote is Pöhl's attitude towards the highest political representative of his own bank's sovereign – also reflective of the institutional stance of the Bundesbank in this regard.

[11] See generally A. Mody, *EuroTragedy: A Drama in Nine Acts* (OUP 2018), 65 *et seq*.

conviction as it was a bluff on the commitment of other participants to go through with the matter under such draconian conditions.

On the other end of the spectrum were the more optimistic French representatives of the 'monetarist' camp. They hoped that initiating EMU through the single currency would underwrite future organic progress towards greater economic convergence and a political union in due time. They were also genuinely convinced, and perhaps naively trusting, that sufficient levels of economic convergence among Member States would adequately compensate for the stringent German approach until the utopian vision of a complete EMU finally materialised.[12]

Stuck between the Scylla and Charybdis, yet determined to move forward, the Delors Report – and later the Maastricht Treaty – arrived at a compromise borne of the unnatural union between these two policy approaches.[13] For the project to proceed in a monetarist (French) direction, it would have to default on an economist (German) method. The uneasy spin 'remained an unresolved tension at the heart of the EMU project.'[14] It made for a far too rigid framework ridden with inherent problems, underpinned by a number of significant and unreliable assumptions, which time would prove altogether overrated.[15]

Aware of the deficiencies, even as they signed off on their learned recommendations, most of the members of the Delors Committee allegedly considered the matter to have been a futile exercise that had reached a dead end.[16] They could not have been more mistaken.[17]

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[12] Their position was not much unlike the ideas of the Werner Group almost twenty years earlier.
[13] Historians and participants in the events would themselves attest that some of the most notorious decisions taken in 1989 and transposed onto Maastricht were concessions to the continued German participation in the venture. See generally A. Mody, above n.11, and K. Dyson and I. Maes (eds.), above n. 8.
[14] Dyson and Maes, above n 8, 265.
[15] In an important sense the history of EMU was one in which the 'economists' claimed successes that turned out to be hollow. At the centre of their concern was the precondition of economic convergence before monetary union. However, the convergence criteria for euro entry, as enshrined in the Maastricht Treaty, proved weak. Though they stressed that convergence must be sustainable, they rested on only a two-year assessment period. Competitiveness was no more than a matter to take into account. It became clear that convergence could prove very fleeting. The convergence criteria encouraged opportunistic, and sometimes dubious, policy-making. More generally, the structural characteristics of the 'real' economy were neglected.' Dyson and Maes, above n. 8, at 264.
[16] Bank of England (BOE) Governor Robin Leigh- Pemberton later told European scholar Alasdair Blair, "most of us, when we signed the [Delors Committee] Report in May 1989 thought that we would not hear much about it." Recounted in A. Mody, above n. 11, at 69-70.
'Moreover, all of the architects were very aware of the faults in the design of EMU in the Maastricht Treaty, though they defined them in different ways and had different remedies. This awareness was not simply rooted in the benefit of hindsight, which only helped clarify the gaps in design. In fact, the architects showed considerable prescience.' Dyson and Maes, above n. 8, at 257.
[17] Economic absurdity did not inhibit political audacity. The conclusions of the Delors Report went on to inform negotiations at Maastricht, concerning one of the most far-reaching and still-developing steps in

1.3. Why We Need Budgetary Discipline | The Backdoor Transfer Union

It was widely accepted that Member States were preconditioned towards fiscal profligacy. That, of course, would prove an issue for a project trying to create a single – functional – economy out of twelve disparate fiscal policies and a single monetary one. Left 'unattended,' an asymmetric EMU with full fiscal independence was sure to lead to large economic divergences and intense pressures for financial redistribution across national borders.

A primary concern for the internal balance of EMU was economic burden sharing. The absence of an aggregate fiscal stance would make price stability increasingly hard to achieve, placing undue pressure on the monetary system to balance out fiscal whims and somehow achieve the macroeconomic objectives of the Union on its own.

The fathers of EMU also had to consider the increased possibility of forced fiscal transfers through financial markets in case of excessive domestic spending. They predicted the 'strong political pressure' to bail out troubled governments in the case of large cross-border debt exposure through the banking-investment sector. As if reading from the pages of future *Bundesverfassungsgericht* judgments, Alexandre Lamfalussy mused that is how foreign nationals' savings – the likely original of credit in the future EMU – could come to be 'exploited' by fiscal profligates who might simply be 'too big to fail'.[18]

There was more. A Member State's fiscal independence to spend at will could potentially: i) drive up interest rates for the entire bloc, crowding out investment for the more responsible parties; ii) lead to an accommodating expansionist monetary policy, causing for higher than optimal inflation and undue loss of investment for budget-consolidated Member States; or iii) cause a depreciation of the single currency vis-à-vis third countries and losses in trade.[19]

As if these were not problematic enough, it was commonly accepted knowledge amongst the Delors experts that the EMU itself would actually worsen governments' spending

European integration ever taken. While further work did indeed take place in the two years until the text of Treaty on European Union was ready for signing in December 1991, the foundational parameters of its legal framework were already evident in 1989. Ultimately, the basic construct of the EMU was legalised at Maastricht more or less as envisioned in the Delors Report and the latter's various intellectual contributions. Dyson and Maes corroborate this view, above n. 8, at 257.

[18] Lamfalussy, 'Macro-coordination of fiscal policies in an economic and monetary union in Europe,' in *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 91, at 96

[19] We must consider this rule must have been especially focused on the likes of France and Italy – with economies large enough to cause ripple effects, political preferences liberal enough to spend excessively, and an aggregate fiscal position in bad need of consolidation.

proclivities and necessitate 'extremely large funds' for cross-border fiscal compensation in its early stages.[20]

Existent regional divergences would not be served well by the common market with labour and capital making full use of free movement towards more competitive environments. In turn, governments would try to offset the resultant inequalities with greater spending.[21] Moreover, as Lamfalussy conceded, it was the countries struggling to keep spending in check that 'stand to lose most from the creation of a union.'[22]

In other words, it seemed that precluding the formal establishment of a fiscal union would dovery little to prevent fiscal transfers. It was clear that disparate fiscal policies could cause a backdoor transfer union in direct conflict with the political mandate to create the EMU.

1.4. How to Achieve Budgetary Discipline | Towards a Synthetic Fiscal Union

An implicit economic assumption about the optimal version of a fiscal-monetary mix informed these musings. It was an understanding deeply rooted in the turbulent economic dynamics of the 70s – there was no place for inflation and high interest rates in the future Economic and Monetary Union. This was, by all means, a normative choice about the political economy of the future project. The single currency was not for everyone. In the wake of the sovereign debt crisis this dynamic would be further amplified, playing out between creditor and debtor member states with the Great Reformation of EU economic governance.

Therefore, when it came to solving the issue of fiscal profligacy the fathers of EMU 'call[ed] for convergence towards the budgetary positions of the more fiscally conservative

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[20] Lamfalussy was certain and mindful to forewarn the increase in cohesion funds in Phase II, the size of which made the project even more unappealing to Karl Otto Pöhl (Pöhl, above n. 9, 135-6).

[21] The wise men collective reasoned these dynamics would be most acutely felt during Phase II of the project, as Member States were supposed to prepare for the introduction of the single currency with further commitment to economic convergence. Making matters worse, the preferred method for balancing out the debt equation – raising taxes – would become a limited solution with people and business simply packing up in search of more money-friendly Union members. Combined, such circumstances would 'give rise to demands for specific assistance over and above what is at present allowed for in the calculations of future Community transfers.' Lamfalussy, above n. 20, 98 Here, Lamfalussy foresees the coupling between what Kaarlo and Klaus Tuori would eventually designate as the micro- and macro-economic constitutions of the EU in *The Eurozone Crisis- A Constitutional Analysis* (CUP 2014).

[22] Lamfalussy, above n. 20, 98. Ironically, the report selects the future PIGS for this honour – The charming acronym given to the countries struggling through the 2010 sovereign debt crisis – Portugal, Ireland, Italy, Greece and Spain. Lamfalussy's predictions were off on Ireland, but a 75 percent success guess rate is more than anyone could expect of any state fair tarot reading.

countries' and strongly advocated for fiscal consolidation, i.e. budgetary discipline.[23] Yet, ensuring fiscal consolidation in the absence of a fiscal union was not a particularly straightforward task. The project needed not only to be functional, but to function in a certain way. Under consideration were organic, market-forced, monetary, and rules-based convergence.

1.4.1. The Case for Organic Convergence

Organic convergence is what this study has labelled the kind of fiscal convergence in federal states attributed to shared histories and traditions between a people. This was considered a non-starter for the EU, which had 'historically shown markedly divergent attitudes towards the merits of fiscal orthodoxy.'[24] With its success premised upon economic cultures, Lamfalussy concluded a European attempt would actually come to favour divergences.[25]

1.4.2. The Case for a Monetary-led Union | Price Stability & the ECB

A most crucial characteristic of the future EMU was the fundamental change in the relationship Member States enjoyed with their national central banks. The conclusion was clear – that could not be the relationship Member States enjoyed with the future European monetary authority.[26]

In this regard, the single monetary policy presented itself as a natural solution to the fiscal consolidation issue plaguing the construct of EMU. The irrevocable fixing of exchange rates for a single currency was bound to tie the hands of national central banks, precluding their ability to accommodate national excess spending with artificial currency devaluations or outright debt monetisation.[27] Removing this monetary safety net was supposed to incentivise fiscal consolidation. Furthermore, the future central banking authority would set

[23] Lamfalussy, above n. 20, 99.
[24] *Ibid.*, 97.
[25] *Ibid.*, 100.
[26] Pöhl was clear the supranationalisation of monetary policy would be absolute – Member States will lose their monetary independence completely with national banks eventually remaining but solely as conduits of Union monetary policy, guided by the ECB at the helm. Pöhl, above n. 9, 131. See also Lamfalussy, above n. 20, 97.
[27] Pöhl conceded much had been set in motion towards completion of the project, but coordinating economic policies had already proven difficult and the ever-present danger of 'disturbances' in the economy would make fixed exchange rates a dangerous proposition, when they should instead remain a safety valve in times of trouble. Pöhl, above n. 9, 131.

a single interest rate for the entire Union, thereby establishing the parameters of sound national fiscal policy within a more consolidated approach.

The Delors report made clear that although 'economic union and monetary union form two integral parts of a single whole… the principal features of an economic union depend significantly on the agreed monetary arrangements and constraints.'[28] In other words, this was to be a monetary-led union.

This power relationship was most comprehensively informed by and secured through the mandate and operational principles of the future European Central Bank. These were designed to protect the monetary authority from unwelcome economic pressures and based on a set of clearly-defined and unmistakably 'Bundesbank' principles of conduct – price stability and central bank independence.[29]

The mandate of the future central bank would be to pursue and secure the 'stability of the value of money.' Price stability is an inherently flexible, but contextually limited concept. It allows the Bank discretion on monetary policy – interest rates and inflation targets, but only as a function of the global economic and monetary policy consensus of the time.[30] In the context of the monetary consensus of the 90s, price stability meant that monetary primacy would promote a fiscally-restrained economic model for the Union at large, whether that fit

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[28] Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community* (Opoce 1989) ('the Delors report') , para 21. In turn, 'the Committee is fully aware that the process of achieving monetary union is only conceivable if a high degree of economic convergence is attained.' Ibid.

[29] This was the price to pay for German participation in the project, resulting in the 'basic compromise that produced the eventual institutional design of the ECB.' James, above n. 10, 182. The monetary union was the quintessentially German contribution to the EMU and price to pay for German participation. The leading voice was Karl Otto Pöhl. To this end Ashoka Mody claims Pöhl as 'the most important member of the Committee' and confirms the 'Delors Committee could not disregard Pöhl and accepted the requirements he had set out' for the structure of the monetary union at large and the European Central Bank in particular. Mody, above n. 11, 69-70. According to James, this ultimately resulted in the future European Central Banking looking 'like an internationalized version of the Bundesbank.' James, above n. 10, 187-8.

[30] It was a technically valid solution with significant political implications, which wrongfully assumed that the economic conditions of the late monetary consensus will endure in perpetuity. This much has become painfully evident in past decade. 'Nowadays, instead of combating inflation, the ECB is trying to stimulate it. With traditional monetary policy losing traction, the Bank has reached above and beyond tinkering with interest rates and is now busy loading up balance sheets with growing expenditure on sovereign debt and corporate assets. Instead of urging fiscal conservatism, the ECB encourages public spending, its President claiming that current anxieties over debt indicators should be strictly limited to the serviceability of debt and the maturity of bond emissions. European Parliament Monetary Dialogue, 28 September 2020, p.17.

with Member States' specific likings or not. It was clear that neither high interest rates, nor inflation, would be tolerated in the EMU.[31]

Price stability was positioned at the core of the EMU as an 'indispensable prerequisite' to the successful attainment of Union objectives.[32] Its sole guardian, the ECB, thus became the keystone institution of the project, securing its rationale and anchoring its development within the bounds of the original contract. A true testament to this endowment was the Bank's response to the sovereign debt crisis.

Like much about the monetary union, price stability was a transplant of a quintessentially German concept – *Stabilitätskultur*.[33] It was, in fact, the cost of German participation. To that end, Karl Otto Pöhl established a monetary *Solange* doctrine, whereby future German involvement in the project became conditioned upon a minimum standard of money stability *as long as* 'monetary and credit policy is not geared to stability to a lesser extent in an economically united Europe than is the case at present in the Federal Republic of Germany.'[34] In simple terms – price stability defined the optimal levels for economic and monetary conduct for the whole of the future eurozone as, at minimum, those secured in Germany.

It was made clear that the future monetary authority cannot secure price stability without independence from the fiscal realm.[35] To this end, the EMU institutionalised a distinct separation and hierarchy between economic and monetary objectives. The support of

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[31] Mario Draghi delivers a compact and packed lecture on the matter of central bank independence, making a direct connection to the historical roots of the ECB's operational principles. See the very informative: 'Central Bank Independence' speech, Draghi, Brussels 26 October 2018, ironically the 'Lamfalussy Lecture.' Accessible: <https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp181026.en.html>

[32] Pöhl, above n. 9, 132. The EMU can only work if there is price stability, which can only be attained in the monetary if the central bank is left to its own devices and operationalised through a rules-based framework of clearly designated rules and allocated responsibilities between the Community and member states when it comes to economic policy.

[33] To this end, see the wonderful review of Harold James, above n. 10, of the 'character' behind the proposals//
191 Harold James in Dyson // Harold James points out that this iteration of stability culture was, in fact, one of the founding pillars of the BundesBank in the sense that it considered its mandate based not only in law, but a certain public understanding about said stability.

[34] Pöhl, above n. 9, 131.; Solange II *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339. In fact, this is precisely what the Bundesverfassungsgericht would eventually certify when giving its conditional blessing to the Treaty of Maastricht come 1993. See the Decision from 12 October 1993, in cases 2 BvR L 134/92 and 2159/92,BVerfGE 89, 155.

[35] The most 'literal' safeguard in this regard was the legal designation of the ECB apart from European institutions. In fact, the eventual adoption of the Bank into the official EU family with the 2009 Treaty of Lisbon left many in the (German) banking circles 'dismayed' and then-ECB President Jean Claude Trichet implying this would amount to political control of the Bank. James, above n. 10, 189.

general economic policy would be *subject* to the primacy of price stability and itself never outlined as an objective of the central bank.[36] If the Bank could not be bothered with the financial predicaments of Member States even in troubled times, neither would it consider jeopardising its prime directive during the course of normal operations. Thus, explicitly, the ECB would not suffer from political instruction on either the national or supranational level – as eventually laid down in Art 130 TFEU on central bank independence.[37]

This decision was informed by the distrust between economist and monetarist factions behind the Maastricht Treaty. It would not matter who would be at the helm of the ECB, for as long as its mandate and objectives structurally precluded them from using monetary powers to offset economic tensions across the Union, i.e. orchestrate some form of backdoor transfer union.[38]

Lastly, we must point to a less conspicuous, but – in the opinion of this study – just as consequential feature of the EMU's macroeconomic framework. Reflecting its role as an anchor of the macroeconomic model for EMU, the Bank was granted not only competence to legislate within the remit of its own mandate, but also the power to consult – with the obligation it be consulted – on any draft legislation or other official act with *relevance* to monetary policy. This could easily be seen as an insurance policy against the political whims

[36] In 1990, during a presentation to ECOFIN on the workings undertaken by the Committee of EC Central Bank Governors to set up the ESCB Statute, Pöhl would clarify that 'in the event of a conflict between price stability and other economic objectives, the governing bodies of the System will have no choice but to give priority to its primary objective. There [could] be no compromise in this respect.' Pöhl cited in James, above n. 10, 188-189. Importantly, this hierarchisation was a purely theoretical construct. Had the numerous number of assumptions behind the EMU withstood the test of reality, economic and monetary policy (and associated objectives) would have never been out of sync, so as to precipitate outright monetary dominance in EMU.
On monetary and economic objectives, see also Zilioli and Selmayr, 'The European Central Bank: An Independent Specialized Organization Of Community Law,' (2000) 37 *Common Market Law Review* 591.
[37] Pöhl, above n. 9, 137. Pöhl extended this feature to the status of national central banks, irrespective of existing national arrangements on the matter, thus securely severing the link between bank and sovereign across the eurozone in at least one direction. For safe measure, the persons entrusted with monetary policy were to enjoy a strategically long tenure of 'at least' eight to ten years – both their office and the 'overriding commitment to maintaining the stability of the value of money' protected from political short-sightedness.
[38] Pöhl, above n. 9, 131-2, was well aware of monetarist designs for a central bank capable of offsetting the tensions anticipated from the merger between the single market and freedom of capital (Lamfalussy, Delors, Triffin). His intervention (should have) made the system impervious to lax policies crossing the line of the fiscal-monetary contract, ensured the continued application of the German model and, hence, participation of the German state. This is the context for exploring the FCC's challenges to the ECB's QE programmes – challenging the Bank without acknowledging the original EMU contract was based on the assumption that the economic and monetary consensus would remain as is and continue instructing the same policies from the ECB.

of Member States or the Commission, with the Bank as the trusted guarantor of original spirit of the Maastricht enterprise.[39]

1.4.3. The Case Against Market Discipline and For Bailout Prohibitions

Another option explored for securing the fiscal consolidation of Member States was reliance on the disciplinary potential of the markets, with the costs of government borrowing in the EMU freely determined by the market.[40] This calculus was premised on the assumption that market actors would view excessive debt as economically unsustainable, making it an increasingly risky investment, calling for an increasingly high premium, which would in turn discourage continued borrowing.

Lamfalussy, for one, was highly agnostic. The mere page allotted to the matter is nothing short of economic divination. In an instance of alarming crisis clairvoyance he claimed not only that markets cannot be relied on to discipline Member States into fiscal consolidation, but will likely enter into a vicious cycle with the fiscal profligates. As Member States economies become increasingly intertwined in the future Union, the cost of a sovereign default would cause serious negative spillovers across national borders. The markets, Lamfalussy admitted, knew that much and would act accordingly.[41] They could not be trusted to support the founding idiosyncrasy of an asymmetric EMU, because they were bound to treat it as fully integrated. In expectation of financial aid to troubled governments – a bailout, markets would undoubtedly underprice investment risk, thereby incentivising the excessive debt dynamic and increasing economic divergences over time.[42] Markets would simply come to serve as a conduit for transferring the costs of profligacy across national borders. This was part of the same 'moral hazard' dilemma, which has played on repeat since 2010 as grounds for crisis conditionality.

[39] Articles 127(2) and 282(5) TFEU, and explicitly stated with regard to the budgetary rulebook in Art 126(14) TFEU.
[40] In particular, Lamfalussy explored this option as a potential substitute for budgetary rules in a monetary union. Lamfalussy, above n. 20.
[41] 'On the other hand, the closer economic and solidarity ties implied by membership of the union may generate market expectations that the country concerned would ultimately be bailed out by other EMU members. That would mean fewer pressures on fiscal consolidation and less differentiation in the cost of funds. The country would effectively benefit from the credit rating of others.' Lamfalussy, above n. 20, 125 (Appendix II on Market Forces and Budgetary Discipline). Moreover, the extreme interlinkages between savers and borrowers would blur the line between who is bailing out who.
[42]Lamfalussy, above n. 20, 100.

The Delors Report added further doubts. 'To some extent market forces can exert a disciplinary influence. However, experience suggests that market perceptions do not necessarily provide strong and compelling signals and that access to a large capital market may for some time even facilitate the financing of economic imbalances. Rather than leading to a gradual adaptation of borrowing costs, market views about the creditworthiness of official borrowers tend to change abruptly and result in the closure of access to market financing. The constraints imposed by market forces might either be too slow and weak or too sudden and disruptive.'[43]

The market became more of a problem than a solution to the EMU conundrum trying to prevent an unwarranted transfer union. There were three in that economic-monetary relationship and no amount of reserved attitude of the future central bank would be enough to dissuade fiscal indulgences or break the toxic dynamic between markets and sovereigns if financial aid was anticipated.[44] Consequently, the architects of EMU turned their gaze to financing prohibitions.

1.4.4. Union and Member State Involvement | Art 125 TFEU[45]

The structural pressures for and near inevitability of future bailouts was, of course, in fundamental conflict with the political mandate behind EMU. With the expectation of a bailout acting as a self-fulfilling prophecy, the solution seemed simple – a complete ban on bailouts.[46] Excessive budget deficits would not do '*no matter how they are financed*.'[47]

To this end, the future Article 125 was supposed to i) 'enhance the effectiveness' of market dynamics – the very same dynamics previously claimed as unreliable; ii) 'encourage greater prudence on the part of both borrowers and lenders' as a scare-tactic; ii) and, as a

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[43] The Delors report, above n 31, 20.
[44] Lamfalussy, above n. 20, 100.
[45] Art 125 TFEU (Art 103 TEC): The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.
[46] Although it is commonly referred to as a prohibition, the intent of the provision is not to proscribe but to release from liability. Article 125 TFEU is not about disallowing help, but absolving from the responsibility of ever offering it. Its text is a direct reflection of the political dynamics at Maastricht.
[47] Pöhl, above n. 9, 134. This was the extent of Karl Otto Pöhl's discussion on the future Art 125 TFEU, whose purpose he clearly took as a foregone conclusion and instead indulged his efforts towards securing a monetary financing prohibition (discussed in the following section).

result, in rejecting the only rational course of action during a crisis, make the case for budgetary discipline even more forcefully.[48]

To be clear, the original intent of Art 125 TFEU – one of the keystones of the sovereign debt crisis and crux of judicial innovation in *Pringle* come 2012 – was, for all intents and purposes, to bluff the markets into thinking that the Union shall not do exactly what had been discussed at length it will inevitably have to do. It was borne as a perversity designed to bluff both markets and individual Member States into financial prudence. It is a legal measure whose purpose and effect are fundamentally mismatched. Its primary intent is to apply indirectly to improbable effect in normal times, hoping to inform the actions of markets and Member States through disciplinary signals, so as to altogether avoid its own direct application which proscribes financial bailouts. In fact, the implementation of the direct – but secondary – intent of the bailout prohibition is, in itself, an admission of the failure of its primary goal and, therefore, must be avoided at all cost.

At no point did Alexandre Lamfalussy – credited with the most exhaustive reflections on the topic – entertain whether the price of following the law during a crisis is worth its supposed benefit in normal times.[49] As is the general rule with bluffs – those are only useful if the issuing party is not called on them. The solution presented to this new, entirely self-generated problem of bailout prohibitions was simply to avoid causing a crisis in the first place by committing to fiscal discipline.[50]

1.4.5. Monetary Involvement | Art 123 TFEU[51]

It was clear at the inception of EMU that an organic asymmetric union, where national budgets remain uncoordinated, would be perilous to the monetary effort to the extent that it

[48] Lamfalussy, above n. 20, 97.
[49] Of course, this is an equation best avoided at all cost, most clearly so by altogether insulating the law from crisis by fully embracing the state of exception. See E.-W. Böckenforde, 'The Repressed State of Emergency, The Exercise of State Authority in Extraordinary Circumstances' [1978] , in id., *Constitutional and Political Theory- Selected Writings* (OUP 2017), 108.
[50] It must be understood that the difficulty faced by the European legal and judicial establishment in interpreting the powers and boundaries of Articles 123 and 125 TFEU are ingrained within the very DNA of the measures – in their original intent and the unfinished logic behind the arguments for their introduction. In this sense, the CJEU's approach in *Pringle* is no scandal, but merely a reiteration of the original sins of Maastricht.
[51] Art 123 TFEU (former 101 TEC) 'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.'

might force the future central bank to monetise national debt. Karl Otto Pöhl took special exception to any such scenarios and proceeded to provide the solution.

Simply put, monetary policy could not be bothered to 'paper over the problems in the Community arising from differing economic and fiscal policies.'[52] Any level of direct monetary financing could jeopardise stability and, worst of all, jeopardise one of the new central bank's foundational pillars – its independence.[53] In this regard, the monetary financing prohibition, which would ultimately materialise into Art 123 TFEU, concealed a double purpose.

On the one hand, it was intended to remove Member State governments' monetary safety net, subjecting them instead to the logic of the market – even if that were the same market which had been extensively analysed as generally unreliable. However, we must point out that while this was a key aspect of the federal systems which Lamfalussy studied to establish the macroeconomic policy guidelines of the future EMU, he concluded that causality between the measure and the lack of fiscal bias cannot be inferred and ultimately refrained from recommending such measures be adopted within EMU.[54]

Just as importantly, prohibiting monetary financing ensured the future central bank need not be bothered with the fiscal concerns of its many sovereigns, so that *ipso facto* no one sovereign's monetary preference would prevail.[55]

Pöhl's unequivocal intervention in favour of a total bailout prohibition secured the rigidity of the EMU framework by removing yet another safety valve.[56] Debt financing could only come at a price arranged by the financial market, with the new central bank destined to communicate with its sovereigns solely through the mystical – and unreliable – ways of said market. In this context, the future EMU would have to fully embrace an economic model heavily indebted to the ordoliberal tradition, which 'emphasized the overriding importance

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[52] Pöhl, above n. 9, 132. Specifically, he argued 'the financing of public sector deficits by the central bank (apart from occasional cash advances) makes effective monetary control impossible over the long term. For a European central bank to be able to fulfil its mandate to ensure monetary stability, strict limitations must be imposed on its granting credit to public authorities of all kinds (including Community authorities). This also applies to indirect government financing through the granting of credit to any central banks of the member countries that continue to exist.' Ibid., 137-8.

[53] Ibid., 134

[54] In fact, he concedes that 'it remains unclear… what are the factors ultimately accounting for the apparent lack of a bias in the states examined,' thereby advising caution in using any of the research on federal states as a perfect blueprint for the framework of the future EMU. Lamfalussy, above n. 20, 98-99.

[55] In fact, the latest legal battles over the integrity of the macroeconomic balance institutionalised at Maastricht are fought over the façade of central bank independence.

[56] Pöhl, above n. 9. As he makes clear, deficits are not welcomed, regardless of how they are financed, and therefore we can easily infer he was well-aware and in agreement of the alternative proposals seeking the same ends.

of Member States taking individual responsibility for putting their own house in order. Otherwise moral hazard would infect states, European monetary union, and the international framework.'[57]

1.5. Back to the Markets

Europeans' relationship with the market was, and remains, complicated (if not outright confused). The Treaty bailout prohibitions may be testaments to the irrationality of the market, but the EMU still is a community whose economic policy is set to be 'conducted in accordance with the principle of an open market economy with free competition.'[58]

That is because 'the market' constitutionalised at Maastricht is as much a theoretical conjecture of a certain economic ideology, as were the decisions to aim for fiscal consolidation in the context of monetary price stability. That particular market is, in fact, a perfect fit to the macroeconomic contract of the Treaties. By contrast, the prohibitions laid down with Articles 123 and 125 TFEU were informed by reflections on the realities of market operations.[59]

The provisions of Articles 123 and 125 TFEU are an attempt to preclude the disturbing influences of the market. They are designed to, instead, limit the relationship between sovereigns and the market within the useful disciplinary parameters complementary to the general EMU framework. To that end, the bailout prohibitions are designed to instruct both sovereigns and markets into responsible borrowing and responsible lending, respectively.

1.6. The Case for a Budgetary Rulebook

It was clear from the beginning that budgetary discipline could not be guaranteed by indirect or passive means such as reliance on the single monetary policy, the markets, or assumption of a culturally-predetermined direction of shared economic development. Albeit niche,

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[57] 'Ordo-liberals like Tietmeyer emphasized the overriding importance of Member States taking individual responsibility for putting their own house in order. Otherwise moral hazard would infect states, European monetary union, and the international framework.' Dyson and Maes, above n. 8, at 265.

[58] Art 3(a) Maastricht final. See also the Delors Report, above n 31, para 25, p.16: 'the economic union should be based on the same market-oriented economic principles that underlie the economic order of its member countries.'

[59] In fact, this scepticism made it as far as the draft Maastricht Treaty, the same one which the CJEU would confer with in deciding the future of EMU in *Pringle*. Therein was intended that one of the main tasks of the future central bank be 'guaranteeing the proper functioning... of capital markets.' (Maastricht prep Section 5.1.b(iii) p.30) Of course, the final version of the Maastricht Treaty does not embrace this proposal (Ch. 2 Art 105 final) as it would be in direct violation of the spirit of the ECB's monetary financing prohibition. And yet, it is impossible to read it without bringing to mind the ECB's legal defence in the *Gauweiler* OMT saga, ironing out the kinks of the market..

budgetary restraints became the primary option and necessary condition to satisfy the political constraints for EMU.[60] They were developed both as fundamental guarantee of a synthetic fiscal union and fail-safe to the potential problems foreseen with the role of the market in the organic relationship between economic and monetary policy.

Importantly – even if counterintuitively – restrictions on national fiscal independence still satisfied the political conditions underwriting the EMU. There were two reasons for that. First, the primary objective of Member States was not so much to avoid supranational authority, but each other. Second, the macroeconomic equilibrium institutionalised with the Maastricht Treaty was a guarantee that fiscally consolidated Member States operating within the boundaries of EMU optimal economic efficiency would not be subject to said supranational authority. Anyone who felt economic discomfort under these circumstances simply did not belong to the future club.

To this end, budgetary *constraints* would remove the possibility of distortions by proscribing fiscal independence beyond optimal levels for EMU to function with 'interven[tion] at the source, by limiting the scope of national discretion in determining budgetary positions.'[61] The boundaries of economic propriety and club membership were set

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[60] In his study of federal states' fiscal arrangements Lamfalussy conceded that the budgetary restraints approach does not meet with much popularity. While not extraordinary, such measures were to be found in just one case study, and even then, in the presence of a shared budget: Australia. Be that as it may, after carrying out a comparison with the mystical disciplinary potential of the market and various iterations of bailout prohibitions, Lamfalussy identified budgetary rules as the single most reliable source of order. Lamfalussy, above n. 20, 95. And seeing as the preference for a stringent rulebook was inversely proportional to the Committee members' trust in the overall viability of the EMU project, the 'economist' faction led by Karl Otto Pöhl was also on board. Pöhl, above n. 9, 133-5. See generally J. D. Savage, *Making the EMU: The Politics of Budgetary Surveillance and the Enforcement of Maastricht* (OUP 2007).

[61] Lamfalussy, above n. 20, 94. Lamfalussy engages with the distinction between fiscal discipline and fiscal coordination, but never explicitly acknowledges it. In his dissenting monetarist opinion on the necessity of a fiscal union and utility of budgetary rules Tommaso Padoa-Schioppa (General director for economic research at Banca d'Italia while Rapporteur for the Delors Report, and future member of the executive board of the ECB, to name but a few of his qualifications) clarifies the significance of the distinction: 'Much of the controversy at the political level concerns fiscal discipline and whether a monetary union is conceivable while some countries have very large public-sector debts and may run into financing difficulties. On the other hand, co-ordination issues are predominant in the scientific literature: the focus is not on public debts, but on fiscal policy as a tool for macro-economic stabilization.' Tommaso Padoa-Schioppa, *The Road to Monetary Union in Europe: The Emperor, the Kings, and the Genies* (OUP 2000), Ch 9, 'Fiscal Compatibility and Monetary Constitution', at 144. Originally published in 1994, the paper was written in direct reaction to the faithful events of 1992 and dedicated to the argument in his contribution to the Delors Report in the paper 'Economic Union: Implications of a Monetary Union.' For that original paper, see ECB archives on The Delors Committee (1988-1989): https://www.ecb.europa.eu/ecb/access_to_documents/archives/delors/html/index.en.html, Last accessed 1 April 2021.

at the now infamous and rather arbitrary 3 percent deficit and 60 percent debt ratios relative to GDP with an obligation placed on Member States to avoid and correct any such scenarios.[62]

Within the bounds of acceptable budgetary parameters, Member States would have to *coordinate* their fiscal policy in order to arrive at the appropriate aggregate fiscal stance for the EMU as a whole, mimicking a real fiscal union and supporting the operations of the single monetary policy. Moreover, and most invasively, Member States would not only have to avoid causing any kind of backdoor transfer union through mindful public spending and coordination, but make active policy decisions on the mere risk they might do so.[63] In a certain manner, fiscal prudence became the equivalent of national commitment to the common project.

Compared to the other convergence methods considered by the fathers of EMU, the budgetary rulebook was an exercise in what we might deem forced, or synthetic, convergence. Forced convergence was (and still is) first and foremost designed to internalise, i.e. nationalise, the negative externalities of economic divergences – of the asymmetric EMU – by offsetting unmet borrowing needs through domestic austerity and taxation. In the absence of monetary balancing levers and the presence of strict prohibitions on public excess, there would be no option for externalising one's economic imbalances. Thereby, the founding political condition behind EMU would be satisfied. In a 'fake it 'till you make it' approach to economic policy, synthetic convergence was expected to deliver real convergence in the long-run, but not before Member States had caught up with each other.[64]

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[62] The 3/60 rule has been widely recognized as (part of) the price to pay for German participation in EMU. Delors himself is said to have hoped the ideas behind the final provisions would be satisfied by mere lip service, never to be truly operationalized during negotiations at Maastricht. This turned out to be largely true for the debt criterion, given that had it 'been enforced, there would have been no eurozone,' but not so for the 3 percent deficit rule. Mody, above n. 11, 86-87.

[63] With Pöhl, above n. 9, 133: Fiscal policy would be 'directed towards *eliminating causes of tension* that could *jeopardize* [economic] cohesion and towards *preventing new tensions* from arising.'

[64] In fact, the national costs of synthetic convergence are anticipated by other contributions to the Delors Report, which address the problem of diverging economies across the union, as well as the proposition that the EMU should very well be expected to worsen these conditions. Most strikingly with M.F. Doyle, who establishes economic integration through an EMU as a perilous process for weaker peripheral regions: 'In sum, therefore, while economic theory suggests that the Community as a whole should gain from the integration process, the considerations just outlined strongly indicate that this gain will be concentrated in the stronger regions and will be achieved at the cost of major adjustment on the part of the weaker economies. As a result, the efficiency gap between the weaker and the stronger regions may actually be widened. This suggests that if left to itself the market process would increase divergences between regions rather than lead to convergence.' Doyle, 'Regional Policy and European economic integration', *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 69, 71.

This, of course, is austerity politics – part and parcel of the EMU's DNA, not just a side effect of the sovereign debt crisis. Seen in this light, the Maastricht compromise was but a collective agreement on a shared economic pretence that sweeps underlying issues under the rug of national austerity, provided, of course, Member States are willing to follow the rules.

The importance and credulous logic employed in implementing budgetary constraints as a founding instrument of EMU cannot be overestimated. The sheer faith placed in this approach is all the more extraordinary because of the lucid awareness of the EMU architects – Lamfalussy especially –of the framework's fragility and built-in paradox. Much like the approach to the moral hazard of financial assistance, the solution to systemic pressures created by fiscal profligacy was to outlaw fiscal profligacy. If Member States stayed within the parameters of the budgetary rulebook, the concerns over market discipline, backdoor transfer unions, EMU disequilibrium due to economic divergences would all magically disappear.

1.6. Necessary Conditions | Hopeful Assumptions

Disparate fiscal policies could cause a backdoor transfer union in direct conflict to the political mandate for EMU and no single approach could guarantee the necessary conditions for a successful asymmetric EMU on its own. The solution had to address budgetary discipline in context – the context of the relationships between governments and the future central bank and between governments and the market. That is how the Economic and Monetary Union came to be based on a combination of a budgetary rulebook (Articles 121 and 126 TFEU), monetary financing and bailout prohibitions (Art 123 and 125 TFEU), and an independent stability-focused monetary authority to anchor the system (Art 130, 127(4), 282(5), and 126(14) TFEU).

But the macroeconomic equilibrium set up at Maastricht was functionally warranted on the basis of a number of consequential assumptions, a good part of which depended solely on unreliable political commitment. The continued success of the scheme was highly contingent on sufficient amounts of economic convergence prior to the interlocking of exchange rates at the end of Phase II of the project, thereafter on blind compliance with the budgetary rulebook, and last but not least, on time-limited assumptions about the state of the global economy.

1.6.1. Compliance | Successful Convergence | Global Economy

The economic sensibility of budgetary restraints was exclusively warranted upon successful convergence.

Only sufficiently converged economies could guarantee an organic alignment of economic interests in order to justify the pursuit of a common fiscal stance, which could then ensure the right kind of fiscal-monetary balance to keep the EMU functional.[65] Only then would it be rational to tie Member States to the mast of budgetary restraints, or expect their compliance in this matter on the assertion that 'policy coordination is beneficial to countries whose economies are closely intertwined.'[66]

Lamfalussy admitted that '[a]s long as countries differ considerably in the structure and relative size of their budgetary expenditure and revenue, in their sectoral saving/investment propensities and in their central banks' ability to resist pressures for monetization *there would be no economic justification for broadly uniform budgetary positions*.'[67] That is, beyond a certain level of divergence, fiscal coordination around uniform budgetary positions loses economic justification. Absent such conditions, a unified fiscal stance would be unattainable making any attempt at budgetary restraint a futile and, in fact, damaging exercise.[68]

This kind of 'primary' convergence was supposed to take place during the transition stage to EMU (Phase II) and be oriented 'towards the budgetary positions of the more fiscally conservative countries.'[69] Once the EMU was operational, budgetary rules could support already-established convergence and even contribute to removing any remaining sources of divergence by coordinating a single type of fiscal policy across the Union. Considering the

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[65] Lamfalussy, above n. 20, 99-100; Pöhl, for instance, judged the economic divergences between Member States so serious that even with effective policies and 'extremely large funds' for fiscal compensation, a doubt remained whether they would ever be compatible enough to justify the existence of a monetary union by the end of Phase II. Pöhl, above n. 9, 135,-6. Apropos, during committee deliberations he went as far as to judge 'a little bizarre' the interest of the Spanish and Italian governments in the project, considering their economic situation. Cited in James, above n. 10, 183.

[66] Lamfalussy, above n. 20, 94, 99.

[67] Ibid., 99 [emphasis added].

[68] To be entirely clear – the sovereign debt crisis has invigorated a debate on the underlying principles of the EMU in stage III – sidestepping the core assumption of the project's architects – that it may only follow logically and functionally as an extension of a successful stage II having achieved sufficient convergence.

[69] Lamfalussy, above n. 20, 99; Phase II convergence necessities and policies are clearly outlined in the other two contributions to the economic chapter of the Collection of Papers submitted to the Delors Report. See Doyle, above n 68, and Delors, 'Regional Implications of economic and monetary integration', *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 81.

seriously disparate economic situations and fiscal cultures across Member States entertaining a monetary union in 1989, sufficient Phase II convergence was an absolute *sine qua non* before the project could proceed successfully.

The simple irony of it all was that the solution allowing for an asymmetric EMU – dealing away with the pressures of economic divergence and associated difficulties – was premised on the assumption of pre-existing economic convergence. Thereby, the budgetary rulebook must have only been intended to bridge an economic divergence gap of much lesser proportions compared to what happened in reality.

Lastly, we must acknowledge the most extensive assumption of them all – the foundational principles of EMU attempted to instil for posterity (through law) the workings of a dynamic system (the economy at large) without factoring in the time-limited assumptions implicit in this normative calculation about the political economy of the project.

The sovereign debt crisis would spotlight one such case concerning the extent of financial and economic integration of EMU and its effects on the system's safeguards precluding unregulated fiscal transfers. As Alexandre Lamfalussy had correctly observed and eventually became evident, the prohibitions written into Articles 123 and 125 TFEU could only ever be sustained for as long as the national cost of a sovereign default did not surpass the shared cost of contagion.

Further, and perhaps most prominently, the EMU assumptions included the interplay between the cyclical spending proclivities of governments and central banks' leading and primary role in combating inflationary pressures. Once applied through the legal prism of the Treaties (and ESCB Statute) this equation was expected to and indeed resulted in a generally restrictive monetary policy conducive to the enforcement of fiscal consolidation across the eurozone and naturally more accommodating to certain member states than others. With time, the invisible constraints of the framework have become painfully evident with the demise of the global monetary consensus in the past decade. The additional economic pressures introduced by the pandemic have only forced these anyways-developing processes to an uncertain, but evolving, resolution.

2. Back to Basics with *Pringle*

To say that the EU was unprepared when the sovereign debt crisis hit is both an understatement and an outright deception.[70] After all, were not those precisely the events that Articles 123 and 125 TFEU had been built for? The bottom line, in the middle of an economic meltdown at the cusp of sovereign default, came back to securing the EMU project while still preventing a transfer union, i.e. financial contagion.

We return now to the circumstances and judgment in *Pringle*, where nothing less than a constitutional overhaul was at play. It is only by understanding the Maastricht dimension of Art 125 TFEU and primary purpose of the European Stability Mechanism (ESM), that we can understand the Court's real objectives behind its interpretation and the political establishment's consequent management of the sovereign debt crisis through the legislative overhaul of the European economic governance framework at issue in this study.

2.1. ESM A Long Time Coming

The ESM had very little – if nothing – to do with the sovereign debt crisis. A permanent financial aid facility had been foreseen since the spring of 2010 as a cornerstone to the overhaul of EMU economic and crisis governance into a framework for crisis prevention, management and resolution, itself planned for since October 2009.[71] The alleged need for such a mechanism was made obvious by the sovereign debt crisis, but the resolve for its

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[70] It cannot be emphasised enough that Articles 123 and 125 TFEU, nor their legislative background, ever define a situation calling for cross-border fiscal transfers as a 'crisis' for EMU. As the good people who contributed to the Delors Report made painfully clear, the prevention of such events was simply a political condition to the construct of EMU, meant to protect Member States from each other's fiscal folly and thereby secure the participation of a wider group. The only critical feature of either Article 123 or 125 TFEU was their very existence. While the inability to service one's debts could very well cause financial contagion across national borders, the economics of the situation is not necessarily a crisis in itself. Only the legal provisions regulating it designate it as such, thereby translating an economically difficult situation into a legal paradox.

[71]In March of 2010 the European Council established a Task Force for the overhaul of EMU governance. This decision was taken in line with the much-earlier October 2009 conclusions of the Economic and Financial Affairs Council, which endorsed - among financial supervision priorities - also 'significantly enhancing the EU framework for crisis prevention, management and resolution; and developing a comprehensive EU-wide framework for closer policy coordination on financial stability.' See: European Council conclusions on crisis prevention, management and resolution 7 Dec 2010, Accessed 22 March 2021 <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/118266.pdf> Also reviewed in Council Conclusions from Dec 2, 2009 <https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/111699.pdf> This background will be discussed in more detail in Chapter 2 – The Blueprint.

institutionalisation had been found long beforehand as Member States took stock of the global financial crisis.

So, while *Pringle* developed in the context of the intensifying sovereign debt crisis (the economic phenomenon), its subject – the ESM – had only to do with the EMU constitutional conundrum, which by that time had already begun to exhibit significant fractures (the legal phenomenon). Moreover, while the response of the CJEU may have been informed by the pressing context of the crisis, the issue at hand in *Pringle* had very little to contribute to the immediate resolution of these economic circumstances.[72] It was, instead, a matter of judicial consent to the comprehensive scheme to re-balance the Maastricht equilibrium in an effort to salvage the Maastricht compromise. To that end, the CJEU had one primary objective – how to allow the establishment of a permanent financial aid mechanism in the face of the financial aid prohibition of Art 125 TFEU.

The monumental challenge was solved through a teleological approach, whereby Article 125 TFEU was broken down to its constitutive components – the same factors which featured so prominently during the deliberations leading to Maastricht. At play were the rule on bailout prohibitions, the norm of budgetary discipline, and the overarching intent behind those to secure the political conditions for EMU – the prevention of a transfer union. The CJEU chose to inform the conversation with the relationship between sovereigns and the market, which is where the whole exercise went horribly wrong (or right, depending on one's take).

[72] Moreover, when the ESM came to the CJEU's attention the EU already had two *ad hoc* financial aid facilities in place – the EFSM and EFSF. Those were, by all accounts, exceptional measures addressing the exceptional circumstances – limited in time and scope by their purpose to restore normalcy, completely unrelated to the purposes served by a permanent facility such as the ESM. In fact, only a day after the regulation establishing the EFSM was signed the Commission already publicly entertained establishing a permanent crisis mechanism. The ECB followed suit with its Note from June 10. (COM communication 12 May 2010) Accessed 22 March 2021 < https://ec.europa.eu/economy_finance/articles/euro/documents/2010-05-12-com(2010)250_final.pdf>

2.2. Pringle | The CJEU Reading

The drama in *Pringle* played out in two acts. First, the CJEU defined the purpose behind Art 125 TFEU in paragraph 135,[73] to then legitimate a set of conditions which would guarantee its fulfilment in spite of conflict with the surface prohibition on bailouts in paragraph 136.[74]

The Court of Justice reasoned that the outright prohibition on the assumption of financial liability was but a rule giving form to the general norm that budgetary discipline is a good thing. This much the CJEU judged obvious after consultations with the text of the Draft treaty on EMU. The means for securing said discipline, the Court then threw in, was by ensuring 'Member States remain subject to the logic of the market.' Apparently, discipline was important because it contributed to a higher Treaty objective – whatever 'maintaining the financial stability' of EMU was to be taken to mean.

With the objective of Art 125 TFEU allegedly established, it was supposedly clear that financial aid was only prohibited in as far as it diminished 'the incentive of the recipient Member State to conduct a sound budgetary policy.' Should the future financial aid mechanism ensure such 'incentives' remain in place, all would be well. To that end, the Court invoked the legislative opinion of the ECB on the draft amendment to Art 136 TFEU and concluded on the two criteria to secure the compatibility of financial assistance with Art 125 TFEU – if indispensable for safeguarding the financial stability objective and subject to strict conditions to incentivise budgetary discipline.

In other words, revoking the bailout prohibition was legitimised by demonstrating the continued fulfilment of its purpose for maintaining budgetary discipline through conditionality in the interest of preserving financial stability. To be clear, having been asked if Art 125 TFEU precluded the establishment of the ESM, the Court decided the provision

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[73] *Pringle,* above n 1, para. 135: 'It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, *Bulletin of the European Communities*, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.

[74] Ibid., para 136: 'Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. As is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.'

actually legitimised the establishment of the ESM. Rules were reverted back into norms, rediscovered, reimagined and formalised into an entirely new set of rules that ultimately resulted in the conditionality culture instituted since the sovereign debt crisis. The validity of this approach was wholly conditional on the correct inference and re-assessment of Treaty intent.

We turn to an alternative reading of *Pringle*, contextualised within what we know to be the real intent of the EMU governance framework set up at Maastricht.

2.2.1. Financial Stability | Transfer Union

Financial stability is a measure of the proper functioning of EMU within the macroeconomic equilibrium concocted at Maastricht.[75] It is, as such, a euphemism for the primary objective behind constructing the EMU framework within its original parameters – namely, avoiding the possibility of unwarranted cross-border fiscal transfers. Substituting the two terms in either the *Pringle* judgment or the ESM Treaty itself goes a long way to understanding their reasoning and purpose.[76]

That said, crisis litigation only reconfirmed the foundational underpinnings of Maastricht as an exercise in risk aversion amongst distrustful Member States, whose relationship had undergone a fundamental overhaul in the context of extensive exposure to mutual financial risk as they became creditor and debtor to each other. Perhaps no one since the Delors Report had put it more candidly than AG Kokott with her valiant defence of Member States' rights to protect themselves from financial contagion. In her opinion on *Pringle* she claimed 'there is no question' that a crisis exists and establishing the ESM is the

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[75] As a term, the financial stability objective was originally introduced with the Council Decision on the amendment of Art 136 and embraced by the ECB in its legislative opinion on the Decision. There was, however, no clear definition of what exactly was meant by financial stability as a primary objective of the Treaties at the time of its introduction. Set apart from the ECB's price stability objective by virtue of the Bank's mandated exclusivity, and created in the context of a budgetary crisis, it was only natural to conclude that EU financial stability encompassed the economic-fiscal realm at the very least. In their seminal analysis of the eurozone crisis, the Tuoris pursue the identity of this novel high objective of the Union, but limit their conclusions with a view to presenting financial stability as a substitute for 'the very future of EMU.' While they are, ultimately, correct in this judgment, it misrepresents the true purpose behind the measure in a lot more positive light than it generally is. Se K. Tuori and K. Tuori, above n 23, esp. ch.5 pp.129-130: 'This objective seems to harmonise crisis prevention, which includes the prohibition on bailouts, with crisis resolution, which may require measures deviating from this prohibition. The Court postulates that compliance with budgetary discipline, which is the primary objective of the no-bailout clause, contributes at Union level to a higher objective; namely, maintaining the financial stability of the euro area. And it is this very same objective which stability mechanisms, such as the ESM, also serve (para. 136).'

[76] The ESM Treaty is also confirmed by the Court to serve the same financial stability objective.

right way to go about managing it.[77] She was concerned, however, that a 'broad interpretation' of Art 125 TFEU would prohibit the establishment of an ESM-like body, thereby depriving the collective of '*the ability thereby to attempt to avert damage to themselves*.' Such an outcome, she continued, would amount to 'an extensive *restriction on the sovereignty of the Member States to adopt measures for their own protection*.'[78]

In the AG's reading, the economic sovereignty of a Member State to default on the markets was precluded by the economic sovereignty of other Member States to protect themselves from the negative externalities of said potential event. In other words, attaining the financial stability objective superseded the prohibition on financial aid (just as the Court would eventually reason in its judgement), because applying the letter of the law by preventing the transfer of liability could no longer sustain its original intent to prevent the transfer of liability.

Simply put, the safeguards instituted with Article 125 TFEU no longer made sense in the economic and financial circumstances of *Pringle* – not only because the bluff on bailouts had been called, but primarily because the relationship between Member States had already evolved through extensive financial integration and sizeable mutual exposure.[79] Maastricht had been built on assumptions about the world and the world -- it had changed.

This study claims the CJEU's judgment in *Pringle* was informed by these events and resolved to solve them with a selective treatment of the market.

2.3. Pringle | Maastricht Reading

With budgetary discipline the objective in question with Art 125 TFEU, the Court should have precluded the establishment of a permanent financial aid mechanism. What better way to teach fiscal profligates *and* the markets a lesson than to guarantee a sovereign default? But that, of course, was an option already removed from the table for both political and economic

[77] What a *future* permanent crisis mechanism would have to do with the pressing context of the time was not particularly clear. Moreover, the ESM would be eventually legitimised in the CJEU's judgment in *Pringle,* as but a variant of existent treaty provisions – a fact, hardly befitting an exceptional response to crisis.

[78] Opinon of AG Kokott in *Pringle*, above n 1, para 140, [emphasis added]

[79] Not incidentally, Art 123 TFEU would face the exact same circumstances and problems (further complicated with the Bank's independence) as early as Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, developing in full force with Case C-493/17 *Weiss* ECLI:EU:C:2018:100, and likely coming to a head with the ECB Strategy Review in late 2021.

reasons. As Alexandre Lamfalussy had warned twenty years earlier, it simply would have been too expensive for *everyone*, causing inadvertent cross-border fiscal transfers.[80]

Therefore, the Court had to suppress the budgetary discipline objective beneath the novel financial stability objective, which was expressly identified to be of a higher standing even if previously unheard of until the ESM saga began. This allowed the outright rejection of the Art 125 TFEU prohibitive function addressed to Union bodies and Member States in the circumstances where the 'greater good' is jeopardised, but it did nothing for the provision's pedantic aim – to secure budgetary discipline by limiting the relationship between sovereigns and the market within the useful disciplinary parameters complementary to the general EMU framework by incentivising sovereigns and markets into responsible borrowing and responsible lending, respectively.

Then the Court put a spin on Maastricht: i) ignoring the dual objective of Art 125 TFEU to affect sovereigns and markets in equal measure, and ii) quantifying the measure of budgetary discipline as 'the logic of the market.' This is, by all means, a contrivance. Assuming – albeit highly unlikely – that the Court limited its investigation into the intent behind the bailout prohibition to the preparatory work cited in paragraph 135, we must point out that while the explanatory notes do not refer to the dual objective of the measure to inform both sovereign and market behaviour, neither do they ever infer a connection between budgetary and market discipline, or – for that matter – ever mention the market being in possession of any 'logic.'[81]

Ignoring the dual objective of Art 125 TFEU allowed the Court room for manoeuvre to tie up loose ends.

To legitimise the ESM, the CJEU had to designate a functional equivalent to the objective underpinning the bailout prohibition. Accepting budgetary discipline within the confines of Art 125 TFEU as the function of the *two-way relationship* between markets and sovereigns would have been counterproductive to the financial stability effort.

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[80] In that particular case – extensive exposure of German and French banks (and nationals' savings) to Greek debt. The CJEU was not unaware of these circumstances. 'According to the prevailing, but by no means uncontroversial judgment, imminent danger existed of contagion and spread of the debt crisis to other euro states. In addition, through losses inflicted on creditor financial institutions default of a Member State was assessed to have serious repercussions on the financial system of the whole Eurozone.' K. Tuori and K. Tuori, above n 23, 128.

[81] See: Commission of the European Communities, Bulletin of the European Communities, supplement 2/91, *Intergovernmental conferences: Contributions by the Commission* – the Commission doc that the CJEU refers to in Pringle for 'legislative history' of the no bailout clause (pp24, 54). Accessed 13 April 2020: <http://aei.pitt.edu/56119/1/B1151.pdf>

Simply, if the ESM embraced doing to Member States what the market would have – mimicking its disciplinary potential through strict conditionality and lending at unfavourable terms, it most definitely refused to do onto the market what a sovereign default should have done with a promise of debt restructuring. Said market, after all, to a significant extent now consisted of the very same Member States, whose unwillingness to carry each other's debts led to the entire predicament in the first place.

What is more, the Court, in fact, reasserted this lopsided arrangement, transferring the onus of budgetary discipline completely onto sovereigns and removing any incentive for the markets to price risk appropriately. In paragraph 137 of its judgement, in a completely unnecessary move to circumvent a literal reading of Art 125 TFEU and asserting that creditor governments will not be directly assuming any liabilities, the CJEU in essence proclaimed that troubled governments will remain responsible to their creditors.[82]

In other words, had it engaged with the intent of the Treaties in good faith, the CJEU could not have satisfied both the higher objective of financial stability, i.e. prevent the unwarranted and unregulated transfer of funds, and that of Article 125 TFEU completely.

We shall return to this discussion with the analysis on the ESM in Chapter 6. For our current purposes, it was important to reveal the dynamics, which came to inform the subsequent legislative overhaul of EU economic governance – the original guarantor of budgetary discipline in the EMU, at issue in this study.

3. Consequences

3.1. Legal Consequences

Pringle, then, was an *ex post* rationalisation of the recalibration of the EMU equilibrium. First, the judgment managed to negate the very existence of an EU constitutional crisis by subsuming the institutionalisation of a permanent financial aid facility – and accompanying crisis-logic – into the existent Treaty framework, thus stabilising the original premise of EMU. Second, the arguments adopted by the CJEU – at the core of overwhelming discomfort

[82] *Pringle*, above n 1, para 137: 'However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.' The Court had just made clear the conditions under which a financial aid mechanism would be legitimated and being exhaustive in its reading has arguably caused more harm than good.

in legal circles – would directly affect the balance within EMU by transferring the onus for fiscal discipline solely onto Member States.[83] Further, institutionalising stability as a novel superseding norm of EU law recalibrated the entire framework of economic governance to one of risk prevention with the ESM at the apex of the regulatory mechanism. Lastly, by authorising the establishment of the ESM, the CJEU – in effect – endorsed the working practices of the crisis adopted by the Mechanism. This further legitimised the rationale of the already developing legislative overhaul of EU economic governance and reaffirmed a novel hierarchy of Treaty values with the permanent institutionalization of crisis rationale.

These are discussed below.

3.2. Internalising | Controlling Crisis

The logic applied to sidestepping Art 125 TFEU in *Pringle* confirmed the EU stakeholders' approach to internalising the causes of crisis by identifying Member State fiscal profligacy at the core of the immediate problem. This shifted the focus from the complete impairment of the EMU framework to that of its economic governance mechanism. This approach negated the existence of crisis by transforming it from an exceptional circumstance in defiance of the legal system to events under the authority of EU law. Establishing legal control over unfolding events stabilised the system and legitimised the resolution of crisis through law. Furthermore, the approach implied that the crisis could be controlled (and prevented) through the regulatory framework for economic governance, creating a 'regulatory' moment for the EU to transform the dangers of a transfer union – budgetary profligacy – into calculated risk. This study argues that by situating fiscal profligacy at the core of the crisis, the EU successfully imagined the default of the Maastricht EMU equilibrium as isolated within the confines of its economic regulatory framework and proceeded to react and reform accordingly.

Moreover, scapegoating budgetary rulebook governance and reading into the Treaties a doctrine of *quid pro* quo conditionality provided significant legitimation for the far-reaching reforms under way since the fall of 2009. In other words, the logic of *Pringle* would trickle down, reinforcing assumptions already advocated by the key institutional players during the Blueprint period.

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[83] In fact, by the time the ECB's OMT programme was reviewed in 2013 in *Gauweiler*, above n 83, two out of the three original safeguards of the Maastricht compromise were judicially – constitutionally – translated from the dispensation of mutual liability into the intensification of national fiscal responsibility. If one were to consider the faith in market discipline at face value, that would actually be three out of four safeguards all transferred into the budgetary realm.

3.3. Market Access as Treaty Boundary

By constitutionalising the underlying objective of the Maastricht compromise into a primary law doctrine of financial stability, the CJEU designated a new boundary for EMU and thereof formally identified a new danger. Being 'in the EMU' now meant being 'in the markets.'[84] Conversely, and perhaps fittingly, loss of market access expelled Member States from both the EMU and EU law, with the ESM found in the realm of public international law. The previous indicator of membership – compliance with the Stability and Growth Pact 3/60 criteria – was transformed into an automatic measure of crisis. In a certain sense, this was an apt reflection of the dire reality of fiscal indicators across most of the eurozone. Ultimately, the revamped framework of economic governance – the European Semester – was completely recalibrated into a framework of crisis aversion set on avoiding the primary definition of crisis in the EMU worldview – a transfer union.

3.4. Crisis Prevention | The Turn to Risk Aversion

The discovery of stability as a novel superseding norm of EU law, with the ESM as its guardian, placed the logic and instrument of the ESM at the apex of EU economic governance. Stability as a primary norm presupposed the existence of an entirely new set of liabilities subject to legal sanction, yet satisfied within the existent competence parameters of Articles 121, 126 and 136 TFEU. The current study will demonstrate how these were quantified and operationalised through the overwhelming turn to risk aversion-crisis prevention in EU economic governance.

The ESM thus came to inform the objectives of EU economic governance towards risk aversion, instructing the direction of reforms and use of conditionality therein. In fact, so great was this impact that even though the two mechanisms are found in disparate legal regimes, the ESM and the European Semester have been functionally, explicitly, and (in part) *legally* consolidated into a single cohesive framework of EU crisis prevention.[85] The CJEU confirmed the relationship in *Pringle*, where it held that 'it must next be stated that, as is

[84] The ECB's learned proposal on the institutionalisation of a permanent crisis mechanism confirms as much, claiming '[t]he mechanism should only be activated in very exceptional cases, when market access for the country concerned is no longer possible.' (ECB Blueprint III.1) The Basic premise behind this line of logic goes back to the moment of transfer of debt exposure from the markets to fellow Member States.

[85] The fact that its provisions apply solely to the fiscal and macroeconomic policies of Member States reconfirms the original perturbations at Maastricht – the deep-rooted distrust of the asymmetric EMU and synthetic fiscal union. Seen in this light, the categorical and expeditious condemnation of budgetary indiscipline as the reason for the crisis is small wonder.

confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199, the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 [the ESM] *serves to complement the new regulatory framework for strengthened economic governance of the Union*.'[86]

As such, the ESM is as much an agent of stability and financial aid as it is the ultimate sanction to economic, fiscal, or financial imprudence in the Union.[87] The ESM is at both the normative foundation and procedural apex of EU economic and crisis governance.[88] EU economic governance after the crisis is cast under the long shadow of the ESM with all of its associated assumptions, perversities and peculiarities. Its existence and value system inform the entirety of EU economic governance legislation, mostly of secondary nature, which now governs the fiscal and economic conduct of Member States.

In this regard, while the current work designates its main subject of study as the EU economic *and* crisis governance framework, it must be understood the distinction therein is merely superficial and for the sake of clarity. With economic governance having become a euphemism for crisis prevention, the objective and obligations of the latter have officially superseded the former. Ultimately, it is all one big exercise in preventing the next sovereign debt crisis.[89]

3.5. Political Consequences | Temporary Powers Institutionalised

The sovereign debt crisis was a major disruptor of power dynamics in the EU.

The sharply altered relationship between Member States mutated from a scale of varying economic performance and fiscal predispositions into the opposing poles of a creditor-debtor conflict. This resulted in the appropriation of the EU Treaty-based intergovernmental competences by creditor logic, concentrating power towards a single end of the econo-political spectrum of the Union. With the financial nature of the crisis having reconfigured credit into authority, certain Member States found themselves in an exclusive

[86] *Pringle*, above n 1, para 58 [emphasis added].
[87] This much is obvious by the legal linkages between the respective surveillance systems and the ESM. This is analysed further in Chapter 6.
[88] In fact, there can be no more talk of EU economic governance without recourse to crisis governance – these are built to operate in unison.
[89] Indeed – specifically so, given how limited the scope of the ESM truly is. For further discussion, see Chapter 6.

position to exercise powers far beyond the remit of their competences within the constitutional structure of EMU.

Even though these dynamics were entirely contextual – borne of crisis and thereby, exclusive and temporary, they would become normatively – and constitutionally – underpinned by the CJEU's interpretation of the failures of the Maastricht compromise as the original sin of fiscally-libertine Member States, and institutionalised for posterity through the proxy of EU law in the Great Reformation of EU economic and crisis governance.

It is easy to distinguish the interests formalised with the novel catalogue of crisis prevention reforms through their selective instrumentality. Simply put, applying the measures cost far less – if anything at all – to those propagating them than the general lot.[90] The fact that discipline would only prove constraining to those in need of discipline was rather convenient, ensuring that the new invasive rules take effect and violate the sovereignty of profligate Member States only.[91] It was, for all intents and purpose, a repeat of history of the political distrust and economic divergences from the dawn of EMU.

4. The BANK

The architects of Maastricht did not get it all wrong. The synthetic fiscal union may have failed to launch and the bailout safeguards may have proven next to useless, in turn undermining the disciplinary potential of price stability, but the ultimate arbiter of EMU equilibrium – the ECB – seemed altogether unperturbed by the crisis.[92] What is more, this systemic collapse would compel the Bank to act in defence of both price *and* financial stability, i.e. the original

[90] This was, however, a serious miscalculation on part of Member States who had taken against their peers in a bout of masochistic righteous indignation. Simply put, they failed to discern that their superiority in the post-crisis construct is preconditioned on a subjective reality – the power of money as a function of the context of greater economic and financial stability. As the global economy took a turn towards hyper-financialisaton coupled with deflationary pressures, in the context of a hyper-economically integrated EU and a functionally limited central bank, the new rulebook would come to take on new meaning, addressing the responsibility for balancing out the aggregate fiscal stance towards surplus Member States. Such dynamics were already evident well before the pandemic-induced economic crisis.

[91] Just as the constraints of the budgetary framework of the Maastricht compromise were only to be felt by those in need of further fiscal consolidation in the interest of increasing economic convergence within the EMU club.

[92] And indeed, the lack of economic convergence amongst Member States coupled with the effects of the global financial crisis did create pressures for accommodating expansionism in monetary policy, just as the father of EMU had anticipated with alarm two decades earlier. And yet, in the ECB's own opinion, monetary policy had not only remained unimpaired, but had actually proven its robustness. ECB, *The Monetary Policy of the ECB* (2011), at 7. Indeed, as Ashoka Mody notes with dismay, the Bank successfully and vigorously resisted the siren calls of economic reality, refusing to drop interest interests for a good while of the global financial crisis, holding steady to its price stability dogma instead. Mody, above n 11.

terms of the Maastricht compromise and of itself. The greater the EMU asymmetry became – theoretically, further inhibiting the ECB's management of monetary policy – the more cause the Bank had for intervening in the economic side of the equation.

This anchor function was, of course, part and parcel of the original design of EMU. The ECB Treaty competences and operational principles were meant to allow the Bank to project its economic ideology beyond the immediate boundaries of its mandates. This study argues the Bank's most significant interventions came through its conduct of monetary policy and its involvement in the legislative process behind the Great Reformation of EU economic governance.[93] We are here concerned with the latter.

Of course, monetary policy was always intended to shape the economic union by conditioning national fiscal urges. In fact, the pressure for external accommodation of ECB measures was the very definition of the monetary-led economic integration launched at Maastricht. Analogously, the Bank's right to opine on any matter outside of – but consequential to – its monetary competence proved a most potent enabler of the ECB's enterprise for re-anchoring EMU when the Great Reformation of EU economic governance ensued. This study will demonstrate the ECB was a leading force behind crisis reform, with its input fundamental to reconfirming the conditions of the Maastricht compromise in the novel crisis prevention framework.

The ECB's reform approach followed through the policy preferences established in *Pringle*, singling out economic governance for 'a quantum leap forward towards reinforcing the institutional framework of [EMU]'[94] and further amplifying its own learned opinion on

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[93] A most noteworthy feature of this dynamic is that the ECB's influence outside onto the fiscal and economic realm is exercised in a more or less unrestricted and formal informal environment. The ECB intervenes without intervening through monetary policy and the legislative process. Of course, the extent of the ECB's alleged control – or lack thereof – over the effects of its monetary policy has become a notorious point of contention between the Bank, CJEU and the FCC (see the *Weiss* saga). As Adam Tooze has succinctly put it, 'far from failing to consider the economic impact of its monetary policies, this is precisely what the ECB spends its entire time doing.' Adam Tooze, 'The Pandemic Has Ended the Myth of Central Bank Independence', Foreign Policy, 13 May 2020.
https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling. But the ECB also wields significant unaccounted power through the influence of its legislative opinions by channelling its institutional policy preferences through the political processes and decision-making prerogative of the EU executive. This study concerns itself with this under-rated and under-studied phenomenon.

[94] 'The recent crisis has revealed the need for a quantum leap forward towards reinforcing the institutional framework of Economic and Monetary Union (EMU). *While the monetary aspects of EMU have proven robust, some weaknesses in its economic functions have become obvious*. There is a need to reinforce economic governance in the euro area, including the fiscal regime enshrined in the Stability and Growth Pact and the national economic policy frameworks. We also have to build and implement a rigorous and credible surveillance framework.' ECB, *The Monetary Policy of the ECB* (2011) 7.

the necessary conditions to legalise financial aid, which, it shall be recalled, the Court had already wholeheartedly embraced.

The Bank's success with crisis reform greatly benefited from the political dynamics discussed in the preceding section. Simply put, the ECB and creditor Member States shared a reform agenda, informed by the same economic ideology constitutionalised with the Treaties and institutionalised with the Central Bank. This highly contextual alignment of interests would transform into a permanent legal state of affairs once the Great Reformation was complete. But not everyone stood to benefit equally.

While the authority of creditor Member States was but a function of the crisis, ultimately unrecognised by the Treaties, the standing of the ECB is a constitutional and constitutive feature of EMU. The reformed framework would only serve the interests of the creditors for as long as the financial context supported their position of power – for as long as financial excess proved an asset to the macroeconomic equilibrium. It would, however, empower the ECB for posterity with any move having strengthened the original EMU construct, by extension, having done the same for the Bank.

5. Conclusion

Three decades ago, European governments bargained the future of their common project on an experimental and highly unstable governance framework riddled with assumptions – the asymmetric EMU. In an effort to avoid establishing a real fiscal union for the main purpose of preventing the cross-border transfer of funds, Member States formalised within the Treaties a synthetic equivalent.

In a bid to fulfil their political mandate, the EMU architects merged together economic credos and conditionalities, which may have made sense separately, but together would prove the framework too rigid to have a realistic chance of success.[95] In fact, the founding principles

[95] Dyson and Maes, above n. 8, 258: 'this brittleness of the foundations of the euro was far from surprising. After all, the architects could not draw on a single authoritative theory of a sustainable monetary union. The project was extraordinarily complex both technically and in broader terms and, not least, could not be dissociated from fundamental political questions of legitimacy that went beyond the brief of the architects.'

of the EMU were based on compromise solutions and standards which had been originally designed to dissuade from the endeavour.[96] It was irrevocable economic idiosyncrasy.[97]

Ultimately, the equilibrium necessary for the successful operation of EMU was built exclusively on the presumption of fiscal abstinence – isolating the negative externalities of the asymmetric union onto the fiscal by quantifying the responsibilities of the fiscal realm, extending them beyond correction to active prevention.[98]

What is more, the troubling implications of the framework were never taken to their natural conclusion or resolution. Problems were 'solved' by rejecting the possibility of them arising in the first place (having been successfully quarantined within national borders). The project's only measure of 'crisis' was the cross-border transfer of funds – a potent omen of what was to come.[99] In a zealous effort to preclude a transfer union, the EMU was purposely deprived from contingencies, lest the latter cause the crisis.[100] And so, the resulting EMU

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[96] Pöhl's proposals purposefully set 'dauntingly high technical standards' for both the monetary and fiscal realms, convinced these would intimidate economically weaker countries into walking away from the project and thus delegating the EMU into the oblivion of history. Mody, above n 11, 69-70And yet, so complete was the default that the Bundesbank council was caught by surprise by the triumph. 'The Bundesbank responded directly to the Delors Report. Internally, it welcomed the report as an 'optimal' solution from its viewpoint, with a federal central banking system, a commitment to price stability, and a rejection of the idea of a parallel currency. Members of the Bundesbank council recorded their surprise that 'astonishingly all the committee members agreed with the German position'. James, above n 10, 186. Pöhl is said to have been 'deliberately difficult', ibid., at 182, during committee negotiations and once those concluded, 'became an outspoken critic of the single currency.' Mody, above n 11, 72.

[97] Ashoka Mody echoes this sentiment in his review of Maastricht: 'With fiscal union ruled out and ambiguity about the possibility that fiscally stressed member nations could gain breathing room by delaying or reducing repayments to their private creditors, the right conclusion should have been that a European monetary union was not possible.' Mody, above n 11, 86.

[98] The Delors Report was also actively engaged in this regard – disproportionately preoccupied with the management of future economic policy and the challenges that the plurality of disparate national fiscal models would present. Padoa-Schioppa, above n 65, 142, agrees: 'Although the Report deals with a broad range of policies (the single market, competition, regional and structural policies, wage and price formation), fiscal policy unquestionably receives the greatest attention.' By contrast, monetary union was regarded as a largely straightforward affair, since monetary policy was already (mostly) de-politicised and independent, managing its transition towards Europeanisation was considered a rather expertocratic venture, to be guided by the tenets of the ordoliberal tradition – focused on price stability, monetarist primacy in a union to 'be based on the same market-oriented economic principles that underlie the economic order of its member countries.' Delors report, above n 31, para 25. This is likely also largely owed to the fact that the last outstanding condition for a successful monetary union – the irrevocable locking of exchange rates, was itself considered a highly technical matter anyway.

[99] Obviously this was an artificial event created by Member States' unwillingness to form a real fiscal union.

[100] A financial safety net would only be extended to circumstances, which could not be traced back to a Member State's own making – i.e. exogenous shocks with Art 122 TFEU (Art 100 TEC). As we shall see by the end of this study, even that possibility was made highly conditional with the introduction of the 'fiscal room for manoeuvre' doctrine, which introduced into the macroeconomic governance framework the responsibility to have the capability to deal with crises on one's own.

framework was, by design, only capable of functioning within a very strict definition of 'normality,' making even the slightest deviation cause for emergency.[101]

Some twenty years later, confronted by the legal paradox of the sovereign debt crisis, the EU would once again attempt to secure the primary objective of the Maastricht compromise. To that end, it deliberately and methodically internalized, reformulated and legalized the crisis as the permanent and continuous threat of budgetary profligacy by establishing a normative parity between financial woes and legal transgression at the core of its value system. It cast adverse and arguably unpredictable environmental circumstances as wilful transgressions, or at the very least – severe negligence, by troubled Member States, wherein the inability to cope became a sanctionable offense. The approach was highly functional, overcoming the epistemological uncertainties of crises by transplanting the phenomenon into the legal system – translating danger into risk for 'only within the system is there any possibility of security.'[102]

This process, however, also sacrificed the principle of legal certainty by rationalising the punitive conditionality of the crisis governance framework both within and without EU law – Semester and ESM, respectively – on the premise that Member States have knowingly broken a rule, which existed only but as a mere suggestion at the time of alleged perpetration.

In the interest of mitigating the risk of an unwarranted transfer union, Member States appropriated for themselves the authority to enforce the highly theoretical concept of market rationality by intensifying budgetary discipline. The legitimating factor allowing governments to act in lieu of the market was the assumption that market discipline is an objective truth about the real condition of the economy and thereby an already existing and active force, as opposed to the creation of an entirely novel competence.[103]

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[101] The future ESM, of course, is the most serious break with this built-in bias.

[102] 'Only system communications offer any assurance of risk management or control. Only within the system is there any possibility of security.' See: M. King and C. Thornhill, *Niklas Luhmann's Theory of Politics and Law* (2003 Palgrave Macmillan UK) 186.

[103] If anything, eurozone sovereigns' relationship with the market exhibited quite the opposite symptoms. The rationality of the market was but a conjecture suitable to the original Maastricht equilibrium, which had not only utterly failed to manifest itself but when it did – with the market panicking, was judged as altogether unsound and in need of a soothing influence. See Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone,' (2017) 44 *Journal of Law and Society* 79. Further, the CJEU's interpretation of the ECB's OMT programme is also a case in point for the irrational nature of the markets. Incidentally, the draft treaty on Maastricht had all the while intended to charge the Bank with straightening out the workings of the capital market. See: Draft treaty prep p.30, section 5.1 b (iii)

The CJEU's selective treatment of the market constitutionalised perpetual debt liability for eurozone Member States. In a flagrant conflict of interest, creditor Member States – whose interests were represented by the ESM and endorsed by the CJEU in *Pringle* – formally disallowed the sovereign right to a default in an effort to preclude a transfer union. Thereby, debt liability was transferred from the theoretical relationship between markets and sovereigns to creditor and debtor factions in the eurozone in a befitting acknowledgment of the altered EMU context.[104] Debt exposure, however, was altogether removed from the equation on the assurance that market debt and financial aid will always be paid back.

Creditor governments were more than happy to benefit from the mystical ways of the free market, but only in the absence of risk. They would see to altogether preclude the possibility of losses by intervening both with the management of debt (by directly instructing eurozone governments on fiscal prudence through the European Semester) and the management of liability (by taking over the 'free market' process in the case of adverse financial events through the European Stability Mechanism).

This power relationship was directly institutionalised into the ESM, as an intergovernmental forum where governments remained in absolute control.[105] But in the context of the EU Treaties, the creditors had to work through proxy – significantly expanding and strengthening the economic governance framework, banking on the assumption that the global economic and monetary paradigm would remain unchanged.

This study will demonstrate that the horizontal tectonic shift between Member States came to greatly affect the hierarchically constituted competences in the EU with temporary powers investing themselves into the law-proper. The transformation within the *pouvoir constituant* affected the operations of the *pouvoir constitué*, in the process severely undermining the integrity of the EU legal order.

Moreover, these intergovernmental dynamics paved the way for and amplified the ECB's involvement in the legislative aftermath of the sovereign debt crisis with creditor and monetary authority interests aligned and fully determined to re-consecrate the economic ideologies of Maastricht. The ECB would make the most of it, recalibrating the EMU and in the process expanding its policy space into direct oversight of the national budgetary realm.

The financial and sovereign debt crises revealed the changed economic context of EMU – the extent of financial integration and cross-border debt exposure, which entailed a

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[104] Ironically, this split followed the factions of economist and monetarist expertise at Maastricht.
[105] Working towards absolute control

heightened immanent risk and respectively increased stake Member States now had in each other's fiscal policies. The attempt to mitigate the risk of the evolving relationship would manifest in the case law before the CJEU, namely for our purposes – in *Pringle*, and the Great reformation of EU economic governance into a framework of crisis prevention.[106]

These were symbiotic developments. *Pringle* rationalised the already unfolding reform agenda, which, in turn, permanently institutionalised the logic of the case. Together, they would instigate a new era of European law, one designated by this study as 'disciplinary constitutionalism' – a system based on a dogmatic conjecture of economic theory, which would see the equilibrium underpinning the Maastricht compromise recalibrated through risk aversion. If markets could no longer be trusted to behave 'normally' and neither could Member States be relied on to behave 'responsibly,' then a legal framework was to be erected as a direct substitute of the disciplining potential of the sovereign bond market (itself, a theoretical conjecture) in protection of the original intent of Maastricht.

And so, buttressed by the enabling context of crisis, the EU establishment focused its efforts on enforcing budgetary discipline with a newfound zeal found with the judicial interpretation of Art 125 TFEU. The process ensued early on in the summer of 2010, when European institutional stakeholders – the Commission, a motley crew Task Force under the auspices of the EU Council President, and the European Central Bank, began consultations on a legislative 'Blueprint' for the major overhaul of EMU. This preparatory process concluded swiftly by the Fall, when all efforts turned to implementation through various secondary and public international law instruments.

[106] Not incidentally, the first wave of reforms initiated by the global financial meltdown was focused on financial integrity and supervisory mechanisms – the European Supervisory Agencies (ESAs) and the foundations of a real Banking Union.

CHAPTER 2

THE BLUEPRINT

1. The Stability and Growth Pact

EU budgetary discipline never really panned out as the architects of EMU envisioned or the project itself demanded. The Treaty provisions designed to secure a functional equivalent to a real fiscal union remained more or less untapped until the sovereign debt crisis, by which time economic divergence seemed well beyond repair. Be that as it may, the vast majority of crisis reforms were pinned precisely on the Treaty fundamental for budgetary coordination and constraints – Articles 121 and 126 TFEU, in an economic reality now far removed from the assumptions and necessary conditions of the Maastricht compromise.

The original Stability and Growth Pact (SGP) suffered from context.

The transitionary Stage II EMU benefited greatly from the incentive of the single currency club. Member States were making valiant economic efforts to consolidate towards the Maastricht criteria and ensure euro membership. Looking at the numbers from that period, it almost seemed as if the panic over budgetary discipline at the dawn of EMU was all for nothing.[1] Against that background, the somewhat operational framework for budgetary coordination and correction came into existence more as a formality under the pressure of Treaty obligations and in light of the fast approaching irrevocable fixing of exchange rates and introduction of the single currency.[2] Its provisions showed.

The SGP was set up with Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and

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[1] 'Initially, however, things got off to a good start, and during the period from 1992 (when the Maastricht Treaty was signed) to 1998 (the year before the introduction of the euro), developments in public finances were remarkably positive. Average deficits improved, falling from almost 5% of GDP in 1992 to just over 2% in 1998. All of the founding members of the euro area (including Italy, which had a deficit of around 10% of GDP in the early 1990s) managed to bring their deficits below 3%. In the second half of the 1990s levels of public debt also began to decline. However, it was arguably the threat of not being allowed to join the euro area that gave rise to this initial success with fiscal consolidation.' Schuknecht, Moutot, Rother and Stark, 'Stability and Growth Pact, Crisis and Reform', ECB Occasional Paper No 129, 2011, p. 9.

[2] However favourable the economic circumstances, Member States were already playing catch-up with the governance framework of their nascent project. In anticipation of the uphill struggle for transitionary economic convergence, the Delors Report had actually recommended such an economic governance facility be put in place as soon as the new Treaty would allow for it to ensure corresponding development across economic and monetary policy. Committee for the Study of Economic and Monetary Union, *Report on economic and monetary union in the European Community* (Opoce 1989) ('the Delors report'),.33-34.

coordination of economic policies (the preventive arm) and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (the corrective arm). Those were informed by the 'political guidance' offered in the Council Resolution on the SGP, which clearly established that whatever rules were put in place – it was up to Member States to define their scope and execution.[3]

The following is a brief overview of these modest mechanisms guiding EU economic governance into place before the crisis under the patronage of the Stability and Growth Pact (SGP).[4]

1.1. Prevention | Reg (EC) 1466/97

Article 121 TFEU formalised a well-known fact – Member States' economic policies were very much a matter of common concern, whether to make the best out of the single currency or simply to prevent an unwarranted transfer union.[5] To that end, the preventive arm of the SGP – Reg (EC) 1466/97 – was meant to ensure the coordination of fiscal and economic policies and prevention of excessive budgetary deficits.[6] This was to be accomplished through a multilateral monitoring cycle based on Broad Economic Policy Guidelines for coordination of economic policies and surveillance of budgetary positions for adherence with medium term budgetary objectives (MTOs) – the measure of a government's prudent fiscal standing.

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[3] Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17 June 1997) [Official Journal C 236 of 02.08.1997]

[4] Consisting of Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17 June 1997) [Official Journal C 236 of 02.08.1997]; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, amended by Reg (EC) 1056/2005 in 2005 (the corrective arm); Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, amended by Reg (EC) 1055/2005 (the preventive arm). See e.g. Heipertz and Verdun, 'The dog that would never bite? What we can learn from the origins of the Stability and Growth Pact', (2004) 11 *Journal of European Public Policy* 765.

[5] Almost plagiarising Alexandre Lamfalussy, some thirty years later, the European Commission would claim: 'The fundamental idea behind Article 121 TFEU is that in an increasingly integrated EU, and particularly in the euro area, the interdependence between Member States means that their interests are best served through the co-ordination of their economic policies.'
European Commission, Directorate-General for Economic and Financial Affairs 'Vade Mecum on the Stability & Growth Pact' (2018) 075, 22-23.

[6] As per Art 126 TFEU (104 TEC), compliance with budgetary discipline is based on: '(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless: either the ratio has declined substantially and continuously and reached a level that comes close to the reference value, or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value; [and] (b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.'

Every spring Member States would submit Stability and Convergence Programmes (SCPs) to the Council and the Commission for ex-post evaluation.[7] Those would contain information on: the government's MTO, the adjustment path towards it, and expected debt ratio; core economic indicators, such as growth, employment, and inflation; significant economic developments such as investment expenditures; and other general economic analyses.(Art 3.2)

In turn, the Economic and Financial Committee and Commission would carry out assessments of economic coordination and budgetary discipline, based on which the Council would examine 'whether the medium-term budgetary objective in the stability programme provides a safety margin to ensure the avoidance of an excessive deficit; whether the economic assumptions on which the programme is based are realistic; and whether the measures being taken or proposed are sufficient to achieve the targeted adjustment path towards the medium-term budgetary objective… [and] whether the contents of the stability programme facilitate the closer coordination of economic policies and whether the economic policies of the Member State concerned are consistent with the broad economic policy guidelines.'[8]

The Council's opinion on these matters was to be delivered after consultations with the Economic and Financial Committee and on recommendation by the Commission. If the Council considered a Member State's SCP could use some more ambition coordinating with the Broad Economic Policy Guidelines, for instance, it could invite the government in question to adjust its programme (Art 5.2). This cycle of invitations and subsequent monitoring could carry on *ad nauseum* with little incentive for Member States to follow through or capacity for the Council to enforce.

If the Council identified 'significant divergence of the budgetary position from the medium-term budgetary objective, or the adjustment path towards it' it could issue a warning to the concerned Member State with a recommendation for adjustments.(Art 6.2) Should Member States fail to heed the warning and remove the threat of an excessive deficit, the Council could at best issue yet another recommendation for 'prompt corrective measures' and make its position known publicly.[9] Lack of compliance could see the procedure escalate to the

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[7] We are here primarily concerned with the eurozone framework and therefore – the Stability Programmes. Even in the current reformed framework, Stability programmes are submitted by eurozone Member States, while non-eurozone Member States prepare Convergence programmes.
[8] Reg (EC) 1466/97, Art 5.
[9] To this day, and even more-so after the reforms to be discussed hereafter, the logic of publicizing Member States' fiscal and/or macroeconomic weaknesses as a means of punishment, thereby providing

provisions of the corrective arm of the SGP – Reg (EC) 1467/98, but this was the extent of what could be done with preventive governance.

The budgetary coordination and surveillance cycle was an annual event more akin to taking the pulse of the general economic condition across the union, than a hands on exercise in securing the essential requirement to the success of EMU. The information flow came through governments selectively self-reporting data based on highly divergent national accounting standards, which the oversight institutions then had to make heads or tails of. To make matters worse, in its political guidance for the SGP, the Council had taken great care to ensure the ultimate decision for any corrective action requested of or recommended to Member States within the preventive arm remain within their own discretion – whatever they 'deemed necessary.'[10]

1.2. Correction | Reg (EC) 1467/98

Crossing the line of prudent budgetary policy – or the Commission being of the opinion there exists such a risk – would trigger the Excessive Deficit Procedure (EDP) laid out in the provisions of Art 126 TFEU and Reg (EC) 1467/98, i.e. the corrective arm of the SGP.

The Commission would take the initiative with a report and then wait for the opinion of the Economic and Financial Committee. Having taken the latter into consideration, if it still believed an excessive deficit to exist, the Commission would then address an opinion and a recommendation to the Council for a decision on the matter. The Council would have three months to make up its mind and – if in agreement – then issue recommendations for effective action to the concerned Member State.

Unlike with the preventive arm of the SGP, these recommendations were no longer within the discretion of the targeted Member State. Moreover, up until this point, the procedure would remain a private matter, but if a government failed to take necessary measures the Council could engage in public shaming and formally acknowledge the absence of effective action. Should that be the case, the Council could 'give notice' demanding effective action yet again and this time within a specific deadline. Member States could be *requested* to self-report on their alleged progress.

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more fuel to a potentially already-spooked financial market, remains an idiosyncrasy for a community whose last round of reform was self-admittedly guided by fear of contagion.

[10] Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17 June 1997) [Official Journal C 236 of 02.08.1997]; Section The Member States paras 1, 3, 4. Furthermore, making recommendations public was solely left to Member States 'own initiative.' Paras 2, 6.

It is only after exhausting this entire process, that continued budgetary trouble and failure to comply with recommendations could lead to the original sanctions foreseen with Art 126(11) TFEU: subjecting the Member State to a pre-emptive information regime for the issuance of government debt; leveraging European Investment Bank lending against compliance, i.e. conditionality; a financial sanction such as a non-interest bearing deposit or an outright fine as a measure of last resort.[11] The Council would have an entire ten months to decide on taking such drastic steps against one of its own. (Art 7) In the interim, for as long as a Member State could demonstrate compliance with the recommendations issued by the Council, the entire procedure could be held in abeyance and drag on for a significant while. (Art 9)

The SGP clearly had serious issues, not the least of which being its lack of imagination for the serious consequences of budgetary profligacy so clearly prophesised at the dawn of EMU and painfully re-examined with the financial and sovereign debt crises.

The qualified majority voting procedure ensured that unfavourable Commission recommendations would need the unlikely approval of two thirds of Member States in addition to the vote of the concerned party, which retained its right to weigh in on proceedings against itself. Moreover, in the context of the Council Resolution on the SGP, EU budgetary governance felt more like a political pledge with governments merely *invited* and *urged* to follow through with procedure, but under no evident obligation to do so.[12] With the early SGP, operationalising even the meagre intent of the law ultimately depended on the Member States' political will to do unto others as they did not wish be done unto themselves.

There were even conflict of interest issues with the Commission which 'had to get the backing from Commissioners before any procedural steps could be taken. Thus, there was always a risk that the Commission would seek to water down proceedings against countries.'[13]

It was rather obvious the SGP had little chance at succeeding in the prevention or correction of budgetary and economic governance in the EU against the will of the potential culprits, but then again in 1997 that was not really considered to be much of an issue. Governments had far less appetite for self-flagellation than fear of each other's spending habits and soon enough, as economic tides took a turn, they would be proven right.

[11] Art 126(11) TFEU.
[12] Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17 June 1997) [Official Journal C 236 of 02.08.1997], section The Council
[13] Schuknecht et al., above n 1, 9.

1.3. First Hurdles | The 2005 Reforms

'Almost as soon as the euro had been introduced, consolidation fatigue set in. Fiscal policies were broadly relaxed, especially during the mild downturn of the early 2000s, and the lower interest rates achieved thanks to EMU were used for increases in primary spending and tax cuts.'[14] But instead of feeling the legal effects of their economic deviations, Member States utilised the full force of their discretion over the SGP. They argued the budgetary rulebook expectations were rather unrealistic and too stringent and, as the ultimate guardians of fiscal policy, proceeded to more or less ignore the whole thing.[15]

Soon enough, the disparity between law and economic reality came to head. In 2003 the Commission took the Council before the ECJ over derailed Excessive Deficit Procedures (EDP) involving France and Germany.[16] At the Council meeting of 25 November 2003, France and Germany, in cohorts with Italy and Portugal, had managed to block the further progression of an EDP against the former two and claim the procedures automatically placed in abeyance in the Council's informal conclusions. The Commission was not impressed.

The case was decided on procedural grounds as a mixed win for the Commission. The Court annulled the Council's conclusions, but upheld its competence to adjust recommendations as it sees fit. The Commission may have had the right of initiative [para 92], but the responsibility for enforcing budgetary discipline was confirmed with the Council [para 76]. Most importantly, however, the judgment contextualised the SGP's purpose within the greater EMU project, holding that 'it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97.' [para 81] In other words, discretion was a limited instrument when it came to budgetary discipline and Member States could not carry on turning a blind eye to their Treaty obligations. In response, the Masters of the Treaties undertook reforms re said obligations.

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[14] 'After reaching a cyclical low of 1% of GDP in 2000, average euro area deficits worsened again, rising to around 3% in 2003 (see Chart 3). Several countries (including not only Greece, Portugal and Italy, but also France and Germany) breached the 3% threshold for deficits. This stands in contrast, in particular, to Italy's commitment, made prior to the introduction of the euro, to record significant budget surpluses. Average public debt also began rising again.' Ibid., 10.

[15] Opposite sat critics whose only concern for the rules was their lack of application - mainly the Commission and as per most recent self-admittance, the ECB which in the latest round of Six Pack amendments asked that the flexibility scheme amendment of 2005 be reversed.

[16] C-27/04 *Commission v Council* [2004] ECR I-6649. This was probably the last time when the 'Big Two' in the EU sat on the same side of the fiscal rules debate, but economic conditions in Germany then were very different from what we have come to assume as the German miracle norm nowadays.

The case thus opened the flood gates to the first overhaul of the SGP, which arrived in 2005 with amending Regulations (EC) 1056/2005 (corrective) and 1055/2005 (preventive).

By 2005, a good six years into Stage III EMU – at a time when national economies should have converged ever further – the economic and budgetary governance framework was increasingly individualised in reflection of the growing economic disparities and lax budgetary discipline in the eurozone. Greece, Portugal and Italy, but most importantly also France and Germany, had breached the deficit limit and begun accumulating additional debt. The mistrust which had informed the Maastricht compromise and EMU legal framework had all but evaporated when the economic powerhouses of EMU all found themselves on the wrong side of the fiscal trenches.

And so, flexibility was introduced with Member State-specific MTOs – a major step away from the one-size-fits-all synthetic fiscal union approach of the original SGP. Additionally, the Commission reports on potential excessive deficits were to take into consideration the details of national economic and budgetary context and reflect on Member State opinions on the matter. Strict budgetary rules were not to inhibit much needed structural reforms, so the case was made for temporary deviations from the adjustment path to MTOs in such circumstances where it could be shown they were proportionately related. Pension reforms, in particular, made a debut in this arrangement. The 'doing more in good times' approach was embraced, assuming Member States would make better headway towards achieving their MTOs while the economy was on the rise.[17]

1.4. Reverberations

These developments did not go without criticism – either contemporaneous or with the hindsight of crisis.[18]

For reference, the Delors Report had envisioned a vastly different approach to economic governance in Stage III EMU, reaching far beyond the sanitary minimum established with the original SGP. Rules guiding macroeconomic and budgetary matters were

[17] For an exhaustive list and critical view, see Snyder, 'EMU – Integration and Differentiation: Metaphor for European Union,' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2nd ed, OUP 2011), 687.
[18] Francis Snyder was one such prominent critic, who claimed this 'fine-tuning' of the SGP only weakened and complicated the supranational surveillance framework, turning to an overwhelmingly intergovernmental approach where Member States call the shots on budgetary coordination. Above n 17, 708. Further, the Commission and the ECB also took special exception with the 2005 flexibility reforms, self-referencing their own negative opinions of the matter throughout their contributions to the Great Reformation.

to finally become binding with distinctive corrective measures foreseen in the case of non-compliance. '[T]he Council of Ministers, in cooperation with the European Parliament, would have the authority to take *directly enforceable decisions* to impose constraints on national budgets to the extent to which this was necessary to *prevent* imbalances that *might threaten* monetary stability.'[19] Further, the Committee mused, regional and structural funds were to become subject to 'terms and conditions that would prompt governments to *intensify* their adjustment efforts' in stage III.[20] Now, the distributive arm of the economic union was always intended to secure lasting convergence through structural reforms, that is – it had an undercurrent of conditionality regarding to the objectives of the scheme.[21] But in this instance, the Committee expressly foresaw dictating the speed of convergence efforts by utilising the distribution of funds.

Instead, the regulatory framework of the economic and synthetic fiscal union not only remained stuck in Stage II EMU, but experienced a remarkable relapse. It would not be until the sovereign debt crisis when Member State interests would again align with the political context behind the Maastricht compromise, so as to make the most of the constitutional framework they had put in place twenty years prior.

Not incidentally, when the EU establishment started on its Blueprint for the Great Reformation of EU economic governance into a framework of crisis prevention in 2010, they echoed the concerns over the 2005 SGP reform and dusted off a great many of the original plans for EMU.[22] By then, the political vote in the Council had undergone major changes.

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[19] Delors Report, above n 2, para 59 [emphasis added]
[20] Ibid. [emphasis added]
[21] Regional and structural funds policy (now European Structural and Investment Funds ESI) made up one of the four pillars of economic union as defined with the Delors Committee,) Describing economic union as a combination of four components: the single market freedoms, competition policy, regional and structural development strategies, and perhaps most importantly as a balance to a single monetary policy – macroeconomic coordination with binding rules for budgetary restraints. Ibid., para 25.
[22] As we shall see by the end of this study, some of the Delors Report's original proposals truly re-captivated the establishment's attention. For instance, direct supranational constraints on national budgets for the purposes of *risk aversion* of imbalances potentially jeopardising financial stability became one of the crowning achievements of economic governance reform since the crisis. On the matter of structural fund conditionality, the crisis wave of reforms would see the EU establishment embrace and surpass the original proposal, going as far as to impose its own assessment of structural reform priorities on diverging Member States. 'With respect to fiscal policy, Pöhl and Tietmeyer could claim longer-term success. The reform of the SGP in 2011, and above all the Fiscal Compact treaty of 2012, moved the process of surveillance of Member State fiscal policies closer towards what they had favoured in the Maastricht Treaty and the negotiations that had led to the original design of the SGP. In the design of fiscal policy, domestic discipline triumphed over collective risk-sharing and insurance.' Dyson and Maes, 'Contributions, Legacies, and Lessons,' in K. Dyson & I. Maes (eds.), *Architects of the Euro: Intellectuals in the Making of European Monetary Union* (OUP 2016), 254, at 263.

Germany had emerged as an economic and political hegemon, sporting excessive surpluses. The weight of its economy (and vote), ensured that for this act in EMU history the Council, the Commission – and the ECB! – will all stand on the right side of prudence, of those very same lines drawn in sand at Maastricht in 1992.

2. The Blueprint

By 2010 everything that could have gone wrong since Maastricht, had gone wrong. As a result, an unwarranted transfer union was no longer a hypothetical threat, but a glaring reality. With the eurozone club economically polarised, the unprecedented pressure for financial aid forced the political dynamics of crisis to mimic the ideological factions from the dawn of EMU. And so, they picked up where they had left off in an attempt to make up for two lost decades of economic and budgetary regulation.

The disparities between law and reality had been growing proportionately to the degree of economic and financial integration in EMU. But while the financial and sovereign debt crises most definitely aggravated the situation and forced the hand of the EU establishment, the Great Reformation had little – if anything – to contribute to solving the crisis.[23] Nonetheless, and as we shall see throughout the rest of this study, the enterprise would greatly benefit from its context, justifying the extensive scope of reforms with the 'exceptional circumstances' at play. Moreover, the experience of the crisis went to inform the assumptions behind the reforms – budgetary profligacy was the root of all evil and financial stability had to be protected at any cost.

To that end, in March 2010, the European Council created a forum for informal deliberations between Member States, the Eurogroup, the European Commission and, last but not least, the European Central Bank. They had the mandate 'to present… the measures needed to reach the objective of an improved crisis resolution framework and better budgetary discipline, exploring all options to reinforce the legal framework.'[24] And explore they did.

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[23] As we shall see by the end of this study, the potential effects of the measures were not to materialize until a long ways into the future, if at all.

[24] 'The European Council asks the President of the European Council to establish, in cooperation with the Commission, a task force with representatives of the Member States, the rotating presidency and the ECB, to present to the Council, before the end of this year, the measures needed to reach the objective of an improved crisis resolution framework and better budgetary discipline, exploring all options to reinforce the legal framework.' European Council, General Secretariat of the Council, *Conclusions*, 26 March 2010, EUCO 7/10.

The colloquially known President's Task Force presented the conclusions of these early negotiations on 21 October 2010 in a Report delineating the boundaries of minimal accord, which formed the basis of the Commission's subsequent legislative proposals at issue in this study.[25]

The stakeholders united around a number of reform-themes designed to realign the EMU back to an originalist formulation of Maastricht and subdue the danger of a transfer union to a regulated risk. Previously disparate oversight procedures, split along preventive and corrective objective and legal base, would be amalgamated and stratified into a single framework of crisis prevention. The enterprise would utilise the Treaty base for economic and budgetary governance to its utmost limit (Articles 121 and 126 TFEU), conveniently aided by Art 136 TFEU – newly introduced at Lisbon.[26]

To that end, the Blueprint contributions overlapped on four strands of reform. Firstly, the SGP economic cooperation and budgetary surveillance functions were split into separate procedures. i) The supranational oversight of budgetary discipline would be greatly expanded with compliance enforced through intensified procedural and financial sanctions. ii) Further, budgetary governance would come to operate directly on the national level in an attempt to increase 'ownership' and early compliance with the rulebook. iii) Competences under Art 121 TFEU would be transformed into a full-blown competitiveness framework with a preventive and corrective arm focused on macroeconomic imbalances in economic governance. iv) And lastly, the establishment entertained the potential for a permanent crisis management framework to provide equal doses of financial aid and economic conditionality if all else fails.

The recommendations of the final Report drew on individual contributions made by the Member States and institutions involved.[27] Amongst them, we can clearly discern two

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[25] Report of The Task Force to The European Council on *Strengthening Economic Governance in the EU*, from 21 October 2010
Actually, the Report was not publicly available until 21 October 2010, close to a month *after* the Commission had tabled its legislative proposals on the first significant round of reforms with the Six Pack, as of 29 September 2010. Nevertheless, the candid confessions about the informal creative process support the view that Task Force Report consultations were most consequential to economic governance reform in the EU. The Commission disclosed the Six Pack legislative proposals came about 'following intense preparatory work and consultations with a broad range of stakeholders, including the Task Force on the Economic Governance chaired by President of the European Council Herman Van Rompuy…' European Commission, Press Release: *EU economic governance: the Commission delivers a comprehensive package of legislative measures*, 29 September 2010, IP/10/1199.

[26] The article allowing for a 'two-speed' EU focused on the progress of the eurozone was introduced with the Lisbon Treaty and would go a long way to overhauling EU economic governance even without its crisis amendment.

[27] Annex 3 of the Report lists the Contributions of Member States and Institutions, where – although identified by date and author only, we can easily discern the Commission Communications from 12 May

communications of the European Commission, Member State input with restricted public access, and most importantly for our purposes – the ECB Note on *Reinforcing Economic Governance in the Euro Area*, which was the Bank's formal and public contribution to the early reform brainstorm and where the story of the ECB's legislative influence in the Great Reformation of EU economic governance begins.[28]

2.1. The ECB Note

Once the reform-game was on, the ECB was given the opportunity to secure the status quo of Maastricht and finish the work started by the fathers of EMU. As the institutional avatar of the monetary union, the Bank would have a vested interest and institutional authority to influence the operations of the economic side of the union, but without the right to legislative initiative beyond its own competence, the ECB was entirely dependent on the political dynamics of the day. And so, once the Blueprint negotiations initiated the Maastricht revival, the Bank would make the most of it.

(COM(2010) 250 final) on *Reinforcing economic policy coordination* and 30 June 2010 (COM(2010) 367/2) on *Enhancing economic policy coordination for stability, growth and jobs* and the ECB Note on Note on *Reinforcing Economic Governance in the Euro Area* from 10 June 2010 as these bodies' formal and uniquely identifiable proposals to the informal reform negotiations taking place in the summer of 2010. Member States' individual participation in the Task Force allowed fluid power reconfigurations based on national interest on each reform policy proposal. While we are precluded from investigating the contents of Member State contributions due to restricted public access and language limitations, Annex 3 of the Task Force Report confirms most member states limited their formal interventions to one, Germany stood out with three. (President's Task Force Report, Annex 3, 16)
Special note must be made of the absence of the European Parliament in this forum. The brief but poignant study by Bressanelli and Chelotti of the European Parliament's post-crisis influence actually follows much of the same method of inquiry as the current work – comparing the positions of the Commission and the Parliament on key legislative proposals of the Two Pack and Six Pack legislations. The authors observe a 'surprisingly limited influence of the [European Parliament] – given its formal powers and the assessment made by most scholars,' supporting a conclusion that the EU Parliament remained little more but a footnote in the history of crisis-reform. E Bressanelli and N Chelotti, 'The European Parliament and economic governance: explaining a case of limited influence' (2018) *The Journal of Legislative Studies* 72.

[28] The recommendations of the final Report were more than a compilation of the various parties' individual contributions. As evidenced by the extensive cross-referencing in documents, the Blueprint was a product of the ongoing exchange between them and early cross-contamination of reform ideas. For one, the ECB Note admits to closely following the mandate and orientations of the President's Task Force and acknowledges awareness of the ideas presented by the Commission in the 12 May Communication (ECB Note 4/14). In turn, the Commission's proposals are said to 'build on the orientations agreed at the 17 June 2010 European Council, reflecting the progress to date of the Task Force on economic governance.' (COM(2010)367/2, 3) The Commission and Task Force had developed 'a constructive relationship' on their shared mandate, the former body admitting to have contributed to the work of the latter in an *ad hoc* manner and a number of official Communications, one of which subject to analysis in this section of the work. (Proposal SGP Preventive, Commission, p.3) The Task Force Report itself describes a series of interim reports 'delivered by the President of the European Council [also President of the Task Force] to the European Council in June and September.' (The President's Task Force Report, 3)

On 10 June 2020, the ECB issued the *Note on Reinforcing Economic Governance in the Euro Area*. Although the Bank limited the scope of its proposals within the original mandate of the Task Force, their content, self-admittedly, was not 'constrained upfront by questions of legal feasibility under the current Treaty framework.'[29] The Bank gave its two eurocents across the board of the economic governance framework 'in the wake of an apparent greater willingness to enhance surveillance and peer pressure.'[30] Its ambitious recommendations concerned matters both technical and political, 'crucial and urgent,' with the ECB unafraid to make 'a quantum leap towards strengthening the institutional framework of EMU.'[31] In that regard, it is no exaggeration to claim that out of the known Blueprint contributions, the ECB Note was the most substantially detailed and demanding – a striking measure of uncompromising institutional audacity.

2.2. The ECB Note in Context

The ECB Blueprint Note is an opportunity to ascertain the institution's reform proposals and ideological position in their original form – to establish institutional idea ownership. Comparing these policy benchmarks with the final Task Force Report would, in turn, allow us to evaluate the proliferation of the ECB reform agenda during the early informal negotiations. Such preliminary success of policy proposals would mean that the ECB's legislative influence on the overhaul of economic governance ought to be accounted for as early as the Commission's unadulterated legislative proposals, even before the onset of the formal legislative process when the Bank had the opportunity to challenge any outstanding issues through its legislative opinions on the Commission proposals.

Further, these same benchmarks can be traced through to the final versions of adopted legislation, mapping the influence of the ECB and evolution of its policy agenda throughout the Great Reformation of EU economic governance, at issue in this study.

The following analysis will not assume the policies championed by the Bank were unique to it. Such claims would be conditioned on a comparison with *all* of the Blueprint contributions, which we do not have access to. Be that as it may, our primary concern here remains with ownership. As with the general approach of this study, we are interested in whether ECB policy proposals were satisfied, irrespective of the ability to determine whether

[29] ECB Note, 4/14.
[30] ECB Note, 5/14.
[31] ECB Note, 4/14.

we can identify the Bank as the sole agent responsible for them. For as long as power was exercised in propagating the ECB's agenda – even if by the Commission or Member State-proxy – it was still power exercised in the interest of the ECB.[32] What is of concern to this study is the overlap between the ECB's vision for the future of the European economic and crisis governance with the final product.

The remainder of this chapter will review the ECB's take on the Blueprint reform themes and compare those with the final Report ideas in order to establish early policy overlaps. Wherever relevant to draw attention to outstanding examples of out-of-the-Treaty-box thinking of the ECB, the discussion will be supplemented with commentary on the other known entity behind the Blueprint – the Commission's Communications on economic governance reform.

This critical overview of the preparatory work of crisis-reform can help us elucidate the rationale behind the eventual solutions proposed during the legislative stage. The Blueprint proposal did not overhaul EU economic governance into an integrated framework of crisis prevention overnight. As we shall see by the end of this study, the ideas materialised over time and over multiple rounds of legislative reform.[33] Moreover, a single reform theme could span across multiple legislative proposals, just as a single legislative proposal could encompass within itself multiple reform themes. This is why it is important to first establish a thematic guidance of EU economic governance reform before we can move to discussing the framework at large, infer the motivation behind specific reform proposals, and identify the influence of the ECB therein.

3. The Game Is On | Reform Themes

The Stability and Growth Pact (SGP) was the obvious choice for reform in that it was the only choice. The overhaul of the framework focused on its obvious shortcomings – a public secret from long before the sovereign debt crisis, and the unexplored potential of Articles 121 and 126 TFEU– the Pact's legal base.

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[32] Where the ECB met with success in stark opposition to the Commission's policy proposals, we could easily assume sovereign support on shared ideas. The fact that Member States participated in the informal negotiations on reform in their individual capacities significantly increased the number of opinions at play and chance for idea-overlap. It is, however, reasonable to assume that such 'alliances' would have benefited far more from the institutional weight of the ECB – the guardian of EU monetary policy, than the influence of a single government. Then again, hardly incidentally, Germany seemed the most involved sovereign with an entire three formal contributions to the Task Force, as per the Annex.

[33] This is most evident with respect to the content of the ECB Note, whose far-reaching content is still reverberating through the European legal framework.

First and foremost, the SGP's once a year ex-post surveillance of economic policies and budgetary compliance would be expanded into a full time dialogue between national and EU authorities with ex-ante reporting requirements – the European Semester. Therein, the SGP's previously conflated management of economic coordination and budgetary surveillance would be split into two distinct procedures. Securing the aggregate economic stance, the Union would be up to the novel macroeconomic imbalances and competitiveness surveillance framework, whereas budgetary matters would remain within the confines of the original SGP. The latter would be subject to major corrections and improvements – dealing away with political discretion, rehabilitating the debt criteria as a measure of budgetary discipline, incentivising compliance through a significantly expanded web of financial, reputational and procedural sanctions. Moreover, national budgetary plans would become subject to ex-ante supranational approval as part of the Semester's ongoing coordination efforts. Outside the specific cyclical procedures of EU law, budgetary compliance would be secured on the national level by transplanting the SGP rulebook into Member State law and installing independent fiscal bodies to monitor and enforce compliance. Should this framework fail to deliver on its objective in securing the budgetary discipline of Member States, i.e. preventing major disruptions of the stability of EMU, then a permanent crisis mechanism for financial aid would serve as a last resource to balance out the equation.

3.1 European Semester

The earliest and most unassuming improvement of EU economic governance was the invention of the European Semester – a procedural ingenuity with a heavy reliance on new governance language, operationalised into concrete practice.

A brainchild of the Commission, the European Semester was envisioned as – and eventually materialized into – the entire framework encompassing of mechanisms for both budgetary and macroeconomic surveillance introduced in response to the crisis.[34] The innovation of the Semester, even at its limited beginnings, consisted of no more than a change in procedural timing, which allowed for two major reforms: i) *ex ante* coordination of

[34] With no immediate legislative changes necessary, the whole thing was orchestrated through a revision to the Code of Conduct of the Stability and Growth Pact, which the Commission invited the Council to approve with the very same Communication under discussion. (COM(2010) 367/2, 12.) On 7 September 2010 the Council gave its blessing for the first cycle of European Semester to commence in January of 2011.

economic policies and ii) better integrated surveillance. The implications were much further reaching than would initially seem.

Until then, the existent SGP framework had provided for EU-level coordination of national economic policy plans, including budgetary and, to a lesser legal extent, structural matters, but it did so in a limited manner. The provisions of Articles 121 and 126 TFEU were interpreted conservatively for *ex post* guidance of Member State policy planning. The Commission rightly considered that moving up the surveillance cycle to the beginning of the year would allow that guidance be provided *ex ante*, instituting a feedback process between EU and Member State levels until 'mutually-agreeable' economic and budgetary plans are put in place.

The Task Force Report embraced the novel opportunities on offer through the Semester, which was anyways a *fait accompli* by the time the Task Force Report was published. The ECB also took the Semester framework as a given and refrained from advising on its form, choosing instead to contribute thoroughly on the details of its content.

3.2. Voting Arrangements

One of the ECB's main concerns with the SGP was procedural. It observed that whatever the actual rules, budgetary discipline would remain an unlikely scenario with governments certain in the knowledge the threat of sanctions is severely limited by the exercise of discretion on the EU level. In response, the Bank advised such liberties be constrained by automating SGP procedures beyond the reach of political sensitivities. Intensifying surveillance and sanctions could be pre-programmed in the future framework, subject to new voting requirements and EU-wide standardised indicators.

To this end, the Bank proposed reversing the burden of proof on Commission recommendations to the Council with the adoption of reverse qualified majority voting (RQMV).[35] Commission recommendations and proposals at any point in the procedure, but especially so for sanctions, would be deemed adopted automatically unless rejected by a qualified majority. The aim was to remove the possibility of a repeat of the 2003 debacle on Germany and France's Excessive Deficit Procedures, which ended up before the Court. With RQMV Member State ownership in the SGP would be reduced to a failure to oppose a measure, rather than a willing political act in upholding it.

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[35] ECB Note, I.2.(a): Strengthening the implementation of rules and procedures, p.5/14

Further to this end and again recalling the experience of the early 2000s, the ECB suggested a limit or veto on the exercise of voting rights in the Council if the Member State in question was subject to an Excessive Deficit Procedure. The Bank allowed such disenfranchisement could also apply on 'all other decisions' to *any* order of business considered by the Council.

Curiously, the Commission was silent on the matter of voting arrangements, preferring instead to focus on more traditional means for incentivising compliance. The Task Force concurred with the ECB's proposals, entertaining the introduction of RQMV and suspension of voting rights for Member States whose case is under discussion.[36] Unlike the ECB, however, the latter measure only seemed to apply to matters concerning either SGP or MIP procedure, as opposed to the Bank's proposal that governments be outright stripped of their vote across the board. Moreover, the new voting procedure would only apply for enforcement steps in procedure, in case Member States shied away from punishing their peers.[37]

3.3 Statistics

But streamlining procedures was not enough since those were heavily dependent on self-reported data based on disparate national standards. What good would RQMV do if the numbers failed to trigger the procedure in the first place? Thus, the ECB suggested standardizing data requirements with Eurostat criteria. The Commission would no longer be burdened with making sense of national data sets for the purposes of SGP surveillance, but neither would it be capable of interpreting those on its own discretion. Likewise, Member States would be devoid of the opportunity to follow the Hellenic example that allegedly precipitated the euro-crisis. But just to be on the safe side, the ECB also proposed that Eurostat be empowered to serve as an independent watchdog – granting it surveillance and auditing capabilities in order 'to check in detail and in real time the quality of the statistics that are relevant for surveillance purposes and to continuously guarantee their full reliability.'[38]

The Commission was on board when it came to statistics. An EU standard, such as the European system of national and regional accounts (ESA95) could ensure not only that

[36] The President's Task Force Report, for SGP – 7, para 24-26 and for MIP – 10, para 40-41.
[37] The President's Task Force Report, 7, para 24.
[38] ECB Note, 6/14.

national data is easily comprehensible, but that the EU rulebook could be easily integrated into national frameworks, removing any uncertainties that could impede compliance and ensuring its successful monitoring.[39] However, the Commission did not envision any major changes in Eurostat's near future at the time. That was indeed a curious turn of events, seeing as the Council would formalise a regulation increasing the auditing powers of Eurostat less than a month after the Commission Communication.

Be that as it may, the Task Force fully made up for any lack of enthusiasm on part of the Commission with a wholehearted embrace of the ECB's ideas. The new Regulation was all fine and well, but furthering the independence and auditing authority of Eurostat were still on the agenda. Moreover, the Report advocated for sanctions in case of 'repeated statistical problems' and reinforcing the mandatory character of good data.[40]

3.4. Incentivising Compliance | Procedural Sanctions – The DBPs & EPPs

The Bank also entertained some procedural upgrades in the interest of 'incentivising' compliance. Sanctions, it was judged, simply came too late in the process to make a difference. This was seen as especially true of the preventive arm of the SGP and Member State efforts on the adjustment path to their medium term budgetary objective (MTO). Reg (EC) 1466/97 was thereby singled out for the introduction of 'appropriate means to encourage compliance' throughout the preventive procedure.[41]

The ECB argued that sanctions should be made proportional to the severity or duration of the fiscal imbalance under scrutiny.[42] This approach would eventually come to define EU economic governance reform in all of its procedural frameworks – making things proportionately more difficult for countries already in difficulty. Further, the Bank proposed a diversified portfolio of new sanctions. For instance, financial sanctions could include making the disbursement of EU structural and cohesion funds conditional upon good fiscal behaviour and non-financial sanctions could mean taking away voting rights.[43]

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[39] 'The European system of national and regional accounts (ESA 1995) defines the accounting rules which need to be introduced so that the economies of the Member States can be described in quantitative terms in a consistent reliable and comparable manner. It is designed for Community institutions, government departments and others involved in economic and social affairs who base their decisions on harmonized statistics.' Eurostat, https://ec.europa.eu/eurostat/web/products-manuals-and-guidelines/-/CA-15-96-001 (Accessed 4 February 2019).

[40] TFR Para 31, p. 8

[41] ECB Note 7-8/14.

[42] ECB Note 8/14.

[43] Whether knowingly or not we cannot know, the cohesion fund conditionality idea was copy-pasted from the Delors Report's plans for Stage III EMU. The ECB also resurrected the 'quantum leap' phrase, which

The crowning achievement of this reform push, however, were the so called 'procedural sanctions.' These warrant particular attention not only because of their eventual far-reaching implications, but because they were introduced under the guise of 'increased cooperation' and 'information sharing.' As such, they remained far removed from the usual scrutiny associated with 'new' competences, even as the consequences of procedural tweaking proved just as violating.[44] In fact, by 2013, these novel provisions would mutate into a procedure of their own and become the ultimate measure of budgetary discipline within the European legal framework.[45]

Procedural sanctions were framed as a trade-off between budgetary imbalances and risk of unwarranted fiscal transfers on the one hand and Member State sovereignty on the other. This approach would see an exponential increase of supranational intrusion in national fiscal competences to the extent that the latter could become subject to direct Union intervention.[46] This trade-off would become another defining guideline of crisis reform in both the budgetary and macroeconomic frameworks.

The ECB indulged in some details. The gamut of procedural sanctions could start with 'enhanced requirements to submit detailed and specified adjustment programmes and report on their implementation'[47] for Member States under EDP (the corrective arm of the SGP). As part of this oversight process, the Commission, *in liaison with* the ECB, could send special missions for on-site monitoring, 'which could be converted into resident missions if necessary.'[48] The enhanced scrutiny and procedural discipline could climax into an outright stripping of Member States budgetary sovereignty with governments in fiscal trouble

had for the first time ever occurred in EMU literature precisely with Delors, or rather even with Karl Otto Pöhl as part of the Committee. In ECB Note ECB Note 7/14. In Delors: 'to apply to existing Community structural policies and to Community loans (as a substitute for the present medium-term financial assistance facility) terms and conditions that would prompt member countries to intensify their adjustment efforts.' Delors Report, above n.2, The principal steps in Stage III, para 59, p.36

[44] While these measures did not find their way into the final version of the Six Pack – dealing immediately with the matters of supranational fiscal supervision, they were eventually implemented into the EU governance framework through the TSCG and Two Pack regulations and have come to represent of the farthest reaching EU governance measures in Member States' fiscal domains. Section __ of Chapter ___ deals with these in extensive detail, but they are still worth nothing here even if briefly.

[45] To be discussed at length in Chapter 5.

[46] 'Procedural sanctions could be envisaged, whereby the degree of EU intervention in national fiscal policies could be increased as fiscal imbalances and the risk of spill-overs to other euro area countries rise.' ECB Note 7/14.

[47] ECB Note 7/14.

[48] ECB Note 7/14 [emphasis added].

‘mandated to seek prior consent for budgetary measures or government borrowing from the Council.’[49]

Make no mistake, these were the exact terms that had just been negotiated with Greece in its first Memorandum of Understanding not but a month prior to the ECB’s Note publication in June 2010, now being advocated as part of the regular economic surveillance procedure of the Union.[50] They will eventually become known as the Economic Partnership Programmes (EPPs), introduced as a corollary of the Stability and Growth Pact’s Excessive Deficit Procedure firstly through the intergovernmental Treaty on Stability, Coordination and Governance and thereafter with Reg (EU) 473/2013 of the Two Pack under the unassuming provisions of Art 121(6) TFEU in conjunction with Art 136 TFEU.[51] Moreover, this shining example of crisis governance was actually replicated twice into EU law – with the even harsher provisions for Macroeconomic Adjustment Programmes (MAPs) of Reg (EU) 472/2013, which pre-existing EPPs would easily evolve into.

However enthusiastic the Commission and Task Force were about intensifying sanctions, neither body’s final recommendations dared (openly) advise for a procedure as invasive as the EDP sanctions foreseen by the ECB. And yet, since the majority of the elements required to assemble such a procedure were more or less agreed upon, it is arguable this silence was symptomatic of political sensitivity rather than outright disagreement.[52]

The Commission aligned with the ECB on earlier and wider implementation of sanctions, the procedural tweaks requiring supplementary information, as well as conditioning existent EU funding – whether the European Investment Bank of cohesion

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[49] ECB Note, 7/14.; Although this last point directly echoes the Delors Report’s Stage II recommendation to impose direct constraints on national budgets, the fathers of EMU justified these measures only if imbalances might threaten the *monetary* stability of EMU and not the general *financial* stability as the EU establishment would contrive during the sovereign debt crisis. See: Delors Report, The principal steps in Stage III, para 59, p.36

[50] Greece signed the Memorandum of Understanding for the first financial aid package – the Greek Loan Facility (GLF) on 3 May 2010.

[51] EPPs in Article 9 - Regulation (EU) No 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area. As the EU crisis prevention framework currently stands, the EPPs have been repurposed to serve as an institutional bridge between budgetary and macroeconomic surveillance and crisis management where they are ‘engulfed’ in the Macroeconomic Adjustment Programmes (MAPs) of Reg (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. These will be discussed at length in Chapter 5 and 6, respectively.

[52] The additional information requirements upon which the ECB’s future EPP procedure was foreseen were agreed upon by both the Task Force and the Commission. Missions were agreed to by the Task Force.

funds – against compliance.[53] It even went a step further, entertaining that Excessive Deficit Procedures allow for the retroactive repurposing of already-disbursed EU funds, where Member Stated could be 'asked to redirect [them] to improve the quality of public finances.'[54] The Commission even pitched a carrot and stick approach, suggesting a 'performance Union reserve to reward sound fiscal policies' that was to be capitalized by any withdrawn funding commitments from problematic Member States.

The Task Force agreed on the same basics, supplemented with the ECB's call for 'a higher degree of automaticity' and broadening the scope of conditionality rules on SGP compliance.[55] While the final Report genuinely ignored the ECB's proposal for the future Economic Partnership Programmes, it nonetheless wholeheartedly embraced the integration of missions in all facets of EU budgetary and macroeconomic governance, in both preventive and corrective iterations. These would prove effective, it was argued, should the promise of sanctions alone fail as a sufficient deterrent to economic indiscipline. Most importantly, missions were to benefit from the starring role of the ECB therein, under the charming *troika* phraseology – 'in liaison with.'

3.5. Debts | Deficits

The ECB also wanted to make sure that the SGP debt criterion be operationalised on an equal footing with deficits, so that a breach of the 60 percent GDP ratio would just as likely place a Member State under EDP. Of course, given the general economic situation across the eurozone at that point, turning the debt indicator into a zero-sum game would have put the majority of Member States under EDP.[56] As a results, the debt ratio would only act as a trigger

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[53] Under the corrective procedure EU budget disbursements are to be used as '*leverage* in terms of ensuring respect of the key macroeconomic conditions of the SGP.' The Commission paints in broad strokes, allowing that cohesion funds, Common Agricultural Policy (CAP) funds, and the fisheries fund (EFF) payments to Member States be suspended or cancelled for either ongoing or future projects. COM(2010) 367/2, 9 [emphasis added].

[54] COM(2010) 367/2, 10.

[55] The President's Task Force Report para 26, p.7 and para 18(ii), p.5.

[56] If accepted as an automatic trigger to the excessive deficit procedure, the debt criterion would have placed no less than 14 out of 27 (51%) Member States in EDP in 2011. This statistic comes remarkably close to the situation back in 1997 when the SGP came into force, with 8 out of the more exclusive at the time 15-member club qualifying as potential transgressors (53%). Eurostat, *General Government Gross Debt – Annual Data,* available at:
https://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=teina225 (Accessed 28 Jan 2019).

provided it was 'not sufficiently diminishing and approaching the reference value at a satisfactory pace.'[57]

In turn, the Bank suggested that process itself be proceduralised. The further away a country was from its medium term budgetary objective (MTO), the greater its adjustment efforts would have to be.[58] In other words, the new SGP would focus on making things more difficult for countries already experiencing difficulties – an economic logical fallacy.[59] This push to punish progressively – forcing governments with troubled finances make larger and faster efforts on the road to recovery became a standard feature of the future system with both the Commission and the Task Force embracing the approach.

But why limit the definition of budgetary discipline within the boundaries of the Maastricht criteria? Utilising every single facet of the Treaty framework, the ECB proposed that the debt and deficit indicators be considered as upper limits of the future SGP, 'so that, once achieved, a further reduction may be pursued so as not to exceed this limit under potentially adverse future economic circumstances.'[60]

It was a slippery legal argument – neither fully new nor old. Technically, risk provisions had always existed in the SGP framework, even if they were not regularly operationalised. For instance, based on Art 126(3) paragraph 2 TFEU, the preventive arm of the SGP provided that Member State MTOs be examined for a 'safety margin to ensure the avoidance of an excessive deficit.'[61] That meant the SGP could indeed be triggered on risk only, but the risk in question was quantified down to the possibility of breaching the 3/60 criteria.

The ECB was proposing something quite different and not quite clear. How would one determine the safety margin necessary to absorb the unknown economic effects of future adverse circumstances, so as to remain on the right side of the Maastricht limits?[62]

Operationalising the informally revoked debt criterion was something everyone could and did get behind. In the new SGP, preventive governance would be guided in accordance

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[57] ECB Note 7/14.
[58] 'MTOs and minimum structural adjustment efforts must be raised for countries where high deficits coincide with high debt ratios.' ECB Note 7/14.
[59] Ashoka Mody has pointed this out as an original sin of the SGP framework, arguing that the 'penalties made even less sense than the rule itself' as they 'would only inflict more pain on the distressed country's finances.' A Mody, *EuroTragedy: A Drama in Nine Acts* (OUP 2018), 88.
[60] ECB Note 7/14.
[61] Art 5 Reg (EC) 1466/97
[62] This approach was a lot closer to the provisions of Art 121(4) TFEU, whose 'risk doctrine' allowed a lot more leeway in identifying risk as anything 'jeopardising the proper functioning of EMU.'

with quantified progress towards national Medium Term Budgetary Objectives (MTOs). Member States with debt to GDP ratios exceeding, or at risk of exceeding, the 60% threshold would be mandated to make faster progress towards the general government balance.[63] For those having deviated from the adjustment path towards their MTO, the Commission would issues a warning even if the deficit was safely below the 3 percent GDP ratio criterion. Failure to comply could lead to intensification of sanctions, specifically a recommendation for an interest-bearing deposit. This novel policy would eventually become known as the Significant Deviation Procedure (SDP) – a corrective measure in the preventive arm of the SGP, which was envisioned as an early opportunity to avoid the much more intrusive Excessive Deficit Procedure (EDP).[64] It was a copy-paste of some 'leftover' recommendations from the Delors Report, which associated MTOs with 'a follow up procedure for monitoring performances and intervening when significant deviations occur.'[65]

In the corrective arm of the SGP the focus fell on operationalizing the debt criterion of the EDP with a suggestion for a 'clear and simple numerical benchmark for defining a satisfactory pace of debt reduction.'[66] Further, much in line with the Commission and ECB's proposals, the Task Force argued that the 3 percent deficit benchmark may no longer act as satisfactory indicator for the instigation or abrogation of an EDP, with the latter closed only if the debt has been placed on a 'satisfactory declining path' that is 'consistent with a continuous, substantial and sustainable decline in the debt-to-GDP ratio.'[67]

The framework would be strengthened throughout with the plethora of novel sanctions available and the turn to procedural dynamics for greater automaticity. But it seemed that the Task Force and Commission were not as committed to the debt criterion as the ECB was.

The Commission was resolute arguing for flexibility allowances in cases of unforeseen extraneous circumstances. 'More than the deficit, public debt developments are subject to factors outside the direct control of governments… therefore judgment is necessary before

[63] COM(2010) 367/2, 7.

[64] 'The Significant Deviation Procedure aims to give Member States the opportunity to correct a deviation from their medium-term objective (MTO) or the adjustment path towards their MTO in order to avoid the opening of an Excessive Deficit Procedure.' European Commission, *Significant Deviation Procedure,* available at: <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/preventive-arm/significant-deviation-procedure_en> (Accessed 6 February 2019).

[65] Delors Report, above n 2, para 56.

[66] COM(2010) 367/2, 8.

[67] The President's Task Force Report, 4

deciding whether they warrant placing the country in EDP.'[68] The Task Force likewise suggested that expert qualitative assessment of the general economic context will be necessary for launching an EDP.[69] Furthermore, the Report recommendations retained the established approach of structural reform exceptionalism – and especially so for pension reform – in the case of breaching SGP criteria.[70] In other words, automatic triggers will not do with the ECB's arch enemy – discretion – here to stay.

Lastly on the issue of the Maastricht criteria, neither the Commission nor the Task Force dared broach the topic of further tightening the rulebook of sound budgetary governance in the EU. This unique proposal of the ECB would make its own way into the world, developing into a central tenet of the reformed framework of EU economic governance. The future 'fiscal room for manoeuvre' would be the procedural manifest of the risk aversion crisis mindset.

3.6. Draft Budgetary Plans

Since the ECB was on board with any means for improving budgetary discipline, it used the opportunity presented by the timeline reforms in the Semester to push further oversight and advocate for the formal inauguration of the Eurogroup as the 'guardian of fiscal sustainability.'[71]

The Bank planned that Member State draft budgets undergo an EU review process. The Eurogroup would then issue country-specific guidelines, which governments would have to revise their draft budgets in accordance with. Only then would national democratic procedures be set in motion with the draft budget presented to national Parliaments alongside an explanation of the Eurogroup's guidelines and their incorporation. It remained unclear what role would democracy play in this framework, except for extending legitimacy.

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[68] COM(2010) 367/2, 8. This comprehensive approach becomes part of what the ECB will eventually come to treat as an 'open escape clause.' European Central Bank, *Opinion of the European Central Bank on economic governance reform in the European Union,* 16 February 2011, CON/2011/13.
[69] The President's Task Force Report, 4.
[70] The President's Task Force Report, 7, para 23. Which the ECB will come to oppose in its later opinions on the matter.
[71] ECB Note 5/14; As will become evident in hindsight, installing additional competences with the Eurogroup proved a remarkably useful tool – one, which taken in consideration with the non-formal existence of the body resulted in great power absent responsibility. Absent legal recognition as a formal EU body, the acts (statements) of the Eurogroup are not subject to legal review and procedural protections, as they were found by the Court of Justice of the EU incapable of 'producing legal effects with respect to third parties.' CJEU (Court of Justice of the European Union) (2015). *Mallis And Others v Commission and ECB*, Joined Cases C-105/15 P to C-109/15, Judgment of 20 September 2016, para 49.

Should the Member State have shied away from adopting the Eurogroup's budgetary guidelines, deviations would 'form the basis for Commission warnings and Council/Eurogroup recommendations addressed to the euro area country, triggering a comply-or-explain approach, and possibly leading to sanctions in case of non-compliance for reasons that are deemed unjustified.'[72] By extension, this would have meant any protestations raised by the national Parliament in defence of budgetary sovereignty against Eurogroup guidelines would be treated under the same hypothesis.[73]

The Task Force took the ECB's recommendations on board as part of its vision for deeper and broader coordination in the future Semester. It mandated that national parliaments would be under obligation to include EU budgetary guidelines, even if – in its opinion – the latter were to be issued by the 'Council and/or Commission.'[74]

While the Commission entertained a similar framework, it shied away from telling it like it is. Instead, it made the unprompted – and ultimately untrue – clarification that its 'intention is *obviously* not to require Member States to submit full-fledged budgets to the EU for "validation" before they present them to their national Parliaments,' but to simply engage in a 'meaningful discussion.'[75]

In reality, however, that is exactly what would transpire with the TSCG and Regulation (EU) 473/2013 of the Two Pack, designed to complete the annual cycle of Semester surveillance with Draft Budgetary Plan assessments. Although the language of these legislative acts would be carefully chosen in the style of new governance parlance – attempting to instil a sense of voluntarism and benevolent guidance, the comply-or-explain approach backed by the threat of sanctions in cases of non-compliance (first advocated by the ECB) tells a different story – one of European diktat over national budgetary sovereignty in the eurozone. These reforms will be analysed in Chapter 5 of the current work.

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[72] ECB Note 5/14.
[73] A note must be made on the ECB's curious focus and trust in the Eurogroup. The Bank's interest in the Eurogroup as a counter to the Commission may have made limited sense, but it is indeed hard to square it with the ECB's candid misgivings about Member States. Were the ministers of economy and finance not, after all, national political representatives? This study offers two propositions. First, we cannot ignore the context of the ECB's proposals – in the heat of the sovereign debt crisis with the Eurogroup's harsh managements of budgetary profligates, proving its integrity to the Bank. Second, we must consider the ECB perceived the Eurogroup as a forum of – supposedly, even if politically-appointed – economic experts, who would be a lot more likely to side with the harsh facts than political comfort.
[74] 'In order to further reinforce national ownership of the recommendations issued under the "European semester", governments, when submitting the draft budget to the national parliament are expected to include policy recommendations by the Council and / or the Commission accompanied by an explanation of how these have been incorporated.' Para 45 Task Force Report
[75] COM(2010) 367/2, 11 [emphasis added].

3.6. National Ownership | Independent Fiscal Bodies | EU Fiscal Agency

However much enhanced the SGP would become, budgetary discipline could not continue depending solely on supranational oversight. To that end, the ECB sought to replicate the obligations *and* surveillance of the pact directly onto the national level and *into* national legal provisions.

This was, for all intents and purposes, a preventive procedure to the preventive procedure – impeding the need of the SGP having to be triggered in the first place. Amongst an array of novelties, these reforms would instil the metrics for 'prudent economic policymaking' directly into the national legal frameworks of Member States, lest the responsibilities stemming from Title III TFEU on Economic and Monetary Policy and SGP regulations fail to imprint serious enough incentives for national compliance.

The legal approach of the Bank was straightforward – it sought to operationalise Treaty provisions, which had been previously treated in the spirit of political pledges. As far as the ECB was concerned, Member States were under Treaty obligation to conduct their national budgetary policy with a view to securing the general objectives of the EU fiscal framework. It would be but a mere technicality to have them transplant said objectives and commitment directly into national law, '*possibly in the constitution.*'[76]

The proposal was rather extraordinary – a call for national constitutional amendment procedures across the Union on the justification it would only rubberstamp already existent responsibilities. But the Bank was not after just another pledge. The purpose of this reform exercise was to secure budgetary discipline oversight directly at the source of fiscal profligacy – a much more advanced method of ensuring compliance than counting solely on heavy supranational procedures in Brussels. A kind of subsidiarity approach to the SGP, if you will. But Member State institutions could not be trusted.

To that end, the ECB proposed that Member States establish independent national fiscal monitoring bodies for the surveillance of Member State budgetary procedures, i.e. the exercise of democracy. And since these bodies would be independent, the Bank reasoned, their unspecified enforcement competences would 'not raise issues of sovereignty.'[77] Independence, thus, somehow managed to absolve the proposed intrusion from agency to

[76] ECB Note, I.7, p. 8/14 [emphasis added].
[77] ECB Note 8/14.

such an extent that it was no longer an intrusion, but an invisible hand guiding governments towards their own objective of European budgetary discipline.[78]

The proposal was truly extraordinary. But the Bank's reform agenda did not stop there. The independent national fiscal bodies would get their own mothership.

Obviously, Member States could not be trusted with budgetary discipline, but as far as the ECB was concerned, the Commission was equally complicit.[79] What if, the Bank mused, the surveillance competences of the Commission were transferred to an independent European Fiscal Agency to directly advise the Council and the Eurogroup? The Commission would retain its prerogative over warnings, recommendations, and proposals, but those would now be based on the Fiscal Agency's independent reports.

The Bank provided details in case anyone should be interested in going down the road of disenfranchising the Commission. Said Fiscal Agency would be an expertocratic body drawing on independent national budget offices or fiscal institutions with the power to investigate Member State fiscal policies and sustainability and the competence to employ 'special missions' for that purpose.

Alternatively, the European Fiscal Agency could be made up of 'a group of wise persons which would regularly screen the fiscal policy of every euro area country and publish its reports,' although it was not clear where the authority of said 'wise persons' to sleuth around national finances would come from.

Should these ideas fail to inspire, the Bank conceded the national fiscal offices could instead report directly to the untrusty Commission, but it did also offer its own fiscal surveillance services 'at the request of the Council or as a second opinion' should there be any doubts.[80]

Independent fiscal bodies were beyond the Commission's imagination – or inclination – at the time. Neither of its Communications ever entertained such entities, not to mention the possibility of disenfranchising itself for the benefit of the Eurogroup or any other body.

The Task Force, however, was a different story. It fully endorsed the ECB's recommendations on the topic, advocating for enhancing national budgetary frameworks in

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[78] The assumption was heavily dependent on the new governance approach the ECB had heavy-handedly exploited in its own operations – the protective garb of independence.
[79] 'At the EU level, the European Commission, the Eurogroup and the EU Council have not been sufficiently stringent in applying the EU fiscal rules.' ECB Note, 10 June 2010, 4/14.
[80] ECB Note, 8/14. It goes without saying that the Bank's enthusiasm at appointing itself a watchdog of Member State fiscal spending was truly remarkable even in the context of crisis and the *quantum leap* in EU economic governance.

a two-tier approach of minimum standards plus a set of 'non-binding additional standards.[81] The latter included the 'independent budget offices or fiscal monitoring institutions' – the ECB's fiscal councils. These would be institutionalized at the national level for the purpose of monitoring government-issued economic reports and fiscal planning by providing 'independent analysis, assessments and forecasts on domestic fiscal policy matters as a way to reinforcing fiscal governance and ensuring long-term sustainability.'[82] The objective was 'a system with built-in incentives for fiscal discipline at all levels.'[83]

The Task Force did not indulge the ECB's idea for an EU Fiscal Agency for the independent national councils to rally around, but it did share concern with the Bank over the Commission's considerably enhanced role in the reformed economic governance framework. In a politically-correct, yet backhanded comment, the Report then called on the Commission 'adopt all necessary steps to ensure that it will fulfil its responsibilities in full independence and apply strictly the steps foreseen.'[84] Independence was definitely seen as a key condition for the credibility of the new economic governance framework.[85]

Similarly, it must be pointed out the ECB remained the only institution nonchalantly proposing constitutional reforms across the EU. Indeed, the proposal attracted a great deal of attention when it surfaced in the Fiscal Compact section of the TSCG some two years later. Admittedly, the furore had more to do with the policy mimicking German law – the Golden Rule on balanced budgets, than it did with the authorship of the proposal, but that does not

[81] The President's Task Force Report 2.1.3, paras 27-30. In fact, the difference between the minimum and additional standards, as designated by the Task Force, was no other than the difference between the eventual Council Directive 2011/85/EU and the Treaty on Stability, Coordination and Governance in the EU (TSCG, semi-incorporated through the Two Pack Regulations). A likely reason why the Report settled on the less-enterprising 'non-binding' approach must have been a lack of sufficient political enthusiasm, as there is nothing in the contents of the additional standards that legally precluded their adoption.

[82] The President's Task Force Report, 11, para 53. A note must be made that fiscal councils are elaborated on in the Task Force report in a section completely unrelated to the national fiscal enhancement proposals, which these bodies are themselves to monitor: Enhancing national fiscal rules and frameworks' in section 2.1.3 on p.7 and 'Stronger institutions for more effective economic governance' in section 2.4 on p.11, The President's Task Force Report.

[83] The President's Task Force Report, 11, para 52.

[84] The President's Task Force Report, 7, para 26. It is of interest to note here briefly, that the one institution, which stood the most to gain from the adoption of the RQMV approach – the Commission, is in fact the one that never proposed it in the first place.

[85] The President's Task Force Report, 11. Furthermore – and quite in line with the focus of the ECB – 'The Task Force welcomes the Commission's announcement to clearly distinguish the analysis and assessment carried out under the authority of the Commissioner for economic and monetary affairs from the decision-making by the college on policy proposals to the Council. The role of the Council and the Eurogroup in implementing the new surveillance and policy coordination framework in the EU and the euro area respectively will be essential.'

subtract from our inquiry establishing that one of the most controversial provisions of the new framework was a brainchild of the European monetary authority.

At any rate, meddling with national budgetary frameworks was no small reform, even if it seemed liked a formality. Those are, after all, 'the set of elements that underpin national fiscal governance, i.e. the country-specific institutional, legislative and regulatory frameworks that shape the design and implementation of fiscal policy at the country level.'[86] What is extremely important to note about these reforms goes back to the original competence construct at Maastricht. The asymmetric EMU was a product of Member States' aversion to a fiscal union of any form. The Bank's proposed solution to the 'many fiscal policies and one monetary policy' macroeconomic conundrum – from direct control of national budgetary plans to an EU Fiscal Agency – was to try to disengage fiscal policy from its sovereign altogether – as much as the monetary realm had already been. In the same vein as the increased dependence on technocratic expertise, independence, and process automatisation, the possibility for independent supervision of discretionary public functions amounted to an institutionalisation of *the (new) governance of governing* with substantive repercussions to the foundational principles of statehood.

As remarkable as these reform proposals were, the majority of them would eventually materialise into EU law. National fiscal rules and the accompanying independent monitoring bodies would become standard fixture of economic governance in the first wave of crisis-reforms – pioneered by Council Directive 2011/85/EU, later intensified through the TSCG with the latter complemented by the almost simultaneous introduction of the Reg (EU) 473/2013 of the Two Pack into Union law.

3.7. Macroeconomic and Competitiveness Surveillance Framework

A most considerable untapped potential of the existent legal framework had to do with the coordination of Member State economic policies provided for in Art 121 TFEU – the legislative gift that kept on giving when it came to crisis reforms.

As per the ECB's own admission, the sovereign debt crisis drew little attention to competitiveness divergences and macroeconomic imbalances in the eurozone – the measures of economic convergence. And yet, as Lamfalussy had argued some two decades earlier, divergent economies could not sustain the economic logic of a monetary union and aligned

[86] The President's Task Force Report, 7, FN 2.

budgetary policies. Unsurprisingly, the ECB found the situation to be of 'crucial importance' and in 'urgent' need of being addressed.[87] This policy turn would eventually come to constitute a significant and important part of the novel EU crisis prevention framework, encompassing anything and everything of national prerogative until then left outside the reach of fiscal surveillance, while operating in tandem with the parallel-running SGP.[88]

The logic behind the turn to macroeconomic and competitiveness surveillance was not based on enforcing a Treaty obligation as the SGP criteria were (the 'thou shalt avoid excessive deficits' with Art 126 TFEU), but on attaining to the general economic objectives of the Union.[89] The new setup would seek to compel the 'ambitious implementation of the structural reforms' and contributing to the Europe 2020 Strategy objectives,[90] which apart from the five headline indicators on employment, social inclusion, research and innovation, education, energy and climate change, could – apparently – comprise of *any* 'factors that hinder Member States' economic development or growth.'[91] These objectives, in turn, were operationalized into prohibitions through a guiding scoreboard of indicators and into obligations through associated compliance measures, i.e. sanctions. Eventually, the macroeconomic surveillance framework would come to surpass its humble legal origins of proactive guidance with a turn to proactive improvement and risk management. In other words, it became preemptively corrective.

The genius of the macroeconomic surveillance setup was hidden in plain sight – soft law instruments proceduralised and backed by the threat of tangible sanctions. The language of the procedure was resolutely 'new governance' – filled with 'recommendations' and 'guidance' that morphed into a veneer of voluntary compliance and gratifying cooperation.

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[87] ECB Note, III Competitiveness framework, pp. 8-11/14.
[88] This was a long ways removed from where macroeconomic surveillance stood at the time – nascent soft law new governance-styled affair with an exchange of best practices, far removed from the original intent for stringent economic guidelines (BEPGs) originating with the Delors Report some two decades prior. The ECB lists the specifics in three strands of coordination: 'a) an informal exchange of views taking a workshop format in the Eurogroup; b) a competitiveness review based on a Commission surveillance report agreed by the Eurogroup in July 2008; [and] c) country surveillance under the planned Europe 2020 strategy establishing Broad Economic Policy Guidelines (BEPGs).' ECB Note, 9/14, FN 2.
[89] Economic objectives of the Union as per Art 3 TFEU: sustainable development, growth, price stability, social progress, full employment, environmental protection, scientific and technical advances, social exclusion, social justice, gender equality, solidarity between generations, children, diversity and cultural heritage.
[90] Themselves a combination of the Broad Economic Policy Guidelines (BEPGs, Art 121 TFEU) and Employment Guidelines (EGs, Art 148 TFEU).
[91] COM 2010) 367/2, p.6, Section 1.2(i)

Yet, the very existence of sanctions would transform said recommendations into mandatory instructions on each and every level of procedure, undeniably exposing the façade.

The competitiveness framework closely mirrored the approach to budgetary governance with an all-inclusive surveillance and enforcement mechanism aimed at eliminating existent *and potential* macroeconomic imbalances and improving optimal levels of competitiveness across the Union.

Of course, for the framework to be operational – absent unnecessary discretion – the objectives and optimal levels were best quantified. To this end, the Bank volunteered itself to present a set of clear indicators 'to determine the intensity of vulnerabilities and surveillance, based on nominal competitiveness measures and other supporting indicators,' themselves sufficient in acting as a trigger for further measures.[92]

Surveillance was to be 'staggered in terms of its intrusiveness and scope' starting with the National Reform Programmes (NRPs) – an annual self-reporting requirement due alongside Stability and Convergence Programmes (SCPs) and assessed and discussed within the European Semester.[93] Just as the SGP, macroeconomic surveillance would too benefit from the Bank's take on procedural sanctions with process intrusiveness being directly related Member States' indicator performance designated in three tiers – unproblematic, problematic, and extremely problematic.[94] Compliance would be ensured on the same principle – from increased surveillance and peer pressure in the Council to reporting missions, public shaming and eventual fines.[95]

A particular feature of the new framework was its distorted focus on risk. As far as the ECB was concerned, the mere potential of future significant competitiveness losses warranted equal measures of oversight and correction as did existent such issues.[96] Moreover, it is in the Blueprint Note where we first see the term 'vulnerability' used in reference to what would eventually become the Macroeconomic Imbalance Procedure, but is still then referred to by

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[92] ECB Note, 2/14. With regards to the indicators, the Bank had a ready-made solution with the 'HICP and/or GDP deflator-based competitiveness index as published by the ECB and ULC (total economy)-based competitiveness index as published by the ECB, or deviations from stability-oriented sectoral/national wage developments.' ECB Note, 9/14.
[93] ECB Note, 9/14.
[94] 'More *freedom* would be given to well-performing Member States with regard to the conduct of their economic policies, while problem cases should be subjected to fuller scrutiny under a new corrective arm with an excessive vulnerability procedure.' ECB Note, 9/14 [emphasis added]. The ECB dedicates an entire page of its Note to a details breakdown of 'effective and graduated procedures and incentives' for the enforcement of the macroeconomic and competitiveness framework.
[95] ECB Note, 10/14.
[96] ECB Note, 9/14. II Competitiveness Framework

the Bank as the 'excessive vulnerability procedure.'[97] The Bank's eventual fixation with the term – throughout its later legislative opinions on proposals for Regulations (EU) 1174/2011 and (EU) 1176/2011 – is a detail worth noting in the context of an institution normally preoccupied with quantifying the qualitative, automating discretion, and removing any semblance of doubt as to rule-based operations. In a special twist on new governance policies, it would seem that the Bank was interested in a loose term with potential for great interpretation to stand in as indicator, in fact – a trigger, for an extremely intrusive procedure. To put it bluntly, the ECB was attempting to quantify vulnerability into a punishable offense, in effect operationalising risk.[98]

The macroeconomic surveillance framework was championed by the Blueprint stakeholders in equal measure, even if some details remained unresolved. Everyone could get behind the somewhat lofty goal of ensuring balanced growth in the EU, which just happened to involve a multitude of policy areas previously unexplored by EU oversight now found relevant to its successful attainment.

The Commission made an interesting proposal, which is definitive of the Great Reformation of EU economic governance, wherein the post-crisis framework had been cast into a complex web of procedures with all means of procedural implications interconnected across legal regimes. To that end, the Commission proposed that 'insufficient compliance with the recommendations under the surveillance of imbalances… be considered an aggravating factor in the fiscal assessment under the Stability and Growth Pact,'[99] thereby connected the two procedures through a convoluted relationship between non-compliance with the MIP and the more stringent sanctions in the procedures of the SGP. This is done in spite of assurances, some six pages further in its reform Communication, that the two mechanisms will remain legally separate even if incorporated alongside each other in the Semester.[100]

Much like the issue over initiating the Excessive Deficit Procedure, the Commission disagreed with the ECB on the automated intensification of macroeconomic surveillance. It was adamant that scoreboard indicators would not be sufficient in triggering specific policy responses without the analytical discretion of economists taking into account country-specific

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[97] ECB Note, 9/14.
[98] The clash over the language and methodology employed in the MIP Regulations will be discussed in detail in Chapter IV, Section __.
[99] COM(2010) 367/2, 5.
[100] COM(2010) 367/2, 11.

contexts.[101] The Task Force Report's standing on this matter was not particularly clear. While it sided with the ECB on the on the automatisation of macroeconomic surveillance upon indicator thresholds, it also reserved some discretion for the Commission on whether to launch procedures.

There was, however, wide consensus amongst the parties on a much further reaching policy approach – the regulation of risk. The Task Force embraced the ECB's vulnerabilities approach, proposing that preventive arm of the macroeconomic framework scrutinise National Reform Plans and Stability Programmes (NRPs and SCPs, part of regular Semester surveillance) against the '*risk* of macroeconomic imbalances *and vulnerabilities*' with potential to trigger the alert mechanism of the procedure, warranting an in-depth review (IDR).[102] Thereupon, entirely apart from the indicator scoreboard, corrective action could be warranted should some national – education, environment, employment, etc. – policy be judged to 'risk jeopardizing the proper functioning of the economic and monetary union' as per Art 121(4) TFEU.[103]

How exactly vulnerabilities and risk would be operationalised remained a mystery during the Blueprint process. Much in line with the general reform attitude during the crisis, the threshold for intervention and breach of national competences was lowered for the pre-emptive correction of potential problems with a good many of the new procedural triggers not quantified rules, but the likelihood of breaking them. Moreover, the generous reliance on unquantifiable triggers, such as risks and vulnerabilities, proved discretion was only a subjectively corrupt concept, depending on the institution wielding it.

Surveillance under the Excessive Imbalances Procedure (EIP) could escalate to on-site missions (with the participation of the ECB) and financial sanctions. In a delightful incident of likely unintended candour, the Task Force attempted to rationalise intensification of procedure in the corrective arm, casually noting that '[a]s in this area there may be long lags between the adoption of the corrective action and the actual resolution of the imbalances, and

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[101] The general strokes of the Commission's proposal were quite in tune with the ECB. The Commission believed that eurozone and non-eurozone Member States' indicators were to be differentiated as 'the behaviour of some economic variables in the euro area is quite different the non-euro-area countries.' Further, the Commission also leaned towards using the indicator scoreboard in categorizing Member States into 'emerging' and 'significant risk' brackets, with respectively-diversified procedures and associated surveillance to follow. The recommendations themselves are promised to be broad-ranging and far-reaching, including national wage formation, labour market, and macro-prudential policies. COM(2010) 367/2, 5.

[102] The President's Task Force Report, 9, para 35.

[103] COM(2010) 367/2, 6. / Task Force p.9, section 2.2.1.2., para 37

not necessarily a direct causality, the assessment of the Council should focus on the effective implementation of the recommended actions.'[104]

In other words, once triggered, the EIP would become a self-perpetuating process quite possibly detached from its rationale for existence – the pursuit of some higher EU objective. Moreover, if the Task Force were to be taken at their word, then the macroeconomic surveillance framework had a serious issue with output legitimacy – the only kind of legitimacy behind the technocratic scoreboard of optimal macroeconomic indicators and right-answer remedies.

Ultimately, vulnerabilities would prove a hard sell during the formal legislative process, in spite of the persistent efforts of the Bank to put them back on the agenda. Risk, however, had the backing of the Treaties and would come to feature prominently in the macroeconomic surveillance framework's Regulations (EU) 1174/2011 and Reg (EU) 1176/2011.

3.8. Crisis Management

As was already discussed in Chapter 1, the sovereign debt crisis escalated the Great Reformation of EU economic governance into a framework oriented entirely – and openly – towards crisis prevention. In fact, the Semester would not only come to institutionalise the vast majority of reforms planned during the Blueprint process, but arrange them into a complex configuration of intertwined and proportionately escalating measures designed to secure the stability of the EMU, i.e. prevent an unwarranted transfer union, i.e. prevent crises. Should these best intentions fail to secure their objective, a permanent crisis framework was called for.

The ECB was the only Blueprint stakeholder who cared to delve into the details of the future European Stability Mechanism (ESM). Its contribution on this topic was simply remarkable, prophesising the CJEU's judgment in *Pringle*.

The ECB Note introduced the EU establishment to the 'institutional safeguards' to minimising the risk of moral hazard intrinsic to financial aid, incorporated alongside already-established practices from the EFSF and still developing Greek tragedy.[105]

First, such a future mechanism would only be activated in exceptional cases, identified by i) loss of market access or the more flexible proposition of ii) loss of market confidence.

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[104] The President's Task Force Report, 9, para 39. [emphasis added]
[105] Even the language used by the Bank would be adopted in *Pringle*.

Either would be considered a danger to the '*financial stability* of the Union as a whole,' thereby warranting a global response.

The Bank also established that the possibility of *expulsion* from the eurozone would not be 'considered a viable option,' although it said nothing of the voluntary departure of Member States.[106] This was in likely reaction to the political commotion over the unfolding situation in Greece, where proposed solutions allegedly included such musings.

In an effort to protect the Union and Member States against breaching Article 125 TFEU, the ECB was adamant on two points – conditionality and a pretence of detachment from private creditors. Conditionality arrangements attached to financial aid were meant to make the future ESM 'very unattractive' to potential profligates.[107] The ECB envisions the future mechanism only offer loans and purchases of government securities on the sovereign bond market. Interacting through the market was seen as a supposed guarantee that financial aid does not directly bail out the troubled government's private creditors, thereby ensuring that sovereign peers remain on the right side of Art 125 TFEU.

And yet, when advising on the fairness that the future ESM benefit from preferred creditor status, the ECB observed financial aid would 'increase the probability that existing creditors are paid in full.'[108] In other words, the future ESM would finance ailing governments just enough for them to be able to service one (private) creditor with the money from another (EU) creditor, thus avoiding Treaty prohibitions through a legalist distinction and ensuring that private creditors enjoy a financial safety net for irresponsible investments. Just as the Court would do some three years later in *Pringle*, the Bank all but ignored the dual purpose of Art 125 TFEU on disciplining the irresponsible lending of the markets.

The Bank's approach to the market is worth noting. While claiming the market would be somehow 'disrupted' – i.e. not operating 'normally' – it also embraced market pricing for government securities in an effort to isolate the purchasing authority from liability to private creditors.[109] Notably, however, the Bank never indulged in transplanting the market pricing approach for government bonds to the financial terms of the future ESM's loans.

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[106] ECB Note, p.11/14, III, para 4

[107] This would be further ensured by the future 'logic of the market' reading of the CJEU in *Pringle,* rendering 'assistance as ineffective and expensive as possible.' Schepel, 'The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone' (2017) 44 (1) *Journal of Law And Society* 79.

[108] ECB Note, III.4, para 2, p.13-14/14

[109] With the purchase of government debt securities, 'the crisis management institution, vested with the power to purchase government debt securities, would be able to quickly address disruptions in sovereign bond markets with likely contagion effects and the potential of putting financial stability in the euro area

Seeking to ensure adequate credit protection – lest a financially troubled MS start entertaining secessionist notions or a default, the ECB suggested that financial aid loans be collateralized through beneficiary MS property and future receivables like EU transfers.[110]

In case conditionality is met with resistance once a financial program is put in place, the ECB proposed a sliding scale of sanctions much in line with its established approach with the rest of economic governance reforms. Apart from the increase in auditing frequency, missions with its notable participation, and suspension of EU funds and voting rights, the Bank also proposed the 'establishment of an Enforcement Officer appointed by the Eurogroup with *loss of fiscal sovereignty*.'[111] In the context of its previous Blueprint recommendations regarding the enforcement of Excessive Deficit Procedure, the latter proposal really was not all that remarkable. In fact, it was much in keeping with the ECB's vision that economic governance and financial aid were part and parcel of a consolidated crisis prevention framework in the EU. The leitmotif, of course, was the trade-off between risk and sovereignty. That is, the higher the risk a Member State poses to its peers, the inversely proportional the exercise of its sovereignty becomes in the context of European economic and crisis governance with the intrusiveness of Union polies being proportional to the threat of cross-country negative effects.

A last special mention must be made of the ECB's matter-of-fact musing on the role of Member States in the future financial aid mechanism. According to the Bank, intergovernmental financing would 'sharpen the incentives for effective peer pressure and surveillance.'[112] Bearing the cost of a peer's fiscal profligacy – with one state's bailout amounting to another's bail in – would ensure a more immediate interest in stakeholder ownership of the process in both the preventive and corrective mechanisms of the future crisis management framework.

But, as this study argues, the Bank need not have bothered pitting governments against each other. The gulf between creditor and debtor Member States was already in place with the problems over financial costs just as tangible as they had been in 1989 when the fiscal union was ruled out.

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at risk.' ECB Note, p.12/14, III.4 para 1. The reasoning and choice of language were indeed curious, foreshadowing its own battle before the CJEU in *Gauweiler*.

[110] ECB Note, III.4, p.12/14. This approach would eventually see the Parthenon mortgaged (see Chapter 6).

[111] ECB Note, 3/14 [emphasis added].

[112] ECB Note, 3/14.

When it came to the future ESM, the ECB was a trailblazer indeed. For comparison, the Commission addressed crisis management in its 12 May 2010 Communication, but only did so in reference to the freshly minted EFSF mechanism, explicitly leaving medium to long term solutions for another day.[113]

The Task Force did not do much better, but it did strike an important note. In confirming the significance of addressing moral hazard, the Report called on the future financial aid mechanism to 'strengthen incentives for Member States to pursue sound fiscal and overall macroeconomic policies and *for financial market participants to lend responsibly*.'[114] This was perhaps the first public mention of the dual purpose of the Art 125 TFEU bailout prohibition since the dawn of EMU and almost certainly the last one since the onset of the sovereign debt crisis. As the Court's judgement in *Pringle* would go to show – the EU simply could not have it all.

Apart from this outstanding advice, the Task Force Report paid homage to the idea of a permanent crisis resolution mechanism, painting themes in extremely broad strokes not unlike those envisioned by the Bank, and – while remaining open to future possibilities – concluded only with a call for further research into the matter.[115]

4. Conclusion

As the sovereign debt crisis spiralled out of control, the EU establishment looked towards its severely limited and greatly incapacitated economic governance framework not just to secure budgetary discipline but to secure the stability of EMU and prevent another such episode. The European Central Bank ceased the moment to influence the early reform conversation and clearly capitalised on its participation in the inclusively-constituted Council's Task Force.

The forum allowed vertical and horizontal power configurations to play out, be those cross-institutional, cross-national, or between certain Member States and EU bodies. These arrangements reconstituted power by aligning expertocratic advice with political interests. Judging by the Blueprint for the Great Reformation of EU economic governance, the contextual and momentary alignment in interests between the ECB's defence of its own

[113] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions: Reinforcing economic policy coordination, 12 May 2010, COM(2010) 250 final, 9.
[114] The President's Task Force Report, 10, para 48. [emphasis added].
[115] Strengthening Economic Governance In The EU, Report Of The Task Force To The European Council, Brussels, 21 October 2010, 10-11, paras 49-50. Hereafter President's Task Force Report.

constitutive framework and creditor governments' fiscal protectionism dominated these informal negotiations and – ultimately – the entire business of EU crisis governance. Thus, with the Commission's proposals on the Six Pack and Two Pack legislations built upon the policy orientations of the Blueprint Task Force report, a significant amount of the Bank's inspired vision on matters extracurricular to its mandate had already been built into the framework.

Blueprint reforms would rebalance the trade-off between national sovereignty and the stability of EMU, which had always been factored into the Treaties – Member States gave up only as much as was absolutely necessary to make the framework functional, to make the asymmetric EMU stable, to make the Maastricht compromise sustainable. The crisis focus on the systemic risks of budgetary profligacy would open the gate to even further interventions in the interest of securing convergence and enforcing discipline, thereby expanding into previously unregulated competence areas to control perceived danger. The monetary would extend its authority over the economic in an attempt to regulate the risk to its own operations. Likewise, creditor Member States would attempt to establish effective control over debtors' hazardous fiscal behaviour in an attempt to preclude the need for a fiscal transfer Union.

Their efforts would result in a highly integrated framework of crisis management through prevention – the regular cycle of EU economic governance, and correction – the novel permanent financial aid mechanism, straddled across and vandalising the boundaries of disparate legal regimes. Within its preventive iteration, the newfound approach would expand supranational oversight into previously unregulated areas in an attempt to subdue the possibility of any dangers into a regulated risk. This, in turn, would serve to obscure the boundaries between Union and national competences with the former extending to the near limits, and in certain instances – beyond, their original Treaty configuration.

However successful the ECB was in propagating its reform agenda in the early planning stages of the Blueprint process, it remained unsatisfied. Then-ECB President, Jean-Claude Trichet, was the only member of the Task Force who refused to subscribe to the entirety of the Report's conclusions, editing in a specific note to this end to signal his institution's seemingly unaddressed concerns.[116] In other words, when the formal legislative process behind the Great Reformation of EU economic governance ensued, the ECB had unfinished business. Legally empowered to consult on these matters, the Bank did not

[116] '*The President of the ECB does not subscribe to all elements of this report.' The President's Task Force Report, 14, Annex 1.

hesitate to address outstanding concerns, contribute further advice, or simply re-iterate old grievances in its committed involvement, subject of the rest of this study.

SECTION II

Section II | Chapters 3-6

LEGISLATING THE BLUEPRINT – THE BANK | OPINIONATED

1. Opinions

This study argues that what is perhaps the most substantive involvement of the European Central Bank in the legal reverberations of the EU sovereign debt crisis has gone unnoticed in the midst of political and academic fanfare clustered around critical case law and *troika* austerity programmes.[1]

Upon the foundations of Articles 127(4), 282(5), and Art 126(14) TFEU, and well-established practice, European and national institutions are under obligation to consult with the ECB in matters which may affect its monetary competences.[2] In fact, should Member States or Union bodies fail to fulfil their legal requirement, they may be subject to infringement proceedings before the CJEU with the possibility for annulment of the concerned – national or union – act.[3] With or without an invite, the ECB is bestowed the right of initiative on having its opinion heard.

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[1] Wilsher, 'Ready to do whatever it takes- The legal mandate of the European Central Bank and the Economic Crisis', (2013) 15 *Cambridge Yearbook of European Legal Studies* 503; Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', (2013) 50 *Common Market Law Review* 1579; Scicluna, 'Integration through the disintegration of law? The ECB and EU constitutionalism in the crisis', (2018) 25 *Journal of European Public Policy* 1874; Tuori, 'Has Euro Area Monetary Policy become Redistribution by Monetary Means? "Unconventional" Monetary Policy as a Hidden Transfer Mechanism', (2016) 22 *European Law Journal* 838; Kilpatrick, 'Abnormal sources and institutional actions in the EU Sovereign Debt Crisis: ECB Crisis Management and the sovereign debt crisis', in M. Cremona & C. Kilpatrick (eds.), *EU Legal Acts* (OUP 2018), 70, and Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer', (2019) 26 *Maastricht Journal of European and Comparative Law* 94.

[2] The remainder of this analysis in this section is focused specifically on Article 127(4) as the primary norm instituting the consultation arrangements. Art 126(14) TFEU only applies to cases specific to the application of the Excessive Deficit Procedure and the competences therein are derivative of the same logic imbued in Art 127(4). Whereas Art 282(5) TFEU is a reiteration of Art 127(4) TFEU in the specific institutional provisions for the European Central Bank in Title I, Ch.6 of the TFEU.

[3] The Bank feels confident in enforcing its rights on the duty to consult even in the context of limited case law pertaining specifically to the case of the ECB. It readily extrapolates and extends to itself legal protections for consultation from CJEU precedents on the matter related to other Union institutions. The Bank positions itself alongside the European Parliament as a keeper of the institutional balance, and alongside the Court itself as a reviewer of legislative Treaty compatibility. See S.E. Lambrinoc, 'The Legal Duty To Consult The European Central Bank, National And EU Consultations' (2009) 9 ECB Legal Working Paper Series, 13, citing cases: C-21/94, C-392/95, C-65/90, C-41/93, C-316/91 amongst others. For a more detailed analysis of the options for infringement proceedings by either the Commission or the Bank directly, ibid., 40-43.

These instruments were already foreseen with the Delors Report back in 1989, as an attempt at proceduralizing the central bank's role in anchoring the Maastricht compromise. The monetary authority would have default – if indirect – access to the fiscal domain by virtue of consultation procedures for 'effective *coordination between budgetary and monetary policy*.'[4] The shared economic objectives and budgetary rulebook of the Union would be secured not only through the Bank's institutional commitment to a certain understanding of price stability, but also – failsafe of opinions.

Naturally, then, once the President's Task Force had settled on the acceptable parameters of the future EU economic governance framework, the ECB was there for it. Having remained not fully satisfied with the outcome the Blueprint preliminary negotiations, the Bank was given an additional – and much further reaching – opportunity to push through its reform agenda with opinions on the formal legislative process.

These documents shine a bright light on the ECB's systemic vision in utilizing the 'quantum leap' in economic governance for the attainment of a more balanced EMU. They allow us to follow through on the Bank's original reform proposals from the summer of 2010 to final legislation. A proposal may not be adopted completely or verbatim, but the insight provided by the legislative opinions allows us to extract the ECB's normative concerns behind the proposed rules and examine whether those have been satisfied in the final legislation.

Indeed, the legislative processes reviewed in the following chapters are not watershed events, such as those which captured the public's imagination at the height of the crisis with the *Pringle* or *Gauweiler* cases. The inter-institutional communications secured through Articles 127(4), 282(5), or 126(14) TFEU and the ECB's Monthly Bulletins are, rather, a death by a thousand cuts. They result in often small and seemingly insignificant amendments, little triumphs for the ECB legal service, whose true gravity and impact on the EU framework of economic and crisis governance is only visible when examined as a whole.

1.1. Opinions | Nature, Impact, Content

ECB opinions are a 'new age' kind of legal instrument – a seemingly inconsequential soft law, New Governance device. As true representatives of the genre, the real meaning of the measures remains hidden and whenever visible – insulated from liability.

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[4] Committee for the Study of Economic and Monetary Union, 'Report on Economic and Monetary Union in the European Community,' 1989 [emphasis in the original] p.24, para 34.

The benign significance of the consultation procedure lies in the supposed i) benefits of shared ECB expertise with Community institutions at large, ii) the promotion of 'information-sharing and communication among Community institutions and bodies as well as between the ECB and the general public,' and iii) quality improvement of the legislative process through increased 'compatibility and consistency of national legislation and Community legislation with the ESCB's legal framework and ECB policies.'[5]

As per the provisions of Art 288 TFEU, opinions have a non-binding character – they do not mandate the Commission or Council take into account the ECB's preferences. The ultimate decision for doing so remains their prerogative. Be that as it may, the purpose of any consultation procedure is the *intent* to influence the final outcome of legislative acts. As AG Jacobs confirms in his opinion in *OLAF*, opinions are quite capable of doing so.[6] This means that whenever the ECB has successfully incorporated its private concerns into EU economic and crisis governance reform through legislative opinions, the institution has remained insulated from any responsibility for its input. In other words, the cause and effect between the ECB's opinions and final legislation is, in essence, legally severed because it is an informal exercise of power.

Taken at face value, this disconnect between power and responsibility is troublesome enough, but it becomes truly startling when one considers the *de facto* impact of these otherwise *de jure* insignificant acts.[7] The following chapters will demonstrate that a significant amount of the key features of the EU economic and crisis governance system emerging after the crisis can be traced back to ECB policies as far as the Note on Reinforcing Economic Governance in the Euro Area (10 June 2010) and specifically outlined in the Opinions of the Bank on legislative proposals related to the Two Pack, Six Pack, TSCG and ESM.[8]

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[5] Lambrinoc, above n 3, 6.

[6] '[c]onsultation of the ECB on proposed measures in its field of competence is a procedural step… which is clearly capable of affecting the content of the measures adopted.' CJEU (Court of Justice of the European Union) (2003) *Commission of the European Communities v. the European Central Bank*, Case C-11/00, Opinion of Advocate General Jacobs delivered on 3 October 2002, para 131.

[7] The ECB itself actually does measure for impact on a case by case basis, 'which is a routine review of the final version of the legislation that was the subject of an ECB opinion.' It concludes that 'in a majority of cases, ECB opinions have been followed either in whole or in part in the relevant EU or national legislation.' Lambrinoc, above n 3, 40.

[8] This goes a long way to suggesting the vision of this new European order – 'the quantum leap' – as a project of the ECB micromanaging any subsystem that has had the ill fortune of ever being coupled with monetary policy. And with the logic of 127 and 282 – almost anything could be traced back to the ECB's ever-expanding field of competence.

Further, while Articles 127(4) and 282(5) TFEU presuppose a connection between the subject matter of the legislative proposals under scrutiny and the exclusive mandate of the ECB, that does not delimit the subject matter of the Bank's opinions within the confines of its mandate. In fact, the intangible cause and effect of the consultative procedure blurs the boundaries of competence. Most importantly, the Bank issues such broad-mandated content fully aware and seeking the legislative impact its opinions carry.[9]

It is not difficult to appreciate the seemingly boundless potential of these legal provisions as interconnections between monetary policy and competences outside the normally accepted purview of the ECB. It is to this background that the study argues and demonstrates that the ECB wields significant unaccounted power through the influence of its legislative opinions by channelling its institutional policy preferences through the political processes and decision-making prerogative of the EU executive.

1.2. Opinions | Form & Practice

We now turn to more practical matters concerning ECB legislative opinions – particularly their format and contents as they relate to the study's analysis.

The format and language employed in the opinions stun with their particularly *legislative* character. These are not examples of monetary technocratic governance, but rather – full-fledged policy instruments. Anyone who has ever bothered to read through the publicly available documents would likely be taken aback by what comes across as nothing short of a legislative push.[10] Once accepted into the final draft of any legal act these amendments result in nothing less than the Bank legislating via proxy. This is all the more noteworthy for the fact that this is achieved through a non-binding act, subject to the ultimate decision of other institutions, leaving the involvement of the ECB outside the scope of judicial scrutiny.

A second oddity of the ECB opinions concerns candid insight volunteered by the authors throughout the text. Opinions on proposed legislation usually develop through 1) an

[9] Lambrinoc, above n 3, 40.

[10] While the ECB may indulge in securing 'legal certainty on technical detail' through the standardized use of acronyms and various referrals to established legislation, it also goes as far as to suggest changes of legal base, the participation of its own or thus-associated bodies, general critiques of political influence on any given legislative topic, and open commentary on social and budgetary matters. It even proposes formal declarations amounting to new legislation and attempts to shape the procedural communications between the Union executive – the Council and Commission.

introduction and legal basis, 2) general observations, and 3) drafting proposals of the annex. These are discussed in respective order below.

The brief introduction of these documents ought to be noted for the Bank's selection of legal base to present an opinion on matters outside its monetary prerogative, but 'relevant to the primary objective of the ESCB – price stability.' As we have established, the Bank has at its disposal multiple Treaty provisions which have institutional consultation proceduralised for draft legislative provisions and proposed community acts.[11] Most commonly, though not exclusively, Articles 127(4) and 282(5) TFEU, in conjunction with the *aims* of an ECB opinion, provide a 'legal bridge' for the Bank to legislate on matters outside of its competence by virtue of their potential connection to the goal of said competence and not the competence itself.

In the General Observations of its opinions, the Bank proclaims its political manifesto. These are outright statements as to how the ECB sees the proper functioning of EMU and associated governance – with faults and defects to be (a)mended and perturbations and prescriptions over the future of the Union. In these discussions, the purpose and contents of the reviewed legislative proposals are filtered through the Bank's worldview.

Thereafter, in the Opinions Annex, the Bank gets down to business proposing side by side amended texts, ranging from the correction of technical omissions to the introduction of new policy, and going through a matter-of-fact denial of political discretion to either the Commission or the Council, sometimes both.

After each section of amendment proposals the Bank volunteers an Explanation as to the thinking behind the exercise. While some of these are simply practical (a legal cross-reference here, a typo there), the good rest of them are genuine management tactics – witness to the Bank's policy agenda. For example, political discretion is seen as no more but a legal loophole to avert rule compliance. Austerity and conditionality are but a means to 'incentivise compliance.' The 'policy dialogue' with national or EU parliamentary bodies may look like an exercise in transparency and accountability, but it too is no more but an effort to 'incentivise compliance' through public shaming.

[11] An exhaustive list can be found with Lambrinoc, above n 3, 28-31, but briefly: Art 66 TFEU, Art 126(14) TFEU, Art 127 TFEU, Art 128 TFEU, Art 129 TFEU, Art 138 TFEU, Art 283 TFEU, Art 134 TFEU.

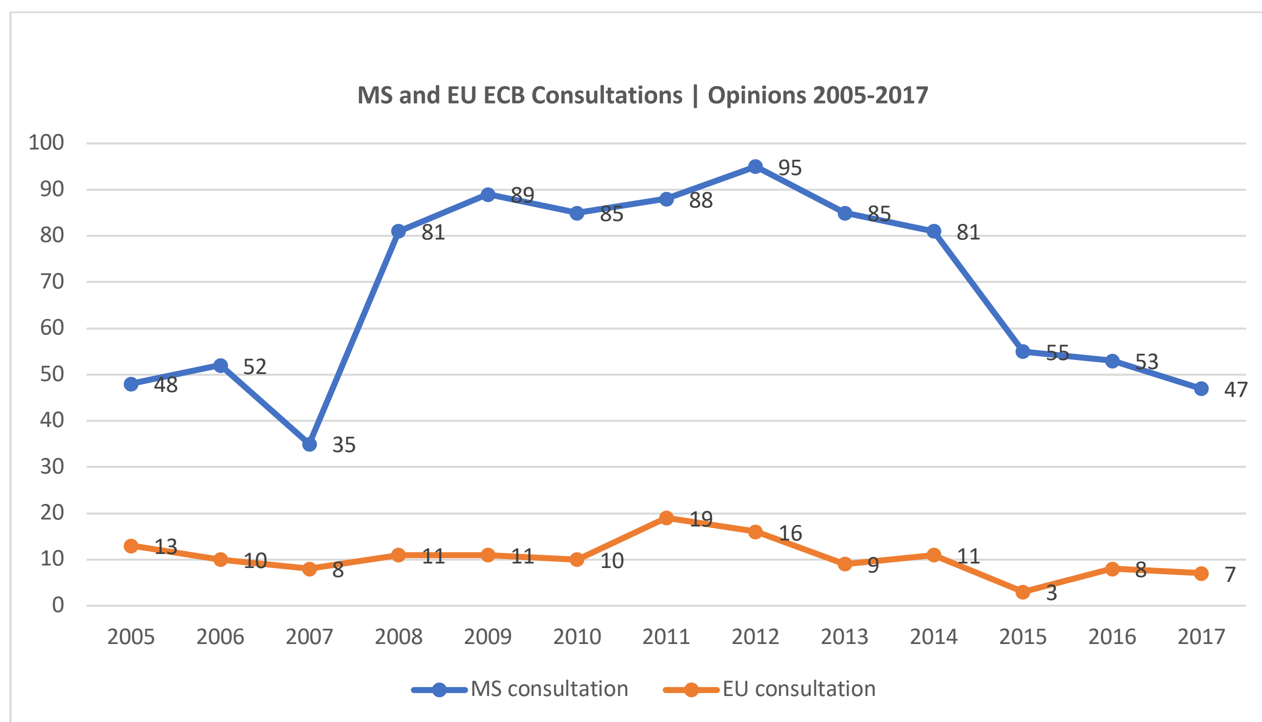
1.3. Opinions | Communications

The legislative opinions of the ECB are not just informative documents, which speak directly to the reforms introduced in EU crisis and economic governance with the voice of the ECB. When the Bank speaks, the markets listen. The ECB's opinions are, hence, always to be understood as simultaneously speaking to the political sphere and to the economic sphere.

Put simply, Articles 127(4), 282(5), and 126(14) TFEU are provisions for inter-systemic communications specifically designed upon the premise of keeping the Maastricht balance of the synthetically divided monetary and fiscal spheres within its original parameters. These consultative procedures are designed to respond to environmental pressures on systemic norms. Opinions are triggered whenever established boundaries are somehow challenged with legislative reforms. In this sense, the more pressure there is on a system for change, for instance – a crisis, the more intensified the communications about change.

The ECB's consultative output for the period of the financial and sovereign debt crises is quite telling in this regard and worth examining in brief. The data on communications between the ECB and Member States and the ECB and the EU paints a poignant picture of system interaction in the EU, compiled in Figure 1 'Member State and European Union Consultations with the ECB.'

Figure 1: Member State and European Union Consultations with the ECB based on Data of Issued ECB Opinions in the period 2007-2017



Data Source: ECB Annual Reports 2005-2017[12]

If we establish the events of the global financial crisis as taking place sometime in mid-2007 through 2009, we notice a significant increase in Member State consultations with the ECB,[13] with little to no change in EU level consultations for the same period.[14] It its Annual Reports the ECB takes stock of the sharp increase in MS-addressed opinions acknowledging 29 out of 81 (36% increase of the total and 72.5% of the difference) to be due to the financial crisis, including 'on national rescue measures concerning state guarantees, the recapitalisation of distressed banks, the purchase of banks' asserts and deposit-guarantee schemes.'[15] This trend continued into 2009 when the 'ECB responded to a record number of consultations by national authorities… [which] was to a large extent attributable to the financial crisis and to increased legislative activity in relation to financial markets.'[16] The following years – well into

[12] ECB, ECB Annual Reports, Last accessed 6 Mar 21, Accessible: <https://www.ecb.europa.eu/pub/annual/html/all-releases.en.html>
[13] (from an average of 45 per annum from 2005-2007, included, to an average of 85 in 2008 - 2010, included)
[14] From a little over 10 (10.33) to a little more over 10 (10.66)
[15] European Central Bank, Annual Report (2008) 133.
[16] European Central Bank, Annual Report (2009) 126.

2014, make no exception in the intensified activity of the ECB vis-à-vis Member States, sustained by the spiralling sovereign debt crisis and introduction of novel legislation on EU Banking Union and financial supervision.

What makes this data truly noteworthy is the disparity between MS and Union consultations with the ECB, bearing witness to the distinct channels of system communication/coupling and the evolution of the crises.

This demonstrates that the global financial crisis (2007-2009) i) was managed primarily at the Member State level, ii) within the available legal framework, and iii) under the purview of the ECB's monetary mandate.

This inference is anchored in historical reality – Europe can hardly be claimed to have responded much to the crisis in the years between 2007 and 2009, if for the simple reason that although it recognized the crisis as such, it did not recognize the crisis as its own. Save for several *ad hoc* liquidity injections attempting to inoculate the banking sector, EU politics and ECB policy in the initial years of the financial crisis proved themselves nothing short of disengaged from (market) reality.[17] It was not until 2011–2012 when the crisis mutated into something of an extraordinarily European character, that it was finally recognised as an EU-level problem with a relevant EU-level response. Largely owing to the uncontrollable financial channels' contagion, the crisis could no longer be contained within national borders, and – most importantly – within the limits of available Union law.

This generated a second level of exceptional circumstances, which laid bare the shortcomings of the Economic and Monetary Union, of the synthetic boundaries of Maastricht. The 2011–2012 ECB-EU consultations are a clear response to these environmental pressures, as the system attempted to re-affirm its foundations towards a more stable configuration of disciplinary constitutionalism through the Great Reformation of EU economic governance. These are the years within which the subject of Chapters 3-6 – the Six Pack, Two Pack, TESG and ESM, were forged. From a little over 10 formal EU-level consultations with the ECB each year from 2005 to 2010, the period between 2011 and 2012 saw that amount almost double in 2011 with 19 opinions. Damage control had begun.

[17] In the first stages of the crisis the ECB exhibited an unrealistic fear of inflation, when - in fact - deflation was on the horizon. The Bank would go on to – misguidedly – increase interest rates no less than three times in a period when the US Federal Reserve was doing the exact opposite. See: A Mody, *EuroTragedy,A Drama in Nine Acts* (OUP 2018), specifically poignant juxtaposition of events in section: *Timeline of Key Events: How it Unfolded*, 471.

2. The Development of the Next Chapters

The following section of this study, Chapters 3 through 6, will examine the evolution of the informal negotiation process of the Blueprint period into a formal legislative one, while tracing the influence of the ECB in the Great Reformation of EU economic governance into a framework for crisis prevention through budgetary regulation and financial aid. The chapters and legislative acts under discussion are organised in accordance with the four reform themes identified in the Blueprint from Chapter 2: i) Supranational Fiscal Oversight (Ch. 3), ii) The Competitiveness and Macroeconomic Imbalances Surveillance Framework (Ch. 4), iii) National Fiscal Governance (Ch. 5), and iv) Financial Aid and Crisis Governance (Ch.6).

Each narrative will prioritise the regulatory function of the legislative acts under scrutiny, while taking due regard of the legislative background behind their finalisation – from Blueprint proposals to the inter-institutional dialogue between the Commission and ECB as provided for under Articles 127(4) and 282(5) TFEU, which stipulate the opinionated participation of the Bank in in any legislative undertaking whose substance might be of relevance to the ECB's mandate over monetary policy, as well as Article 126(14) which provides for mandatory consultations with the ECB regarding provisions on the implementation of the Excessive deficit procedure. In the few cases where legislative opinions are not available, i.e. on treaties of public international law, the discussion will be supplemented by another official form of Bank communication – the ECB Monthly Bulletins.

By the end of the study it should become increasingly clear that Crisis Inc was a methodical affair, which successfully reasserted the original boundaries of the Maastricht compromise in the face of immense intrinsic and external pressures for change.

Throughout the analysis the work will i) follow the influence of ECB reform ideology, ii) consider the appropriation and reallocation of competences in EU law, and iii) scrutinise the transformation of sovereignty and power configuration in the European constitutional framework. Concluding each chapter will be a brief summary of the findings – the ECB 'take-aways' from the legislative process as well as the general implications of the reforms for the EU constitutional conditions.

As we are here interested in the ECB's methodological imposition of a certain worldview onto the European economic and crisis governance framework, the Bank's influence will be evaluated based on the legal evolution of ECB reform proposals from Blueprint to law. Evidence of clashing ideology between the Bank on the one side and

Commission and/or Council on the other, during either the Blueprint or legislative negotiations will further inform the conversation.

Some ECB reform proposals were outright triumphs, where in spite of Blueprint or legislative period opposition to its plans, the Bank ultimately succeeded in incorporating its ideas into the final legislation. Others saw the ECB prevail without facing opposition – either where there had been general agreement between the parties or no opposition expressed against Bank opinion. Some proposals escaped the Bank's influence altogether on procedural grounds, as novelties introduced after the ECB formal legislative opinions. Lastly, the Bank's agenda also suffered some clear defeats where in the face of persistent debate and opposition, its ideas did not find their way into the final text.

And while the details of these developments are of general interest, it is worth remembering the primary concern of the study is establishing whether and how much of the ECB's ideology – one way or another, with or without opposition, with or without support, with or without a fight – has been instituted into law as a result of the European sovereign debt crisis. Even where the Bank may have failed in achieving its vision, the proposed amendments provide points of reference to enrich our understanding of its prerogatives, while the associated explanatory notes solidify any claims to motive we might want to draw for the purpose of the study's argument.

2.1. TSCG and ESM Exceptionalism

Special note should be made here regarding certain legal developments under scrutiny in this chapter. The ESM and TSCG instruments seem like exceptions to the current analytical framework, which is focused on secondary EU law and the Bank's influence through the formal legislative process in opinions.

Although it may not be immediately obvious, the TSCG and ESM are not real exceptions. Indeed, these instruments originally manifested through public international law, thus precluding formal Bank involvement through opinions that we may be privy to, but their story did not end there.

It is important to remember that a primary purpose of this study is to examine how much of the Bank's reform worldview was eventually, one way or another, instituted into law. Both the TSCG and ESM relate directly to tenets of the Blueprint doctrine propagated almost exclusively – and thus, identifiably – by the ECB. The Bank has also provided its assessment

on these legislative developments through its Monthly Bulletins, which are one of the Bank's official lines of communication to the outside world – policy and markets alike.[18]

While the TSCG and ESM were unconstrained by the Treaty legislative process, that was not the case for content. Both instruments aimed to 'respect' the Union framework, could not infringe on exclusive Union competences, and actually made active use of Union institutions and their allotted competences, as well as secondary EU legislation. Some of the substance of both instruments has been partially anchored and operationalised through EU law through secondary legal measures with the Two Pack regulations, themselves subject to formal procedure and Bank opinions. Most importantly, however, the TSCG and ESM underwent a failed bid for their formal incorporation into EU law, the legislative background to which further supplements our understanding of the Bank's opinion of them.[19]

Therefore, although in a more serpentine path, the substance of the TSCG and ESM have travelled more or less the same legislative route as the rest of crisis-reforms under discussion. As such, their content is technically open to the same method of scrutiny adopted for the rest of the study, connecting the Blueprint reform design to the post-crisis legislative framework on crisis prevention, all the while investigating the involvement and influence of the ECB.

3. And So, It Begins…

By 29 September 2010 the Commission triggered the formal legislative process to oversee the Great Reformation of EU economic and crisis governance. It issued proposals for legislation on five regulations, amending the existing rules to the Stability and Growth Pact (SGP) and

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[18] Since 2014, dubbed Economic Bulletins: 'The Monthly Bulletin was published one week after each monetary policy meeting of the Governing Council. It explained the monetary policy decision and provided a detailed analysis of the current economic situation and risks to price stability.' Source: European Central Bank at <https://www.ecb.europa.eu/pub/economic-bulletin/mb/html/index.en.html> Accessed: 15 April 2019. 'The Economic Bulletin presents the economic and monetary information which forms the basis for the Governing Council's policy decisions. It is released eight times a year, two weeks after each monetary policy meeting. The Bulletins in March, June, September and December provide comprehensive analysis of economic and monetary developments including an integrated discussion of the staff macroeconomic projections on inflation, growth, public finances, and external trade.' Source: European Central Bank at <https://www.ecb.europa.eu/pub/economic-bulletin/html/index.en.html> Accessed: 15 April 2019.

[19] A serious discussion on the incorporation of the TSCG in EU law never really took hold after the Commission's Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, 6 December 2017, COM(2017) 824 final. The ESM, however, was an entirely different matter – a process rife with political drama in conflict to the united front presented by the ECB and European Commission. This story – and the latest iteration of the ESM (draft) Treaty – are examined at length in Annex I.

introducing the macroeconomic imbalances procedure (MIP), and one directive focused on national fiscal frameworks – collectively known as the Six Pack.

Meanwhile, it had become clear that the ad-hoc crisis-resolution mechanisms of the EFSM and EFSF were to benefit from permanent institutionalisation with the European Stability Mechanism (ESM), signed as an intergovernmental treaty under public international law on 11 July 2011. By the time the ESM became operational in February 2012, Member States were ready to sign another treaty outside the confines of EU law to further the achievements of the freshly minted – but apparently lacking – Six Pack. Thus came about the Treaty on Stability, Cooperation and Governance in the Economic and Monetary Union (TSCG). Absent sufficient political will, its provisions only applied to Member States wishing 'to do more' on a voluntary basis, until a hypothetical consensus to incorporate the Treaty's substance into EU law was reached within five years down the road, as per the provision of its Art 16 TSCG.

Whatever public international law substance could be agreed upon within the EU Treaty framework was integrated in a piecemeal approach through a return to the formal legislative process with the Two Pack regulations.[20] Regulation (EU) 473/2013 on *the prevention and correction of macroeconomic imbalances* from the Two Pack duplicated and formalized a great many of the TSCG provisions within the European Semester framework. Regulation (EU) 472/2013 on *the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area* worked analogously for the ESM by formalizing the surveillance procedure and conditionality arrangements for Member State beneficiaries of ESM financial aid.

The ECB was there for it all – opining, advising, consulting – responding to the legislative push either through opinions or with its other channel of formal communication, the Monthly Bulletins.

[20] In force no more but three months after the TSCG (May 2013).

CHAPTER 3

SUPRANATIONAL FISCAL SURVEILLANCE FRAMEWORK

When plans for the Great Reformation of European economic governance began in the summer of 2010, the immediate focus fell on a calculated upgrade of the existent legal framework as a most secure and swift means for achieving the envisioned change towards greater fiscal discipline. It was the multilateral surveillance and economic coordination arrangements of the preventive SGP, now part of the European Semester, and its corrective framework, designed to offset excessive deficits, which became the prime focus of the efforts. These underwent a significant overhaul reforming and supplementing the existent legal base, institutionalising the Blueprint reform themes of debt and deficit criteria parity, maximized automaticity, minimized discretion, intensified and expanded sanctions. This chapter will trace the operationalization of these ideas through an analysis of the most significant legislative revisions introduced by Regulation (EU) 1175/2011 amending the preventive arm of the SGP (Regulation (EC) 1466/97), Regulation (EU) 1177/2011 reforming the corrective arm (Regulation (EC) 1467/97), and the complementary Regulation (EU) 1173/2011 designed to enhance rule enforcement for both.[1]

1. Regulation (EU) 1175/2011 | The Preventive Arm & Associated Enforcement Measures | Regulation (EU) 1173/2011

The preventive arm of the SGP forms the legal foundation of the European Semester – an all-encompassing year-round framework for budgetary and macroeconomic surveillance of Member State economic and fiscal policies for the purposes of their coordination within agreed bounds, premised on the understanding underlying Article 121 TFEU that these

[1] The 2011 reforms were not the first significant overhaul of the SGP framework. As summarized in Chapter 1, it is worth recalling here that the 2003 Franco-German Excessive Deficit Procedure events in Council and eventual litigation before the CJEU bore the fruit of serious legal amendments towards greater flexibility and individual assessment. These became subject to much political, ECB, and even academic scrutiny, retrospectively blamed for the increased leeway and enforcement deficiencies, which were seen as a driving factor behind the unstable positions Member States found themselves in as the financial crisis began mutating into a sovereign debt problem. Therefore, evaluating the crisis-reform of the supranational fiscal surveillance framework is no straightforward task, obliging us to take stock of legal developments spanning over a few decades within their political context.

constitute a matter of common concern.[2] This attempt at aligning a common EU-wide fiscal stance, along the minimum requirements for an operational EMU outlined by the Delors Report, is based upon an annual cycle of back-and-forth national self-reporting and supranational review of MS multiannual budgetary plans laid out in Stability and Convergence Programmes (SCPs).

The central measure for compliance observed therein is the progressive achievement of 'the country-specific medium-term budgetary objective (MTO) which corresponds to the structural budgetary position that Member States should achieve, and maintain, over the cycle.'[3] The ultimate rationale behind these arrangements is the cultivation of sustainable public finances through the prevention of excessive government debt and deficit, measured against the Maastricht convergence criteria.[4] But the MTO indicator is actually designed to surpass the Maastricht values by providing a 'safety margin' for them at times of downward economic movement.[5] That is, with the SGP, the Maastricht rules represent only the *outer* bounds of economic prudence. Member States are required to be able to respect them *throughout* cyclical fluctuations of the economy, which can only be ensured by keeping MTO budgetary positions 'close to balance or in surplus.'[6]

In spite of how loudly these arrangements may resonate with the crisis approach to risk prevention, this is in fact the original iteration of MTOs from Council Regulation (EC) 1466/97. However, due to generally poor compliance and weak enforcement, even the very limits of the 3/60 had become a challenge to EU fiscal consolidation.[7] These significant deficiencies thus became the focus of the impulse for reform provided by the crisis. The predicament with the preventive arm was largely due to the inability to quantify 'sufficient progress' towards the only quantifiable objective in the scheme – the country-specific MTOs.

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[2] The relationship between coordination and surveillance was instituted as soon as the concept of the Semester had been formulated during the Blueprint period with a revision to the Code of Conduct of the Stability and Growth Pact, approved by the European Council on 7 September 2010.

[3] European Commission, SGP Vade Mecum (2018) 17. Furthermore, the Commission reviews SCPs for compliance with the general recommendations issued under the Annual Growth Survey (AGS), economic and social priorities of the Union and related Member State Country Reports.

[4] These, of course, set the upper limits for fiscal prudence at 3 percent deficit to GDP ratio and 60 percent debt to GDP ratio, in keeping with the 'reference values' provisioned under Art 126 TFEU.

[5] European Commission, SGP Vade Mecum (2018) 17.

[6] 'Whereas adherence to the [MTO] of budgetary positions close to balance or in surplus will allow Member States to deal with normal cyclical fluctuations while keeping the government deficit within the 3 % of GDP reference value.' Recital 4, Council Regulation (EC) 1466/97

[7] For an overview of the 1997 and 2005 versions of the preventive SGP, see Chapter 2, above

Moreover, the provisioned procedure in case of an identified 'actual or expected significant divergence' did not have much in it to compel the desired Member State reaction.[8]

The Six Pack reforms of Regulation (EU) 1175/2011 were intended to resolve these particular issues by i) increasing automaticity/decreasing discretion in procedure – through the actualization of MTOs with the 'introduction of an expenditure benchmark, which sets an upper limit for the net growth of government expenditure thereby providing more operational guidance;'[9] and ii) strengthening enforcement by introducing a graduated sanctions regime starting early on in the surveillance process within the formal establishment of the Significant Deviation Procedure (SDP), as well as a significantly intensified surveillance system, including monitoring missions.

By the time these reforms were instituted, the 'safety margin' provisions of the original SGP would be operationalised as Member States' 'fiscal space for manoeuvre' – an epitome of both risk-prevention *and* crisis governance in the Union.[10]

1.1. MTOs | Expenditure Benchmark – Articles 2-5

When it came to operationalizing the MTO, most legislative action took place in Section 2, Article 5 – stipulating the monitoring guidelines for SCPs.[11] The rules that defined MTOs remained mostly unchanged from their original introduction with the 2005 amendments – specifically, the country specific computation,[12] save for the possibility of updating Member State-specific MTOs every three, as opposed to four, years and a provision that the rules be replicated into national legal frameworks as per the instructions of Council Directive

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[8] The Council, on recommendation from the Commission (as in most procedural steps involved), could demand a more ambitious programme in the form of an opinion. Thereafter, programmes became subject to surveillance based on Member States' own reporting (as a rule, based on highly divergent national accounting standards) to the Commission. Should the Council identify 'significant divergence of the budgetary position from the medium-term budgetary objective, or the adjustment path towards it' based on the Commission's assessments, it could issue a warning to the concerned Member State. Should the Member State fail to heed the warning, the most that could materialise on the Union level was a more forceful recommendation, with the potential of public shaming through publication. See, generally: Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on *speeding up and clarifying the implementation of the excessive deficit procedure*, Article 6. For more details, see Chapter 2..

[9] European Commission, SGP Vade Mecum (2018) 23.

[10] This much will become particularly evident with the discussion of Chapter 6 on Crisis Governance and the concluding discussion of Chapter 7.

[11] The reforms introduced – and related ECB amendments – followed an analogous path with regards to the surveillance of convergence programmes.

[12] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

2011/85/EU, also part of the Six Pack.[13] The newfound relevance of the MTO was owed to the introduction of the 'expenditure benchmark' and Maastricht debt criterion into the mix.

Agreed upon during the Blueprint process, the expenditure benchmark is the quantified measure of sufficient progress on the adjustment path towards MTOs 'on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures.'[14] Compliance with the preventive arm therefore became premised on a 'two-pillar' approach, whereby structural balance (the ultimate goal of MTOs) is contextualized within and conditioned against the growth rate of expenditure.[15]

What this means, in practice, is that government spending is directly tied to prudency, where straying from the righteous path to MTOs must be directly offset by either additional revenue (i.e. taxation or better collection) or expenditure reductions (i.e. austerity). Moreover, the conditions of the expenditure benchmark ensure that excess windfall revenue is invested towards debt reduction, rather than frivolously spent.[16] This approach of 'doing more in good times' was aimed at ensuring Member States work towards fiscal consolidation beyond the 3/60 rule, newly rediscovered as the sanitary minimum of budgetary discipline.[17] Such prudent conduct was further operationalised with the provision for its consideration in the formal assessment of SCPs.[18]

While the core of the reform – the expenditure benchmark measure itself (as outlined in Article 5.1(a), (b), and (c)), remained unchanged from proposal to final legislation, and without a peep from the ECB, the formulation for arriving at it did. This also included considerations of the debt and deficit criteria and additional discretionary provisions for flexibility discussed below.

1.1.1. Hard Numbers | Vague Concepts

The original proposal for regulation had intended to assess the adjustment path towards MTOs against the concept of 'prudent fiscal policy making.' Admittedly, the subjective formulation did not seem conducive to the professed objectives of the Six Pack to strengthen surveillance and compliance. The approach, however, was meant to be 'quantified' through a

[13] See Chapter 5.
[14] Reg (EU) 1175/2011, Art 5.1.
[15] European Commission, SGP Vade Mecum (2018) 23.
[16] Reg (EU) 1175/2011, Recital 18.
[17] Reg (EC) 1055/2005, Recital 6)
[18] Reg (EU) 1175/2011, Art 5.

collection of benchmark conditions that were eventually adopted directly in its stead.[19] Either way, the ECB was inimical to the 'abstract-concept,' which it judged would only serve to provide unwarranted leeway in enforcement, amounting to an escape clause capable of undermining fiscal sustainability.[20] The Bank would raise the issue on any additional references to 'prudent fiscal policy making' in its Six Pack opinion, eventually succeeding in revising the language in favour of the more concrete, easily measurable, and thereby trigger-capable 'MTO adjustment path,'[21] even removing it altogether from any provisions of procedural significance to the overall framework.

1.1.2. Debt | Deficit

In spite of the significant Blueprint input and general consensus for the equal operationalization of the debt and deficit rules throughout the SGP, the legislative proposal issued by the Commission was a rather half-hearted affair on this particular point. For instance, in stipulating the criteria for assessment of the adjustment path towards MTOs, while the Commission did bother introducing debt as a trigger for the additional review of SCPs, it defaulted on a mere reference to the unquantifiable '*high levels'* of debt in conjunction with excessive macroeconomic imbalances.[22] The Bank's involvement with this matter was minimal, but interesting. Naturally, it sought to clarify matters on the suspiciously vague 'high level' of debt by pinning it at the 60 percent of GDP Maastricht standard, but it followed a

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[19] Judging by comparison between Proposal point 4, Art 5.1, para 3-4 and Art 5.1, para 3, final: Prudent fiscal policy making would have amounted to: '(a) for Member States that have achieved their medium-term budgetary objective, annual expenditure growth does not exceed a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures; (b) for Member States that have not yet reached their medium-term budgetary objective, annual expenditure growth does not exceed a rate below a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures. The size of the shortfall of the growth rate of government expenditure compared to a reference medium-term rate of potential GDP growth is set in such a way as to ensure an appropriate adjustment towards the medium-term budgetary objective; (c) for Member States that have not yet reached their medium-term budgetary objective, discretionary reductions of government revenue items are matched either by expenditure reductions or by discretionary increases in other government revenue items or both.'

[20] European Central Bank, Drafting proposals regarding the proposal for a Council regulation amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (COM(2010) 522), Annex, Opinion on economic governance reform in the European Union (CON/2011/13), 16 February 2011, Explanation to Amendment 8.

[21] ECB Opinion Reg (EU) 1175/2011, Explanation to Amendment 6.

[22] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1466/97 on the strengthening of the surveillance budgetary positions and the surveillance and coordination of economic policies, 29 September 2010, COM(2010) 526 final, point 4, Art 5.1., para 2.; For a discussion on the reforms introducing the Competitiveness and Macroeconomic Imbalances Framework, see Chapter 4.

completely opposite logic with the introduction of another standard – 'pronounced risks in terms of fiscal sustainability.'[23] What constitutes such risks and how they are to be evaluated remained subject to open interpretation. Yet, the Bank met with success on both counts of legislative amendment.

This would be but the first foray in a long affair with the delegalisation of risk throughout the Great Reformation of EU economic governance. As explained at length in Chapter 1, the obsession with preventive action would serve to further tighten the noose around Member States' exercise of sovereignty, much in line with the already present fiscal pre-emption standards set by the MTOs. The Bank, otherwise an avid proponent of quantifiable, automatically enforceable rules and procedures, would time and again fall on the side of subjective definitions and an open-ended approach, whenever those advanced a wider opening for intervention into Member State competences.

1.1.3. On Flexibility

Lastly, in its amendment on MTOs and SCP surveillance, the ECB stood its ground on derogations. In addition to the flexibility introduced in the SGP after the Commission *v* Council legal scrummage of 2004,[24] mindful of the exceptional circumstances surrounding the reforms, the Commission now sought an exemption for temporary departures from the MTO adjustment path 'in periods of severe economic downturn of a general nature.'[25] We must note here the irony of these otherwise rather rational exemption provisions, in contrast to the MTOs' aim to keep Member State finances within the 3/60 bounds *especially* in times of economic downturn.

The ECB would have none of it, calling for the outright removal of the provision, explaining it would amount to an 'escape clause, which would undermine fiscal sustainability.'[26] The argument was all but ignored. While the final text heeds some of the ECB's concern – conditioning the derogation against the potential of endangering fiscal sustainability in the medium term, it also manages to add insult to injury with a second norm for derogations from fiscal righteousness in the shape of 'an unusual event outside the control of the Member State concerned.' (Art 5.1, last para, final)

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[23] ECB Opinion, Amendment 8
[24] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Art 5.1, para 2-3.
[25] Reg (EU) 1175/2011 Proposal, Art 5.1, last para.
[26] ECB Opinion Reg (EU) 1175/2011, Explanation to Amendment 8.

In fact, as will become evident throughout this chapter and was already indicated with the Blueprint, support for the removal of legal derogations and discretion would remain subject to discreet case-by-case calculations and general lip service for both the Commission and Council, light years away from the totalizing automaticity approach of the ECB.

1.2. Significant Deviation Procedure – Article 6 | the ECB

The second consequential reform to the preventive arm of the SGP came with the procedural upgrades introduced to the significant deviation procedure (SDP). Once submitted, Member State SCPs become subject to an evaluation, which results in guidelines for reform issued by the Council on the basis of a Commission recommendation.[27] The SDP is borne of the Commission's *ex post* surveillance of whether a Member State has 'take[n] due account of the guidance addressed to them in the development of their economic, employment and budgetary policies before taking key decisions on their national budgets for the succeeding years.'[28] Particular attention is paid 'to identifying actual or expected significant divergences of the budgetary position from the [MTO], or from the appropriate adjustment path towards it.'[29] As such, the successful operationalisation of the SDP was largely owed to the Six Pack reforms introduced to MTOs, reconditioning the rather unconvincing iteration of the procedure with Regulation (EC) 1466/97 (Art 6).

The significant transformation took place in spite of the Commission's stance on the matter and is much owed to the active involvement of the ECB during the legislative process, claiming the procedure be 'overhauled' and made 'more effective' through the introduction of new steps.[30]

In the proposal for regulation, the Commission remained reticent in entertaining any substantive reforms to the terms of the SDP, with the recommended ones falling short of professed objectives. New language was proposed (and adopted) whereby significant divergences now became significant deviations, which were to be measured against the same weak formulation of 'prudent fiscal policy making' employed for MTOs. The original 1997 *recommendation* for adjustments would now became a *warning*, giving advanced notice that the procedure is subject to escalation into newly-introduced sanctions in the form of an

[27]Reg (EU) 1175/2011, Art 2-a(3); this process includes the National Reform Programmes of the Macroeconomic Competitiveness Framework, with the procedure running in parallel.
[28] Ibid., Art 2-a(3)
[29] Ibid., Art 6; furthermore, these evaluations are to be based on Member State self-reporting.
[30] ECB Opinion Reg (EU) 1175/2011, Explanation to Amendment 9.

interest-bearing deposit, should a Member State fail to heed advice. But there was still one important element, essential to any proceduralisation, persistently missing – a timeline. That meant progressing from warning to actual sanction would remain highly improbable, thereby negating the usefulness of the threat and point of the whole procedure. Furthermore, the legislative proposal introduced formal discretionary exemptions to the already weak rule.[31]

During the Blueprint discussions on quasi-automated sanctions, the ECB did not entertain ideas of proceduralizing observed significant divergences in the surveillance of stability and convergence programmes.[32] Nonetheless, it seized the opportunity to correct this oversight during the formal legislative process. The ECB's Opinion on the future of Article 6 Reg (EU) 1175/2011 raises a laundry list of issues, which ultimately succeeded in instituting a *corrective* procedure in the *preventive* arm of the SGP through reforms in the SDP.[33]

The ECB was mindful of the need for deadlines in setting up and assessing goals (reforms) and even more so of the possibility for ensuing sanctions. As such, as per its intervention, the warning over a significant observed deviation stipulated in Article 6.2 Reg (EC) 1466/97 i) becomes subject to keeping within the adjustment path towards MTOs, as opposed to prudent fiscal policymaking, and ii) starts the clock on a one month deadline for the Council to follow suit with definitive action adopting a Commission recommendation with policy measures aimed at addressing the deviation within a certain deadline. This, in turn, leads to reporting responsibilities for the Member State concerned as to the degree of reform it has undertaken in applying the recommended actions within anywhere from five to three months, inversely related to the severity of the observed problems, as per the Bank's proposition.[34]

Once this first deadline has passed, there follows a second review where, in the case of Member State non-compliance, the ECB had hoped to mandate the Council 'immediately' adopt a Commission recommendation stating as much. The final regulation does not (fully) indulge the Bank. It is the Commission which shall *immediately* recommend, for the Council to then adopt a decision through the regular qualified majority voting (QMV) procedure, which may include revised recommendations. However, the final Reg (EU) 1175/2011 states, the Council cannot block the procedure indefinitely. Should it prove unsusceptible to the

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[31] Proposal (Art 6.2, para 3-4)
[32] European Central Bank, *Note on Reinforcing Economic Governance In The Euro Area*, 10 June 2010, Section I.4, 6/14.
[33] ECB Opinion Reg (EU) 1175/2011, Amendment 9.
[34] ECB Opinion Reg (EU) 1175/2011, Explanation to Amendment 9, second last para.

Commission recommendation within a month's deadline, the latter can reissue its recommendation that no effective action had been taken, which shall be deemed adopted by the Council unless it conjures up a qualified majority *in opposition*, i.e. RQMV.

The decision establishing a lack of effective actions in the SDP is the initiation of the preventive arm financial sanctions regime for eurozone Member States, amounting to a 0.2 percent of GDP interest bearing deposit. This is the single financial sanctions novelty introduced to the preventive arm of the SGP with Reg (EU) 1173/2011, taking the preventive procedure to its ultimate conclusion.

These reforms managed not only to operationalise the SDP by providing sufficient incentive to keep Member States on the righteous path towards their country-specific MTOs, but – following a distinct approach of crisis-reform – managed to proceduralise and sanction procedure. That is, in the context of the specifics introduced by the Bank in its Opinion on the legislative proposal, the procedure of the SDP itself became subject to intensifying enforcement, not just the substance of the sought-after corrective measures.

1.2.1. Surveillance Missions

There is, however, an even more significant means of enforcement introduced in the scheme outside the legal basis of Reg (EU) 1173/2011 – surveillance missions, applicable to all Member States.[35] In the unassuming 'Common Provisions' Section 4, Regulation (EU) 1175/2011 camouflages on-site missions in the context of the good governance principle of a 'permanent dialogue' with MS authorities. Why 'boots on the ground' are required for this dialogue is not clear.

On-site missions *may* be included as part of 'reinforced monitoring' by the Commission, designed to oversee the implementation of SCP reform guidance in the early stages of the Semester.[36] What other powers the freshly-introduced concepts of 'reinforced monitoring' entail is not clear. Neither is there a formal trigger for missions, leading to the conclusion they are left entirely to the Commission's discretion. Moreover, with this provision, any Member State (i.e. all) subject to recommendations in the spring Semester may become a potential beneficiary of the Commission's presence. Furthermore, the official

[35] 'The Commission may undertake enhanced surveillance missions in Member States which are the subject of recommendations issued under Article 6(2) or Article 10(2) for the purposes of on-site monitoring. The Member States concerned shall provide all necessary information for the preparation and the conduct of those missions.' Reg (EU) 1175/2011, Art 11.2.

[36] Ibid., in Art 2-a(3)

mandate of missions is the comprehensive 'assessment of the actual economic situation in the [Member State] and the identification of any risks or difficulties in complying with the objectives of [the] Regulation.'[37] As already noted, the conclusions to such risk appraisals provide significant opportunities for further encroachment into Member State business.

Should the Member State in question be a eurozone or ERM-II member, the Commission may decide to invite the ECB to tag along. Article 11.2 also stipulates the possibility for 'enhanced surveillance missions' to Member States as soon as the SDP is triggered with the initial warning-recommendations package under Art 6(2)/10(2).[38] In that case, monitored governments are expected to 'provide all necessary information for the preparation and conduct of those mission.'[39] On what basis the Commission *may* decide to intensify this surveillance instrument from regular to 'enhanced' missions, again remains unaddressed.

Most disturbingly perhaps, the novel concepts of reinforced monitoring and enhanced surveillance missions would remain undetermined within the context of their own legal framework with the Six Pack. While in 2013, with the adoption of the Two Pack's Regulation (EU) 472/2013, the European establishment finally defined what 'enhanced surveillance' entails, the relationship between the regulations does not provide any retroactive clarity as to the intentions behind Reg (EU) 1175/2011.

This episode is just one of many examples where the premeditated character of the Great Reformation of EU economic governance comes across loud and clear. The comprehensive framework put in place by the end of 2013 – and subject to ongoing refinements – was not a crisis-reactive programme of stop-gap measures. Rather, it was an entirely conscious effort of incorporating the working practices of the crisis in regular economic governance, thus leading to a supranational competence enhancement in the midst of an overwhelming legislative overhaul. This matter cannot be emphasized enough and is probably best illustrated by the juxtaposition in circumstances between IMF-inspired monitoring missions to debtor states without access to markets in the context of some MoU, being employed in the preventive European Semester surveillance cycle to Member States, which have strayed from their MTO budgetary goals. It is worth reiterating here, the SDP procedure in question does not signal a Member State has necessarily crossed the 3/60

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[37] Ibid., Art 11

[38] Ibid., Articles 6.2/10.2 SDP procedure, first warning about significant observed deviation (both eurozone and non-eurozone)

[39] Ibid., Art 11.2.

Maastricht criteria, but rather – that it may, hypothetically, have to do so should the economy turn bad.

Missions are a most noteworthy reform-coup of the ECB in the surveillance and correction framework of European economic governance. In the opinion of the Bank, missions 'should contribute to the achievement of the objectives of the [regulation] and should be an important deterrent for the non-compliant Member State.'[40] It is crucial to note that, as far as the Blueprint indicates, the idea of surveillance missions was an original proposal of the Bank, which the Task Force came to agree on. On the other hand, the Commission remained just as reticent about the idea during the formal legislative process as it had been in the summer of 2010, without a single mention of surveillance missions in any of the first wave reform proposals with the Six Pack. It is these type of circumstances that let us take stock of the real influence (and mindset) of the Bank. Time and again, taking every legislative opportunity within its opinions, the ECB would introduce amendments that would see 'the Commission, in liaison with the ECB if it deems it appropriate, carry out monitoring missions in Member States.'[41] Remarkably, and starting with the SDP, the measure has been adopted *every time* when it has been proposed in amendment by the ECB,[42] becoming a cornerstone of the European economic and crisis governance framework.

1.3. Additional Matters | Provisional Peculiarities

In its opinion on the proposal amending the preventive arm of the SGP, the ECB advocates a total of 12 amendments introducing 33 separate instances of modification. Out of these twelve amendments, we have only discussed two – the most comprehensive ones with most significant consequence to the substance of the proposal.[43] Multiple others have not been mentioned, as their substance spans generally technical matters based with the Bank's

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[40] ECB Opinion Reg (EU) 1177/2011, Amendment 5. The explanation for missions is only provided with the proposals to the corrective SGP, but we may freely extrapolate the same rationale behind the preventive arm, seeing as the Bank originally introduced the idea in its Opinion on both proposals for regulation.

[41] One of many examples – ECB Opinion Reg (EU) 1175/2011, Explanation to Amendments 9 and 11 on SDP Procedure.

[42] In fairness, somewhat indicative of the ghost of discretion, in certain cases final legislations have nevertheless dared stray from the Bank's learned opinion as much as to stipulate missions *may* be undertaken, as opposed to the mandatory *shall*. As the work proceeds, it will make a brief note of every instance concerning missions.

[43] This study is of the opinion that it is not impossible to quantify a 'success rate' for ECB proposals, as it is not simply a measure of accepted or rejected ideas, but rather acknowledging their weight in regards to substance. This is why the content of the current study is of such importance – breaking down and analyzing the Bank's formal contribution to the great reformation of European economic governance law.

concern for ensuring 'legal clarity'. However, there are some occasions on which the ECB springs up some truly surprising ideas (even by its own standards), seemingly out of context, in a public confession of its most intimate institutional desires. Such is the case with amendment proposals 5 and 12 on the proposal for Reg (EU) 1175/2011.[44] With astonishing audacity the ECB proposes that:

> 'An advisory body of persons of recognised competence in economic and fiscal matters shall be established. It shall provide a yearly public report on the manner in which *the Commission and the Council have conducted their obligations* under Articles 121 and 126 of the Treaty and under [the Regulations forming the Stability and Growth Pact (1173, 1175, 1177/2011) and Macroeconomic Imbalance surveillance and correction framework (1174, 1176/2011)] Following a request by the Commission, the Council or the European Council, this advisory body shall also provide analysis on specific economic or budgetary issues. The Members of this advisory body shall be independent in the performance of their tasks.'[45]

In just one paragraph the Bank succeeds in exhibiting the entire spectrum of its ideological construct, taking it to an extreme, especially so in the context of European constitutional power structure. Yet, in the context of the Bank's Blueprint proposal, one ought to find these ideas somewhat less shocking, if not entirely predictable. These Amendments are i) a concoction of the Bank's adamant crusade against political discretion and rule flexibility; ii) a thematically-related climax manifest of distrust not only in political bodies such as the Council, but also of the administrative Commission; and iii) persevering trust in the redeeming qualities of a New Governance approach summed up in the superiority of 'independent expertise.' Although the text seems self-explanatory enough, lest we draw unsubstantiated conclusions of intent, let us yield to the ECB's candid confessional in the explanation provided to the two amendments. The Bank admits to 'consider[ing] that this advisory body would contribute to *compliance by the Council and the Commission* with their obligations under the Treaty and under the procedures addressed in the Commission proposals.'[46]

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[44] The former is an attempt to insert a recital to the same spirit as the article propagated by the latter and shall therefore be treated in conjunction.
[45] ECB Opinion Reg (EU) 1175/2011, Amendments 12 [emphasis added], almost verbatim covering the content of Amendment 5. [emphasis added]
[46] ECB Opinion Reg (EU) 1175/2011, Explanation to Amendment 5, as referred to by the explanation to Amendment 12 [emphasis added].

Could we extrapolate that the ECB perceives itself in light of the same infallible grandeur of independent expertise that it wishes to force upon other EU institutions? It is a body, which had fought tooth and nail – and continues to do so – 'in defence of its Treaty-mandated independence,'[47] but nevertheless demands oversight of Treaty level peer EU institutions. In the context of a transnational ordoliberal order of New Governance, the Bank seems to judge itself special by function and superior by form.

2. Regulation (EU) 1177/2011 | The Corrective Arm & Associated Enforcement Measures | Regulation (EU) 1173/2011

Should the EU establishment's best efforts and Member States' best intentions prove insufficient in deterring excessive deficits, the corrective arm of the SGP (Regulation (EC) 1466/97) was meant to ensure the procedural enforcement of the Maastricht criteria through the Excessive Deficit Procedure (EDP) instrument. This is done with a view to averting any risk to public finances sustainability or the EMU.[48] The procedure follows much of the same logic as the preventive arm, with monitoring and recommendations from the Commission at the discretion of the Council, which, in turn, is expected to advise the MS concerned to undertake corrective action.[49] The exercise is repeated with potential for intensified sanctions until the excessive deficit has been rectified. On the basis of Art 126(11) TFEU, Regulation (EC) 1467/97 also provided for a comprehensive list of punitive measures.[50]

2.1. Shortcomings

But, as the Commission attested in 2010, the first decade of SGP implementation proved difficult.[51] Even if triggered, EDP sanctions were found to apply too late into the process to provide any form of 'an effective deterrent, not least because the financial situation of the country concerned may have deteriorated so much as to make the threat of a fine less

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[47] CJEU (Court of Justice of the European Union) (2003) *Commission of the European Communities v. the European Central Bank*, Case C-11/00, Judgment of 10 July 2003.
[48] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 4.
[49] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, Section 2.
[50] These range from requiring a MS under EDP to provide additional information with regards to their issuance of bonds and securities; the decision to publicise the existence of the proceedings as a means of sanctioning the MS through what has more recently come to be embraced as the 'public shaming' approach; involving European Investment Bank lending policy towards the MS in concern; as well as the financial sanction of non-interest bearing deposits and outright fines as a measure of last resort. Art 126(11) TFEU.
[51] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 5.

credible at the very time when it should become real.'[52] This was a rather remarkable statement, acknowledging the establishment's full awareness of the additional harm that sanctions inflict on already ailing Member States. And yet, in the new era of post-crisis economic governance, sanctions were to be applied to any possible procedure, beginning earlier, in the hope they would amount to a sufficient guarantee for MS compliance before debt and deficit indicators could jeopardize the functioning of EMU and stability of the euro area. There was little consideration given that doing so may simply hasten the arrival of harder times.[53]

The SGP even struggled with implementing one of its founding criteria. As constituted with Art 126 TFEU, the original iteration of the EDP was always intended to examine and enforce compliance with budgetary discipline based on *both* debt and deficit criteria.[54] However, practice saw the debt criterion all but discarded, with the EDP focusing almost exclusively on deficits.[55] This was largely owed 'to the less straightforward nature of the debt threshold compared to the deficit, including the ambiguity of the notion of sufficiently diminishing pace of reduction and the greater impact on the debt ratio of variables outside the control of the government, notably inflation.'[56] Moreover, there seemed to have been somewhat of a conscious choice on the part of the powers that be, the Council and Commission alike, on altogether avoiding strong enforcement. This spared them from fighting a losing battle with a majority of Member States whose debt record at the time seemed beyond reprieve, as well as the associated bad optics of holding over half of the EU in contempt. But with the overwhelming events of the sovereign debt crisis, operationalising the debt criteria rose to primary importance because of the alleged causality between fiscal profligacy and crisis.

In fact, the entire SGP framework suffered from one particularly serious flaw – materialising the intent of the law ultimately depends on the Member States' political will to do unto others as they do not wish done upon themselves in the setting of the Council. The amount of discretion exercised by the political executive in avoiding strict application of the

[52] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 5.
[53] Ashoka Mody has argued this much in his *EuroTragedy, A Drama in Nine Acts* (OUP 2018). ______
[54] The rule came with mitigating circumstances, forestalling the EDP in cases where there is evidence for a 'substantial and continuous decline' or exceptional circumstances for the deficit (Art 126.2(a)) and 'sufficiently diminishing and approaching the reference value at a satisfactory pace' debt (Art 126.2(b)).
[55] The rule came with exceptions, forestalling the EDP in cases where there is evidence for a 'substantial and continuous decline' or exceptional circumstances for the deficit (Art 126.2(a)) and 'sufficiently diminishing and approaching the reference value at a satisfactory pace' debt (Art 126.2(b)).
[56] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 4.

EDP in no way contributed to implementation. Member States argued that the expectations laid down by the framework were rather unrealistic and too stringent, thereby putting them in a position to remedy said injustice through more or less ignoring the law. In 2003, this attitude resulted with the Council and Commission coming to loggerheads over EDP procedure involving France and Germany in case C-27/04 *Commission v Council*,[57] ultimately leading to a substantive amendment of the SGP by 2005.[58] The so-called 'flexibility' provisions introduced therein also drew much ire with the hindsight of crisis in 2010.[59]

Collectively, these perceived shortcomings set the stage for the Six Pack reforms of the SGP corrective arm, laid out in Reg (EU) 1177/2011 *on speeding up and clarifying the implementation of the excessive deficit procedure* (amending Regulation (EC) 1466/97) and Reg (EU) 1173/2011 *on the effective enforcement of budgetary surveillance in the euro area*, strengthening enforcement through additional procedure and financial sanctions, respectively. These retained the structure of the EDP as well as the flexibility amendments for procedural timing and derogations, first introduced with the 2005 legal intervention, in spite of professed intentions to the contrary. While the reforms sought to exert additional pressure on Member States, they could only do so for the eurozone within the limits of Art 136 TFEU, which is why they were formalised in a separate legislation for the purposes of legal clarity (Reg (EU) 1173/2011). The legislative process for SGP enforcement was not as contentious as that for its procedural precursor, likely counting on the long-established approach that a feeble preventive arm – as seemed to be intended – would be an unlikely trigger for the corrective, deeming the latter inconsequential. The regulations sought to i) operationalize a parity between the debt and deficit criteria, ii) optimise automaticity and remove discretion through voting procedures and iii) intensify sanctions, which would be graduated and start earlier.[60]

The crisis had finally provided the necessary incentive for reform, with the Commission going as far as to advocate for the naturally troubled relationship between law

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[57] C-27/04 *Commission v Council* [2004] ECR I-6649. This was probably the last time when the 'Big Two' in the EU sat on the same side of the fiscal rules debate, but economic conditions in Germany then were very different from what we have come to assume as the German miracle norm nowadays.

[58] The result came less than two years later at the European Council of 22-23 March 2005 with Regulations (EC) 1056/2005 (corrective) and 1055/2005 (preventive)

[59] See above, Chapter 1.

[60] In both purpose and form these are replicants of the reforms applied in the preventive arm, but they differ significantly in terms of severity. The legislative process for SGP enforcement was not as contentious as that for its procedural precursor, likely counting on the long-established approach that a feeble preventive arm – as seemed to be intended – would be an unlikely trigger for the corrective, deeming the latter inconsequential.

and exception. It claimed that the continued application of the SGP rulebook, *especially* in the context of the sovereign debt crisis, has actually 'contribut[ed] to anchoring expectations of its orderly resolution.'[61] The logic behind this notion cast budgetary discipline as a tool for signalling the markets, alleging Member States' *obligation* towards sound budgetary policies as directly related to (market) expectations of government solvency.[62]

2.2. Reformed Procedure | Corrective and Enforcement

The procedure is straightforward enough in following Art 126 TFEU. Should the Council, upon recommendation from the Commission, decide on the presence of an excessive deficit with Art 126.7 TFEU, it is to issue advice on corrective action to the Member State. With the provisions of Art 3.4a Reg (EU) 1177/2011, the latter is now expected to report on the measures it has undertaken to comply with the economic targets set out in the recommendation. Furthermore, in a classic crisis approach of aggravating circumstances in accordance with Member State misfortunes, the deadline for taking effective action on the recommendations from Art 126.7 could now be constrained to three, instead of six months, should the situation be found particularly troublesome (Art 3.4 Reg (EU) 1177/2011). Already with the decision that an excessive deficit exists (Art 126(6) TFEU) a Member State would be required to lodge a non-interest bearing deposit amounting to 0,2 percent of its GDP in the preceding year (Art 5.1 Reg (EU) 1173/2011). Before the crisis reforms, this type of sanction was envisioned as a last resort with the ultimate provisions of the EDP, once a Member State has failed to comply with a special notice under Art 126(9).

In the next round of back and forth disciplinary measures, the Council (upon recommendation from the Commission) considers whether the Member State has taken effective action, based off Member State public statements on policy and the report prepared in accordance with Art 126.7. Escalating enforcement measures, should the Member State be found in contempt (Art 126.8 TFEU), the Council can now demand a fine.[63] There follows a decision to give notice with a new recommendation to fix outstanding deficits, which in this particular case, may adopt the top-down approach of including specific measures on how to go about achieving the recommended budgetary goals (Art 126.9 TFEU, Art 5 (EU) Reg

[61] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 4.
[62] '[T]he obligation to correct excessive deficits contributes to anchoring the expectation that government solvency will be maintained.' Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 5.
[63] Amounting to 0,2 percent of the Member State's GDP in the preceding year (Reg 1173/2011 Art 6.1).

1177/2011). The MS is expected to prepare another report, which will then inform the decision on failure to comply, exhausting EDP procedure with Art 126.11 TFEU. Should it come to that, Art 7 Reg (EU) 1173/2011 provides that in the case of continued non-compliance sanctions could be furthered in line with the provisions of Art 126(11) TFEU stipulating the assortment of therein-allotted sanctions can be applied *and* also intensified.

In spite of all the best intentions for strengthening procedure, there are few novel measures, which increase automaticity and severity, that do not meet with flexibility arrangements, seemingly designed to balance them out. Regulation (EU) 1173/2011 introduced the possibility that 'on grounds of exceptional economic circumstances *or* following a reasoned request by the Member State concerned' the Commission may recommend to the Council to reduce the amount of the financial sanction imposed under either Articles 4.4 and 5.4. The Bank had objected vehemently, but unsuccessfully, arguing the procedure would thus lose automaticity.[64]

2.2.1. Surveillance Missions

Furthermore, with the introduced reforms, the Commission may decide to engage another enforcement instrument throughout the above procedure – surveillance missions. The corrective arm of the SGP makes ample use of those in an exact replica of the preventive arm's provisions – in the context of a 'permanent dialogue,' generally present and possibly intensified into 'enhanced-mode' – to be applied to the EDP.[65] In a supplementary function, EDP missions are also poised to affect the Council's evaluation of whether a Member State has taken effective action in response to an Art 126(9) TFEU notice. Mission-reports to be taken into consideration alongside those submitted by Member States and 'any other publicly announced decisions by the government of the Member State concerned.'[66]

2.2.2. RQMV

Both Regulations (EU) 1177/2011 and 1173/2011 provided for full reverse qualified majority voting (RQMV) throughout these procedures. The Council, 'as a rule,' was expected to follow through on any formal act of the Commission, with decisions deemed adopted *unless* a majority of Member States vote against the motion.[67] This guaranteed the procedure would

[64] In its amendments 2, 5, and 6; ECB Opinion Reg (EU) 1177/2011, Explanation to Amendments 5 and 6.
[65] EDP missions are outlined with the provisions or Art 10a.1 of Reg (EU) 1177/2011.
[66] Reg (EU) 1177/2011, Art 6.1.
[67] Reg 1177/2011, art 2a para 2 and Reg (EU) 1173/2011, Art 5(2) and 6(2) final

move a lot quicker, with the intergovernmental dominance prevalent until then, now off the table. Member States would have to work a lot harder to ensure deterring discipline, thus avoiding the Franco-German Council scenario of 2004.

2.2.3. Debt | Deficit

By 2010, encouraged by the crisis, the establishment would seek to reinforce the EDP by operationalizing a legal parity between debt and deficit,[68] with high levels of debt argued as 'a more serious threat to public finance sustainability than occasionally high deficits.'[69] Establishing the 60 percent GDP debt threshold had been crossed was straightforward enough with plenty of Member States in breach. The issue came down to reigning in provisions for mitigating circumstances, which was done through the simple introduction of a numerical benchmark meant to quantify the otherwise subjective 'sufficiently diminishing' rule. With Article 2(1a) of the final text, government debt over the threshold value would be tolerated only in cases where 'the differential with respect to the reference value has decreased over the previous three years at an average rate of one twentieth per year as a benchmark, based on changes over the last three years for which the data is available.'

2.2.4. |more| Flexibility

Ironically, this formalization of the debt criterion, as a fully operationalized norm of the EDP, raised issues of automaticity and discretion. The amended legislation would keep well-established flexibility criteria based on structural reform justifications, and specifically those pertaining to pension reform, which were in fact extended to apply as a derogation to the debt criterion on equal footing with the deficit.[70] Moreover, the numerical benchmark would not amount to a sole or automatic trigger for the EDP, with the Commission having to make use

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[68] In the summer of 2010 the Bank, the Commission, and the Task Force were in clear agreement on this issue.
[69] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 4.
[70] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 5; reflected in Reg (EU) 1177/2011 Art 2.5 final. The flexibility theme on the connection between structural reforms and budgetary rules has been a significant component of economic governance in the Union. In fact, the Commission's Communication on making the best use of flexibility within the SGP would become a guiding document to Member States on how to make use that specific provision and a guideline for navigating the new stricter rulebook. See: European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions and the European Investment Bank: Making The Best Use Of The Flexibility Within The Existing Rules Of The Stability And Growth Pact*, 13 January 2015, COM(2015) 12 final.

of ‘all relevant factors’ for analysing the existence of excessive deficit with its report on Art 126.3 TFEU.[71] Furthermore, debt and deficit were to be connected, somewhat balancing each other out, with below-threshold debt considered to an ameliorating factor increasing the flexibility to assessment in cases of excessive deficit.[72]

Unsurprisingly, the Bank found issue with this approach, unsuccessfully arguing that all relevant factors ought to be considered *only* when the government debt ratio is declining and that ‘any mitigating relevant factors should never lead to an assessment that a Member States has no excessive debt ratio where its debt ratio exceeds the reference value and in on an increasing path.’[73] These were unsuccessful interventions.

The ECB was also opposed to the newly-introduced additional flexibility, whereby the Commission considered a revised recommendation under Art 126(7)[74] and revised notice under Art 126(9)[75] in cases of ‘severe economic downturn of a general nature.’ The Bank objected on three separate instances, arguing such measures would increase leeway and should therefore be rejected,[76] as well as that ‘a need to expressly foresee the adoption of a revised recommendation [or notice]… is not apparent.’[77] The former objection is indeed much in keeping with ECB reform ideology. The latter, however, is striking if one considers the Commission was trying to procedurally address the potential for the same kind of crisis event, which had initiated this legislative reformation in the first place. Attempting to ensure breathing room for already troubled Member States is, thus, diametrically opposed to the Bank’s reform ideology of tightening constraints precisely when the going gets tough. At any rate, a compromise was reached between the two approaches. While the final legislation kept this derogation, it also conditioned it – revised recommendations based on severe economic downturns would be warranted only ‘provided that this does not endanger fiscal sustainability in the medium term.’[78]

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[71] As provided by Art 126(3) TFEU and specifically outlined in Art 2.3 of the regulation (final). In turn,these factors themselves were clarified ‘placing explicit emphasis on the fiscal variables that can be assumed to be under the direct control of the government, in particular expenditure,’ with the purpose of strengthening procedure in the early assessment of mitigating circumstances and effective action once EDP has been triggered. Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 6.

[72] Reg (EU) 1177/2011 Proposal, COM(2010) 522 final, Explanatory Memorandum, 5, Art 2.4.

[73] ECB Opinion Reg (EU) 1177/2011, Explanation to Amendment 2, para 3.

[74] Art 3.5 proposal and final)

[75] (Art 5.2 proposal and final)

[76] ECB Opinion Reg (EU) 1177/2011, Amendment 1.

[77] ECB Opinion Reg (EU) 1177/2011, Explanations to Amendments 3 and 5.

[78] Reg (EU) 1177/2011, Art 3.5 and 5.2 final.

2.3. Planning For the Future – Fines | ESM

The proposal on Reg (EU) 1177/2011 stipulated that collected revenue and accrued interest from the catalogue of new financial sanctions be allocated towards 'well-behaving' eurozone Member States, thus exploiting national self-interest and the rift between surplus and deficit states into potential for furthering peer pressure for the enforcement of rules.[79] The Bank successfully advocated that proceeds instead revert to the – at the time, still hypothetical – future permanent stability mechanism for crisis management (the ESM).

The idea was only slightly different in its capitalisation on the political context of the crisis, pinning creditor against debtor, as opposed to the Commission's surplus and deficit Member States. More importantly, however, it is indicative of the premeditated and coherent approach to economic governance reform with the legal anchoring between regular governance and crisis management which would come to define it. These are both founded on the dogmatic insistence on an interdependence between budgetary indiscipline and economic crises. The ECB did not miss the opportunity to reiterate this alleged lesson of the crisis in the accompanying explanation to the relevant amendments.[80]

Ultimately, the Bank prevailed with the centralisation of disciplinary revenue into the ESM becoming the standard throughout EU economic governance legislation after the reforms.[81]

3. Regulation (EU) 1173/2011 | Enhanced Statistics

Regulation (EU) 1173/2011 introduced another novelty, found nowhere in the legislative proposal itself, but much in line with the Blueprint theme of 'enhanced statistics.' It is an entirely new procedure, which, in spite of being unencumbered by ECB involvement, is worth analysing for the significant increase in delegated powers to the Commission.

The self-descriptively named Article 8 on *Sanctions Concerning the Manipulation of Statistics* introduces the possibility that Member States be financially sanctioned in the case they misrepresent statistical data on debt or deficit either 'intentionally or by serious

[79] Collected fines were intended to be distributed 'among Member States whose currency is the euro which do not have an excessive deficit… and which are not the subject of an excessive imbalance procedure.' Proposal for a Regulation of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, 29 September 2010, COM(2010) 524 final, Art 7 and Reg (EU) 1177/2011, Art 16.

[80] 'The reason for these fines to accrue to the ESM is that there is a link between non-compliance by Member States with their obligations under the Commission proposals and the need to establish an ESM.' Explanation in amendments 6 to Reg(EU)1177/2011 and 7 to Reg(EU)1173/2011

[81] Reg (EU) 1177/2011, Art 16 (proposal and final); Reg (EU) 1173/2011, Art 10 final (Art 7 proposal).

negligence' in the context of the SGP.[82] These are considerable fines, which could reach up to, but not exceed 0.2 percent of GDP. Should the Commission decide there are 'serious indications of the existence of facts liable to constitute such a misrepresentation' – with no clarity provided on what these indications might be, it 'may conduct *all* investigations necessary to establish the existence of the misrepresentations.'[83] The provision then continues with outstanding intrusiveness, stipulating that 'in order to carry out its tasks, the Commission may request the [MS] to provide information, and may conduct on-site inspections and accede to the accounts of all government entities at central, state, local and social-security level.' The Commission shall, however, 'fully respect the rights of defence of the MS concerned during the investigations,' and provide the latter with 'the opportunity of being heard' by commenting on any findings.[84]

Furthermore, the Commission is empowered to adopt delegated acts to completely shape the substance of the new procedure, including detailed 'criteria establishing the amount of the fine; rules concerning the procedures for the investigations, the associated measures and the reporting on the investigations;' and 'detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines.'[85]

But what does any of this mean?

The Commission may somehow come to suspect that a MS has made use of some creative accounting and thereby proceed with exercising its novel investigative powers, which it has itself set the rules and procedures for.[86] It may, in the course of its investigation, conduct a surveillance mission to the MS concerned and demand access to *all* public government accounts. Should it conclude there has in fact been a manipulation of statistics, it will recommend to the Council to adopt a decision to impose a fine, whose amount had been previously established by the Commission in its detailed rules on procedure. Any flexibility on the fines will be under the sole control of the CJEU to annul, reduce, or even increase the amount, with 'unlimited jurisdiction to review the decisions of the Council imposing fines.'[87]

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[82] For both the preventive and corrective procedures, as per Art 8.1 Reg (EU) 1173/2011.
[83] Art 8(3) Reg (EU) 1173/2011
[84] Art 8(3) Reg (EU) 1173/2011
[85] Article 8(4) Reg (EU) 1173/2011
[86] While recital 6 of the Commission's Delegated Decision (2012/678/EU) stipulates the decision to launch an investigation should be justified, the rest of the legislative document provides no details as to the grounds on which an investigation may be launched.
[87] (Art 8(5))

During this entire process, the Commission will, of course, provide ample opportunity for defence of the accused – just so far as it is within the limits it had itself previously set.[88]

The possibilities offered by Article 8 Reg (EU) 1173/2011 seem boundless with a process where the Commission is positioned as judge, jury, and executioner. It is this vicious circle, which Spain sought to contest before the CJEU after it became the first MS subject to the full application of the statistical misrepresentation procedure. Starting with the 2012 Semester cycle, as subject to EDP, Spain had a significant amount of reporting requirements. In the process of enhanced surveillance the Commission noted inconsistencies in the reported deficit data (specifically arising from the healthcare sector of the Autonomous Community of Valencia), which lead to no less than four country missions.[89] It was established that the government had not made the necessary corrections, even when signalled of the discrepancy by the regional audit office on a number of separate occasions. Thus, inferring negligence, the Commission proposed that Council impose a fine on the Spanish government in accordance with Art 8(1) Reg (EU) 1173/2011. By 20 July 2015 Spain was fined 18.93 million euro; by 29 September 2015 it brought an action for annulment of before the CJEU.

Spain alleged a whole raft of infringements of proper administrative procedure ranging from the impartiality of the Commission given the composition of its auditing staff to the proportionality of the fine.[90] On the substance of the complaints, the Court reverted to the business-as-usual general principles of good administration and deferential standards of review it employs for any EU administrative action, making no distinction between Member States or private individuals. On the 'nature of the beast', however, the Court had 'to venture into uncharted waters.'[91] Had the decision to impose the fine been classified as a regular 'implementing measure' under Article 291 TFEU, the Court of Justice would have had to refer the case to the General Court. The Court would have none of that, though. The exercise of conferred powers under Reg (EU) 1173/2011, it held, falls outside the constitutional structure of delegated lawmaking and implementing measures under the Treaty and should be viewed

[88] This delegation of powers, Article 11 of Reg (EU) 1173/2011, is conferred upon the Commission for three years subject to implicit extension for consecutive three-year periods, unless the European Parliament of the Council raise any objections no later than the last three months before the expiry of each period (Art 11(2)). These powers, further, may be revoked at any time by the Parliament and Council (Art 11(3)).
[89] (May, June, September 2012 and September 2013).
[90] 'First, Spain claims that the Commission disregarded Spain's rights of defence during its investigation… Secondly, Spain submits that its right to good administration has been infringed… Thirdly, Spain takes the view that the material conditions for imposing a fine are not fulfilled… Fourthly, Spain objects to the calculation of the fine imposed.' Case C-521/15, AG Opinion, para 39.
[91] CJEU (Court of Justice of the European Union) (2017). *Kingdom of Spain v Council of the European Union*, Case C-521/15, Opinion of Advocate General Kokott delivered on 1 June 2017, para 6.

as a *sui generis* enforcement measure. The powers should be understood to be justified not by the need to ensure uniform implementation of the Regulation, but 'by pursuit of an objective consisting in deterring the Member States from misrepresenting data that is essential for the discharge of the responsibilities which Articles 121 and 126 confer on the Council so far as concerns the coordination and surveillance of the Member States' economic and budgetary policies.'[92] The judgment is a classic of European crisis law: constitutional aberrations are cushioned and justified by the application of the regular tropes of principles of good administration. But more importantly perhaps, it is a prime example of the bottomless pit of legal opportunism that Articles 121 and 126 TFEU have become in enforcing MS compliance with budgetary discipline.

Article 8 on the manipulation of statistics is, indeed, a remarkable and significant addition to European economic governance legislation, all the more so because of its seemingly random positioning in a most unassuming legal space in a most unassuming legal manner. Through these provisions, the Commission (or Eurostat) come to serve as supreme – and direct – auditor of national accounting bodies, completely bypassing the sovereign jurisdiction of national governments over their own institutions. This is a significant empowerment of the Commission and overextension of supranational oversight, which may not qualify as a formal transfer of powers, but most definitely constraints the exercise of sovereign powers through the severity of its intrusion and serious procedural and financial consequences for Member States. Moreover, the Commission has proved itself more than willing to activate this instrument. Besides Spain, so far, Austria has also been the subject of an investigation, which found government authorities there guilty.[93] There is no reason to think this is not a trend.

It is a stunning example of fulfilling the intent of the Blueprint. The Bank and the Task Force had entertained the possibility of proceduralizing the principle of good statistics with the endowment of investigative powers to Eurostat.[94] The goal had been to get Eurostat as

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[92] CJEU (Court of Justice of the European Union) (2017). *Kingdom of Spain v Council of the European Union*, Case C-521/15, Judgment of 20 December 2017, para 53.

[93] COM(2017) 94 final, Brussels, 22.2.2017, Report from the Commission on the investigation related to the manipulation of statistics in Austria as referred to in Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area (Commission Decision of 3 May 2016) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0094&from=EN

[94] See: ECB, Note (June 2010) I.3(c); Strengthening Economic Governance in the EU, Report of the Task Force to the European Council, Brussels, 21 October 2010, para 31.; European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions:

close as possible to an independent agency in order to ensure the type of technocratic reliance that the Bank could put its trust into. And, indeed, the Commission's Delegated Decision, implementing the details of its own auditing powers, makes ample use of Eurostat for the conduct of its investigations, but the ultimate decisions to move forward with procedure remain with the Commission executive.[95]

4. Conclusion

The crisis remodelling of the European supervisory framework for budgetary governance demonstrated that the ECB was not only a very opinionated and active participant in the legislative process, but also – an effective one.

Whether it was through targeted interventions during the final stages of legislation, standing alone on ideas such as surveillance missions and re-routing financial sanctions' revenue to the ESM, or procedural reforms everyone could agree on,[96] all things considered, the ECB succeeded in instituting its vision for fiscal governance conducive to price and financial stability throughout the overhaul of the SGP.[97]

And yet, it is unsurprising that one of the few contentious points of reform would see the Bank clash – and lose to – political interests. The legislative evidence reviewed in this chapter indicates that even as Member States sought means to increase the pressure on profligate peers by intensifying the severity of financial and procedural sanctions, they nevertheless wanted to retain control over exercising these instruments.[98] To that end, and in spite of the Bank's adamant objections, none of the flexibility introduced with the 2005 SGP

Enhancing economic policy coordination for stability, growth and jobs, 30 June 2010, COM(2010) 367/2, 7.

[95] Art 2.2, Commission Delegated Decision of 29 June 2012 on investigations and fines related to the manipulation of statistics as referred to in Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area (2012/678/EU), based on Art 8.4 Reg (EU) 1173/2011.

[96] Including the increased use of RQMV and trend towards quantifying trigger criteria; the deepening and expansion of financial and non-financial sanctions, including steeper fines coming earlier in the process; more invasive and demanding procedures, such as self-reporting requirements; and reputational sanctions, such as the publicization of reports; and the operationalisation of the debt criterion.

[97] There are, of course, the outliers on this spectrum of reform success, where – as we have seen – reforms have been solidified in the final version of legislations without being present in the proposals. The institutionalisation of enhanced statistics into full-blown Commission/Eurostat oversight is such a noteworthy case. The function of what the ECB and the Task Force had been advocating during the Blueprint negotiations was ultimately fulfilled, but done so in an alternative manner without the possibility for further input during the formal legislative process.

[98] It was, however, a compromised win, because the voting reforms (RQMV) and the Commission's right to initiative ultimately deemed these as shared 'competences' between the Commission and intergovernmental realm. Nevertheless, they remain somewhat of a discretionary tool.

reforms was walked back. Moreover, flexibility provisions were actually expanded on most new procedures and sanctions. The ghost of discretion – and associated intergovernmental control – remained fine and well. This was, for all intents and purposes, an affront to the Bank, especially in consideration of the shared enthusiasm professed during the Blueprint period.

Such instances give us a clear view of the reform priorities of the ECB – where it stood and that, sometimes, it had to stand alone. Moreover, it goes to show that the alignment of interests with overzealous Member States during the Great Reformation had its own natural limits with each party attempting to retain control of the (economic, legal, and power) situation.

With its limited mandate, especially in matters of fiscal governance, the ECB put its trust in supranational bodies and, in fact, any body which could be placed in a hierarchical relationship with the national budgetary realm. On the surface of things, these reforms greatly empowered such institutions (the Council included). But their more significant consequence was disempowering Member States and assuming further control of budgetary competences without the formal assimilation of those in the EU realm. In that sense, the ECB truly was an 'equal opportunity' legislator – without concern for who might be at the receiving end.

CHAPTER 4

THE COMPETITIVENESS AND MACROECONOMIC SURVEILLANCE FRAMEWORK

The following chapter will address a true novelty of European economic governance, representing a move beyond the traditional obsession with fiscal deficits and government debt[1] – the macroeconomic and competitiveness surveillance framework proceduralised through the Macroeconomic Imbalances Procedure (MIP).

The idea was not entirely new, i.e. completely crisis-reactionary. In essence, the MIP is an attempt at formalizing New Governance practices, previously attempted through the Open Method of Coordination (OMC).[2] As it stood, macroeconomic surveillance at the time was merely a monitoring instrument, involving a fairly limited 'a) informal exchange of views taking a workshop format in the Eurogroup; b) a competitiveness review based on a Commission surveillance report agreed by the Eurogroup in July 2008; [and] c) country surveillance under the planned Europe 2020 strategy establishing Broad Economic Policy Guidelines (BEPGs).'[3]

Converting this soft law practice into an outright corrective instrument was a definite result of the circumstances, as the troubling trends across Member States exposed by the crisis helped usher along the 'understanding that a currency union requires, above all, coordination of price and wage evolution.'[4] Moreover, housing, building, and investment bubbles, to name but a few, had left Member States overly exposed and vulnerable to whims of the financial markets – underestimating risk in good times and overcompensating in bad. Had there been a proper framework capable of capturing *and* correcting such troublesome

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[1] H. Flassbeck and C. Lapavitsas, *Against the Troika: Crisis and Austerity in the Eurozone* (Verso, 2015), Ch 2.

[2] This pedigree would come to permeate throughout its legal fabric. In support, see M Dawson, 'New Governance in the EU After the Euro Crisis: Retired or Reborn?', in M. Cremona and C. Kilpatrick (eds.), *EU Legal Acts: Challenges and Transformations* (Oxford University Press 2018).

[3] ECB, Note (June 2010) 8/14.

[4] The idea had been brewing in the background for some time before the crisis: 'The Commission made the case for deeper and broader economic coordination in the euro area repeatedly in the past, including in the 2009 Annual Statement on the Euro Area and the 2008 Communication on "EMU@10: successes and challenges after 10 years of Economic and Monetary Union". Proposal for a Regulation of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances, 29 September 2010, COM(2010) 527 final, Explanatory Memorandum, FN 2, 2.

trends, the thinking went, the EMU would have been better positioned to withstand the shocks of panicked capital that ultimately led to the sovereign debt crisis.

In fact, the Commission justified the comprehensive surveillance of the MIP by establishing a direct connection to EU-wide disturbances. The envisioned spill-overs included general cross-border repercussions of national economic policies in the context of highly interdependent states, unaddressed imbalances inhibiting the operations of the EMU, and severe imbalances with the alleged potential of leading to all-out crises (financial, debt, market, etc.).[5]

These foundations made for a highly intrusive instrument, providing unprecedented legal access into governance areas previously reserved to the economic prerogatives of Member States – basically, anything outside the reach of the SGP was now to be governed under the MIP. As such, this micromanagement of macroeconomic policies towards a certain standard of EMU-conducive competitiveness completes the European Semester, operating in parallel to and in conjunction with the SGP's budgetary surveillance. But the relationship between these two tracks raises a certain amount of legal issues due to the occasional lack of clarity in procedure and, more often, because of the intentional interchange of monitoring and corrective instruments in between. Furthermore, the MIP framework exhibits additional systemic issues, such as an adjustment asymmetry and a bias towards proceduralisation caused by a defective relationship between recommendations and imbalances resolution.

Not without its peculiarities, the New Governance bend towards a premeditated use of vague language or such that explicitly transfers ownership away from the source of authority in the regulation, i.e. the EU, and the wide net of supranational scrutiny, have led to misguided hopeful interpretations of the framework as a 'socialisation' of the Semester.[6] It is not a straightforward relationship, not the least due to the fact that these matters indeed pertain to exclusive Member State competences, formally outside the hard law legal reach of

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[5] On the rationale behind the MIP, the Commission's Compendium selects three main reasons: 'First, the economic policies of highly integrated countries are a matter of common concern in light of deep trade and financial links; this gives origin to potential spillovers and cross-border repercussions... Second, if left unaddressed, macroeconomic imbalances may compromise the proper functioning of the monetary union and the common policies and institutions of the Union....Third, the emergence of major macroeconomic imbalances in one country (e.g., external debt, household debt, corporate debt) may lead to the insolvency of large financial institutions, sovereign debt crises, or difficulties in maintaining exchange rate arrangements, potentially leading to a loss of market access and the need for triggering financial assistance.' European Commission, Directorate-General for Economic and Financial Affairs, 'The Macroeconomic Imbalance Procedure, Rationale, Process, Application: A Compendium' (2016) 039, 18.

[6] Phrase coined by Zeitlin and Vanhercke, 'Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond', (2018) 25 *Journal of European Public Policy* 149.

the MIP. Lastly, the MIP utilises a special toolkit for the enforcement of compliance through the financial sanction of legally non-mandatory recommendations and a conditionality attachment to European Structural Investment Funds (ESI Funds).

The following pages provide an in-depth analysis of these themes, the content and legislative procedure behind the introduction of the MIP with Regulation (EU) 1176/2011 *on the prevention and correction of macroeconomic imbalances* and Regulation (EU) 1174/2011 *on enforcement measures to correct excessive macroeconomic imbalances in the euro area.*[7] The Blueprint brainstorm behind macroeconomic governance benefited from general agreement between the institutional players, which nonetheless, did not prevent the ECB from making a number of consequential interventions in order to better align the framework with its reform agenda.

The chapter will conclude with a summary of the Bank's involvement and the general takeaways on crisis-reform of economic governance in the EU.

1. The MIP – Reg (EU) 1176/2011 | Reg (EU) 1174/2011

1.1. Scope |Art 1-2

The contents of Reg (EU) 1176/2011 establishes a procedure for the *detection of imbalances*, which are defined as 'any *trend* giving rise to macroeconomic developments which are adversely affecting, or have the *potential* adversely to affect, the proper functioning of the economy of a [Member State] of the [EMU], or of the Union as a whole.'[8] This 'preventive' iteration functions more like an *enhancement* mechanism for convergence towards achieving and maintaining a dynamic internal market in the interest 'of the proper and smooth functioning of the [EMU].'[9] It culminates in the corrective actions advised with the Country Specific Recommendations (CSRs) in the cycle of the Semester.[10]

On a second track, Reg (EU) 1176/2011 is concerned with the *prevention and correction of excessive imbalances*, identified as 'severe imbalances, including imbalances

[7] The work will also make use of the proposals for regulations establishing the MIP (COM(2010) 527 and COM(2010) 525), the ECB's opinions thereon (contained in the Six Pack Opinion (CON/2011/13)), various secondary sources, amongst which, prominently, the Commission's Compendium Guide to the MIP, which it published as a clarification on the application of the MIP since (European Commission, Directorate-General for Economic and Financial Affairs, 'The Macroeconomic Imbalance Procedure, Rationale, Process, Application: A Compendium' (2016) 039).
[8] Art 2(1), Reg (EU) 1176/2011
[9] Reg (EU) 1176/2011, Recital 3.
[10] As per Art 6, Reg (EU) 1176/2011

that jeopardise or *risk* jeopardising the proper functioning of the [EMU].'[11] This track leads to the Excessive Imbalances Procedure (EIP) and associated corrective measures, which factor into the crisis reforms of EU economic governance in a rather significant manner, as will become evident later on in the study.[12]

Yet, even this highly subjective formulation was not quite enough for the ECB, which had originally intended the Macroeconomic *Imbalances* Procedure to be a Macroeconomic *Vulnerabilities* Procedure.[13] This line of argument seemed specifically designed to be a wide-cast net, capable of turning the mere possibility of risk – however those are defined – into a trigger.[14] It was a peculiar move for a body concerned with increasing automaticity and removing discretion, uncharacteristic and all the more-so undoubtedly deliberate.

As will be recalled from Chapter 2, the 'vulnerabilities' idea did not fare well during the early planning stages of reform – the Commission ignored it entirely, the President's Task Force resigned to no more than an acknowledgement. Thereafter, the proposal for Reg (EU) 1176/2011 did not even mention it. The Bank was not impressed. The total of 26 proposed amendments to the legislative proposal contain 44 revisions, 28 of which attempt to add 'vulnerabilities' to any mention of a procedure starting with the identification of macroeconomic imbalances. The ECB provided an identical explanation for all of its 28 interventions:

> 'The preventive nature of the procedure would be enhanced by means of the inclusion of the expression 'vulnerabilities' in addition to that of 'imbalances', *given that there will be a number of situations that a sound macroeconomic governance would need to cover within this procedure but which may not entirely fall within the current understanding of the term 'imbalances'.*'[15]

The amendments were rejected in the final legislation, perhaps with good cause. Vulnerabilities were defined as 'situations of possible [MS] difficulty that sound

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[11] Art 2(2), Reg (EU) 1176/2011
[12] Procedure for EIP laid out in Chapter III, Reg (EU) 2276/2011; for more detail on developments see review of Two Pack Regulation (EU) 472/2013 in Chapter 4.
[13] See: Chapter 2.
[14] As the ECB explains, '[t]he inclusion of the actual situations to be covered by the procedure brings clarity and legal certainty to the procedure. The *risk* that any of these situations *may* arise should be a triggering factor of the procedure.' European Central Bank, *Drafting proposals regarding the proposal for a regulation of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances (COM(2010) 527),* Annex, Opinion on economic governance reform in the European Union (CON/2011/13), 16 February 2011, Amendment 16 to Art 2 [emphasis added].
[15] ECB Opinion Reg (EU) 1176/2011, Explanation to Amendment 1 [emphasis added].

macroeconomic surveillance of [EMU] would reasonably cover.'[16] A Macroeconomic Imbalances *and Vulnerabilities* Procedure designed in this manner would have resulted in a significant expansion of the legislation's reach into any and all MS policy deemed 'at risk of risk.' Furthermore, such a subjective normative base would have made for an even more unpredictable – therefore, inept and likely nonjusticiable – law.

The MIP framework simply did not need include 'vulnerabilities' to excel at the institutionalisation of the crisis-borne risk-prevention approach, wherein risk features as a procedural trigger in both iterations.[17] It is incredibly intrusive based on a 'sufficiently broad definition' of imbalances, so as to be able to apply the scrutiny of the instrument across the board on national policies ranging from current account imbalances and housing bubbles to welfare systems, education, healthcare, and labour law.[18]

1.2. Alert Mechanism | Art 3

Both these tracks of the MIP follow from the same initiation procedure found with Articles 3 through 5 of Reg (EU) 1176/2011 – the basic structure being i) screening, ii) identification and analysis, and iii) recommendations, monitoring and enforcement, the latter splitting into a preventive and corrective track.[19] The process begins with an Alert Mechanism Report (AMR) issued by the Commission as an annex to the Annual Growth Survey (AGS) in the fall, initiating the Semester. The AMR contains 'a qualitative economic and financial assessment based on a scoreboard with a set of indicators the values of which are compared to their indicative thresholds' (Art 3.1). It is on the basis of this report and within it that the Commission identifies Member States that may be affected or at risk of imbalances.

The regulation, however, provides that the indicator thresholds would not amount to automatic triggering of the procedure, stipulating instead a significant amount of discretion for the Commission in drawing conclusions from its findings. This approach is a significant divergence from the ECB's reform agenda and general aversion to flexibility, which sees the Commission's Blueprint intentions come to fruition at the expense of the more automated

[16] ECB Opinion Reg (EU) 1176/2011, Amendment 16.
[17] In fact, the preventive imbalances track entertains a double conjecture, whereby an imbalance is simply a trend hypothetically identified as a potential cause of future problems. Moreover, the effects of macroeconomic imbalances are considered vis a vis a much wider background for intervention – including national and the Union economies.
[18] European Commission, MIP Compendium (2016), 15-16.
[19] European Commission, MIP Compendium (2016), Infograph p.22.

and streamlined policy advocated by the Bank.[20] Nonetheless, the MIP remains a highly subjective procedure in spite of its technocratic numerical foundations with the scoreboard. The irony is that the soft-law flexibility introduced into the reading of the scoreboard seems designed to offset the externalities of proceduralizing soft law, 'best practices,' New Governance-type indicators into hard law, towards some form of acceptable political balance.

The AMR is put up for discussion to the European Parliament, the Council, and the Economic and Social Committee as a means of ensuring political ownership and extending legitimacy. As a general rule, the Council is expected to endorse the AMR and invite Member States to take the contents into consideration when preparing their Stability and Convergence programmes (SCPs) and National Reform Programmes (NRPs).[21] Meanwhile, the Commission moves on to prepare in-depth reviews (IDRs) of the Member States it has shortlisted in the AMR with the explicit purpose of establishing the existence and severity of potential imbalances (Art 5).

1.3. Surplus | Deficit

All imbalances, however, are not equal before the law. Importantly, as per Art 3.2 of the Regulation, current account deficits and surpluses are scrutinised against differing thresholds for legal action – at -4 percent and +6 percent, respectively.[22] This provision is a palpable reminder of the underlying bias running through EU economic governance after the crisis, wherein the establishment has consistently applied a double standard to judging normative outliers on opposite ends of the fiscal health spectrum. The SGP actually encourages surpluses with a requirement of a balanced or in surplus budgetary position[23] and the half-hearted surplus limit imposed by the MIP is but a concession on the original intent of the regulation, to a great extent – courtesy of the ECB.[24]

When planning for future macroeconomic governance during the Blueprint, the ECB did not judge surpluses as a troubling indicator and did not foresee the opening of MIP for surpluses, expressly noting that surplus surveillance shall remain within the 'light regular

[20] On the Scoreboard ECB, Note (June 2010) 9/14. See generally: Chapter 2, Blueprint.
[21] Which, at this point in the process, comprises of an assorted review of macroeconomic conditions across the Union with limited preliminary information on Member States singled out for potential imbalances.
[22] The thresholds are set out in the indicator scoreboard.
[23] Originally the approach to MTOs and eventually institutionalised as the – very German – 'golden rule' with the TSCG and Reg (EU) 473/2013.
[24] Unsurprisingly, Germany is said to have been more than unimpressed and vehemently opposed to any possibility of the framework encompassing the correction of surpluses.

surveillance under the Europe 2020' based on NRPs.[25] Nevertheless, while the proposal for regulation did not even mention the term 'surpluses,' the provisions on the AMR stipulated that surveillance ought to indicate 'whether the crossing of *lower or upper thresholds* in one or more Member States signifies the possible emergence of imbalances.'[26] The ECB would have none of it, attempting to edit out any possibility for symmetrical adjustment, including through a highly detailed definition of imbalances designed to target deficits only.[27] While the final regulation attains the lower and upper bounds for indicators, it concedes on a compromise – surpluses will be assessed, but this may be done in a differing manner from that for deficits.[28]

Moreover, while the Commission has theoretically defended the review of surpluses and indeed launched the preventive MIP based on surplus imbalances,[29] the procedure shows not only for weak implementation effects,[30] but – more disturbingly – for weak resolve on the content of recommendations. In their review of Germany's 2014 surplus-imbalance in-depth report (IDR), Flassbeck and Lapavitsas attribute this weakness to the Commission largely sharing into the same theoretical bias that has come to underpin European economic governance since the crisis – a dogmatic belief in puritan free-market economics, which renders it systemically blind to certain underlying economic conditions.[31]

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[25] ECB, Note (June 2010) 9/14.
[26] Proposal Art 4.2 [emphasis added]
[27] Amendment 18.2, 19.2, and Amendment 16, COM (2010) 527 on Reg (EU) 1176/2011
[28] Lower and upper threshold levels are moved to Art 4.4 in the final Reg (EU) 1176/2011..
[29] The Commission defends the review of surpluses, arguing they might indicate sub-optimal investment and reduced growth potential, higher risks of disorderly rebalancing, reduced room for correcting existing external imbalances or for deleveraging in the presence of high internal debt, as well as issues for trade partners, since surpluses are the counterpart of deficits somewhere else. (MIP Compendium Compendium Box 3.4 page 49) The Surplus MIP has been launched for The Netherlands, Luxembourg, and Germany. For a succinct and useful breakdown of the procedure, concerning surplus countries, see: D Gros, M Busse, 'The Macroeconomic Imbalance Procedure and Germany: When is a current account surplus an 'imbalance'?' CEPS Policy Brief No. 301, 13 November 2013
[30] In support of weak effects in implementations, see generally: Valerie D'Erman, Jörg Haas, Daniel F. Schulz, Amy Verdun, Measuring Economic Reform Recommendations under the European Semester: 'One Size Fits All' or Tailoring to Member States?, JCER Vol 15 No 2 (2019): Special Issue. Accessed 8 March 2020: https://www.jcer.net/index.php/jcer/article/view/999/839; M. Hallerberg et al., 'On the Effectiveness and Legitimacy of EU Economic Policies', Bruegel Policy Brief (2012), 5. Accessed 8 March 2020: https://www.bruegel.org/wp-content/uploads/imported/publications/pb_2012-04_final.pdf
[31] In this regard, the German experience is a telling case, if also for the most obvious irony that the 'golden rule' is a quintessentially German contribution to political economy of the Union. In a critical take on the manner in which the Commission has treated this sensitive issue with Germany, Flassbeck and Lapavitsas review the country's 2014 IDR, pointing to the Commission's confused struggle to identify the economic reasons behind these imbalances, while at the very same time point to 'the saving and investment behaviour of domestic economic agents.' As the authors put it: 'The Commission has found an elegant way of saying precisely nothing.' H. Flassbeck and C. Lapavitsas, above n 1, in particular chapter 3, at 124-5.

1.4. Scoreboard | Art 4

The scoreboard of macroeconomic and macrofinancial indicators – the normative compass of the MIP, therefore comes with lower and upper, eurozone and non-eurozone indicative threshold levels, designed to alert towards imbalances. The underlying purpose to this exercise in technocracy is the legally mandated promotion of a particular version of competitiveness across the Union.[32]

The scoreboard indicators are concentrated in a number of areas, namely: external sustainability, trade performance and competitiveness, private sector indebtness, government debt, financial sector, housing and mortgage markets, employment and social developments.[33] In 2015, employment and social variables, which had been previously added as auxiliary indicators, rose to the ranks of headline indicator.[34] Such developments have been hailed as a step towards the socialisation of the MIP and, by extension, the Semester, but the reality is a far more complicated function of the legal interactions between economic and social matters.[35] The later discussion on Country Specific Recommendations (CSRs) will address this issue in more depth.

At any rate, while the discussion on the scoreboard is highly technical and best left to other fields of academic endeavour, a normative note is still warranted. The choice of indicators – of macroeconomic policy rights and wrongs in the Union – are premised upon a certain understanding of optimal levels of efficiency needed for the smooth functioning of the EMU.[36] In the case of the MIP scoreboard, one such prevalent ideology is offered by labour

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[32] Both the choice of indicators and thresholds are expected to be competitiveness-conducive (Art 4.4, Reg 1176/2011).

[33] The initial scoreboard comprised of ten headline and nineteen auxiliary indicators, which had been put in place through discussion in Economic Policy Committee
(EPC), which the ECB is part of, and the Lisbon Methodology (LIME) Working Group. While the Parliament and Council provided opinions, the Commission's Compendium admits those were general endorsements of the original proposal. When a financial sector indicator was added in 2012, the ESRB had to be consulted as per Art 4.5 of Reg 1176/2011. See, for more detail: European Commission, MIP Compendium (2016) Section: 3.3.1.1..

[34] These developments will be contextualized in the section on the Socialization of the Semester, ___.

[35] Institutional opinion on these matters is also split. While the Commission cast these developments as a step in the socialisation of the MIP, ECOFIN Council begged to differ. With little nuance to its opinion on the matter, the 15 January 2016 conclusions on the AMR 'expressed concern' and 'underlin[ed] that social and labour market indicators are not relevant for identifying macro-financial risks and developments in these indicators cannot trigger steps in the MIP process.' European Commission, MIP Compendium (2016) 38.; ECOFIN Council, in its 15 January 2016 conclusions on the AMR, cited in European Commission, MIP Compendium (2016) 38.

[36] See, for instance, the updated list of headline indicators in Eurostat's 'The Macroeconomic Imbalance Procedure (MIP) introduced,' Accessed 5 March 2020: https://ec.europa.eu/eurostat/statistics-explained/index.php/The_Macroeconomic_Imbalance_Procedure_%28MIP%29_introduced#The_MIP_indicators

market theory with its campaign for flexible markets and improved competitiveness – a race to the bottom for wages and labour rights protections.[37] So, it is worth remembering that, as with any normative framework, procedures emanating from the scoreboard unavoidably amplify and play out as a function of any bias to the primary constituent rules therein.[38] In this sense, the MIP develops and enforces a strong foundation of market rationality in its take on competitiveness.

1.5.. In-Depth Reports |IDRs| Art 5

In any case, the appraisal borne out of the AMR early screening scoreboard leads to the compilation of in-depth reports (IDRs) for countries considered at risk of imbalances. Moreover, IDRs may be prepared without a trigger from the legal framework, in the event of exceptional economic circumstances, upon the exclusive discretion of the Commission.

In order to best ascertain the situation in Member States under review, the Commission is to undertake surveillance missions with the participation of the ECB – upon invitation – where a eurozone or ERM-II Member State is concerned. This is a significant provision of the MIP, which is the only surveillance framework throughout EU economic governance reform to introduce mandatory missions so early on in the process. To be clear, these are instruments borne of the crisis and previously employed only in severe cases in states in receipt of financial aid, now instituted as part of the regular preventive surveillance of the European Semester with a very high probability of utilisation.

The provision came about as a consequential intervention of the ECB during the legislative process. The proposal for regulation started with surveillance missions to be carried out only once the MIP enters its most intensified stage with the EIP.[39] This resulted

[37] This is especially true in the context of a search for policies supporting the achievement of the Union's objectives for growth and employment.

[38] A case in point may be the Integrated Guidelines for Growth and Jobs (IGs), where one need not look any further than the Commission's oxymoronic 'flexicurity' strategy, meant to somehow simultaneously enhance 'flexibility *and* security in the labour market. It attempts to reconcile employers' need for a flexible workforce with workers' need for security – confidence that they will not face long periods of unemployment.' The policies borne of such considerations see the Commission advise Member States that new mothers' tax breaks or maternity benefits be cut to an 'optimal' minimum, so as to encourage females re-appropriating their roles as contributors to the economy, rather than mothers. Or, on another instance, designate persistent poverty as just bad for the economy, 'creat[ing] more inequality, which can lead to long term loss of economic productivity from whole groups of society and hamper inclusive and sustainable economic growth.' See: European Commission, Employment, Social Affairs & Inclusion, Accessed March 5 2020: https://ec.europa.eu/social/main.jsp?catId=102&langId=en; Eurostat, Smarter, greener, more inclusive? Indicators To Support The Europe 2020 Strategy (Statistical Book, 2016) 24, 34, 139.

[39] Albeit with a certain amount of confusion, seeing as the recitals of the regulation.

in a total of three separate stages in the MIP wherein a mission might be carried out, nonetheless with the involvement of the ECB upon the Commission's discretion.[40]

While Reg (EU) 1176/2011 featured surveillance missions since the original legislative proposal, a couple of related developments must be noted. The proposal itself had an unclear relationship with missions, providing for their use in both preventive and corrective arms of the procedure in the explanatory memorandum and recitals, but refusing to commit in the substantive provisions with a notable omission from Art 5 (proposal). Furthermore, these were never intended to include the participation of the ECB. The Bank, naturally, sought to resolve these restrictions – confirming the use of surveillance missions for IDRs and inserting itself into those.[41]

Next, in the framework of the Semester, Member States are expected to outline their budgetary policy objectives within Stability and Convergence programmes (SCPs) and structural reform plans in National Reform Programmes (NRPs). It is the latter of the two instruments that has been directly coupled to the macroeconomic and competitiveness guidance issued by the Commission with the AMR. NRPs present a chance for Member States to take Commission criticisms on board early on as a deterrent to the potential intensification of the MIP.[42]

1.6. IDR Outcomes | Art 5

Should an IDR have identified *imbalances* (as per Art 2.1) – which would not be hard to do – the Council, on a recommendation from the Commission, *may* address recommendations to the MS in question as per Art 121(2) TFEU procedure.[43] This, however, is done under the 'comply or explain' approach and under the circumstances of severe disparities in the technical abilities between the two institutions, so as the Council's autonomy in the matter counts for little real effect, besides political ownership.[44] These recommendations become

[40] ECB Amendment 20, Art 5.1, Art 9.3, Art 13 Reg (EU) 1176/2011.
[41] In Amendments 20 and 24 of its opinion on the legislative proposal.
[42] Furthermore, because of the legislative allowance for deviations from budgetary criteria due to structural reforms, this point in the procedure is also a chance to avoid SGP action.
[43] Art 6, Reg (EU) 1176/2011.
[44] Although there is no RQMV involved, the sheer expectation that a Council committee may be a match for the expert and statistical fire-power of the Commission as to be able to carry out a comprehensive review in order to potentially substantiate a reasonable disagreement on recommendations borders on the absurd and makes a mockery out of the political ownership of the process.

part of the regular Semester surveillance framework in the spring, part of the Country Specific Recommendations (CSRs), alongside the SGP's preventive arm.[45]

CSRs are the end of the line for the preventive framework of the MIP. They are to be monitored, reviewed and – where necessary – adjusted, annually through the Semester in an identical manner both MIP- and SGP-based recommendations. This is achieved through 'regular contact with policy authorities – including by means of missions and bilateral meetings in Brussels between representatives of Member States concerned and Commission services' country teams.'[46]

This is, however, only the official story, as far as the provisions of Reg (EU) 1176/2011 are concerned. The practical application of the MIP has seen the development of an array of new – and legally unforeseen – procedures (to be addressed at the end of this chapter), among them the 'specific monitoring' arrangements for MIP CSRs.

Specific monitoring started off with the Commission's attempts to avoid placing Spain and Slovenia in an EIP in 2013. The experience was hailed so successful that by 2016 it became standard practice for the surveillance of all regular imbalances. As an 'enhancement' of regular procedure, specific monitoring foresees the 'intensification' of dialogue with Member State authorities. This includes a higher frequency of missions in their most severe Reg (EU) 1176/2011 iteration – with the mandated participation of the ECB's in the case of concerned eurozone members. These, in turn, produce more progress reports leading to a more concentrated compliance evaluation cycle.[47]

This practical diversification, however, came with legal consequences which warrant a note on the legally hybrid nature of CSRs.

1.7. CSRs | Conflated Enforcement

CSRs are issued on the legal basis of Articles 121 and 148 TFEU and related secondary legislation – the SGP's Reg (EU) 1175/2011, the MIP's Reg (EU) 1176/2011, and/or the

[45] 'MIP recommendations are part of the set of Country Specific Recommendations (CSRs) issued in the European Semester framework. CSRs are generally published by the Commission in May, endorsed by the European Council in June, and adopted by the ECOFIN Council in July.' European Commission, MIP Compendium (2016) 53.
[46] European Commission, MIP Compendium (2016) 53
[47] 'Specific monitoring reports are made public. The reports are discussed in the ECOFIN committees. Discussions take place in the EPC, which produces a report delivered to the EFC. The ECOFIN is informed by the EFC.' 'specific monitoring 'activation is commensurate with the severity of the imbalances, with more encompassing mission and reports to assess progress with policy commitments for countries identified with excessive imbalances.' Compendium 54

Integrated Guidelines for Growth and Jobs (IGs). Since the initiation of the Semester, the practice has been to clearly designate CSR's governance frameworks, but this is not always an either/or distinction. In fact, increasingly so – it is not.[48]

With a fluidity to categorizing recommendations, a certain CSR may be relevant to more than one governance framework and therefore be issued under a combination of legal bases – MIP & SGP, MIP & IGs, SGP & IGs. In this context, the framework with a weaker enforcement mechanism greatly benefits from the strengthened implementation procedures of the other, where the utilitarian improvements of the MIPs specific monitoring come into play (in descending order of severity: MIP, SGP, IGs).[49] But these arrangements make for an unavoidable legal conflict of interest with regards to competences, or at the very least – a highly questionable practice. Simply put, discretionary labelling of recommendations initiates procedures of distinctly varying consequences for Member States in terms of content (internal review) and procedure (enforcement).

The case of the MIP is special in this regard, seeing as the wide cast net of its recommendations 'may need to span several policy areas to address broad-based imbalances and ensure an effective adjustment process. For instance, in the case in which high government indebtedness compounds other source of imbalances (e.g., deteriorating productivity and competitiveness or high private debt) recommendations in the framework of the SGP may also be flagged as MIP relevant. Alternatively, in countries where labour market reforms are needed to ensure an effective correction of existing imbalances that helps contain social costs, recommendations that are relevant in the context of the Employment Guidelines may also be flagged as MIP-relevant.'[50]

Furthermore, the MIP might outright appropriate IG recommendations, which – although thus likely to benefit from better compliance – are to suffer the lost input of the Employment, Social Policy, Health and Consumer Affairs Council on policy matter affecting predominantly social spheres of governance.[51]

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[48] For succinct and excellent date overview, see: European Parliament, 'Country-specific recommendations: An overview - September 2019' Economic Governance Support Unit (EGOV) Authors: Jost Angerer, Kajus Hagelstam and Matteo Ciucci Directorate-General for Internal Policies PE 624.404 - September 2019; Accessed 5 March 2020: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/624404/IPOL_BRI(2018)624404_EN.pdf

[49] In fact, this phenomenon has been argued as complementary evidence towards what hopeful academic observers have deemed the 'socialisation' of the Semester, addressed in the following section.

[50] European Commission, MIP Compendium (2016) 53.

[51] With content, in a critical take on the Semester's 'socialization' capacity, Mark Dawson points out that '[i]f country specific recommendations take the Macroeconomic Imbalance Procedure or the Stability and

This problem is compounded in light of the fact that studies, which have engaged in coding exercises with the CSRs, including the Commission's own 2016 Compendium, signal a trend of upward MIP identification for the total number of recommendations.[52] Furthermore, 'countries under MIP receive a higher number of CSRs,'[53] with which 'available evidence indicates' stronger compliance largely due to the regime of intensified monitoring, effectively acting as sanction.[54]

In light of the significant overlap in policy recommendation themes between available legal bases, these developments suggest the disturbing conclusion that the discretionary designation of CSRs might be more concerned with instrumentalising the associated enforcement mechanism than with the policies' substance. While the distinctions in procedure must be maintained due to legal considerations having to do with competences, the overlapping policy themes and increased flexibility in procedural implementation might very well signal a trend towards a practical 'streamlining' of the Semester, if not the complete alignment of procedures.

1.8 CSRs – Hybrid Law | Hybrid Socialization

We must here make a brief tangent note of an academic discourse borne of the aforementioned legal fluidity – the alleged 'socialisation' of the European Semester. Broadly, the debate is about the effects of crisis reform on the governance dynamics between the social and economic spheres in the EU. Perhaps unsurprisingly, the difference in opinion seems to run along academic lines of persuasion, with New Governance theorists enthusiastically positioned on one end opposite the warier critical and constitutionalist schools.

New Governance proponents claim the rise of social indicators and objectives in the CSR framework, coupled with the new-found enforcement mechanisms of the Semester and supposed inclusivity of social actors in committee discussions, as a positive development –

Growth Pact as their legal basis, they are discussed solely in the Economic and Financial Affairs Council. If they are based on Articles 121 and 148 of the Treaty, i.e. the larger Lisbon 2020 integrated guidelines, they are normally additionally discussed and adopted in the Employment, Social Policy, Health and Consumer Affairs Council.' Here, committee input is expected to lead to different content and considerations in the final recommendations. See M. Dawson, 'New governance and the displacement of Social Europe: the case of the European Semester' (2018) 14 *European Constitutional Law Review* 203.

[52] In general, see: J. Haas, V. D'Erman, D. Schulz and A. Verdun, 'Embedding or dis-embedding markets: What is the European Semester an instrument for?, Paper presented at the Workshop 'EMU at Twenty' (2018) Leiden University 16-17 November.; and European Commission, MIP Compendium (2016) Section 4.3.1.

[53] European Commission, MIP Compendium (2016) 63.

[54] European Commission, MIP Compendium (2016) 63-66.

somewhat of a 'social-creep' through reflexive learning in European economic governance.[55] That is, indeed, a highly optimistic appraisal of the situation, which is only sustainable in the context of analysis in vacuum. Simply put, New Governance theorists might have the entire process backwards.

As demonstrated by the above analysis on the legal hodgepodge created with the implementation of Semester recommendations, and the legal requirement that the choice of indicators and thresholds of the scoreboard to 'be conducive towards promoting competitiveness in the Union,'[56] the unprecedented access into (national) social policies is predominantly granted through the economic prism – and often, instruments – of Art 121 TFEU for the purposes of achieving wider economic objectives.[57] Therein, indicators can quickly turn into the subject of recommendations themselves and socially-focused recommendations can become optimized for best economic purposes, not to mention that within this context it hardly seems possible to practically protect the theoretical distinction of competences between national and supranational spheres.

In effect, that would mean the Semester conditions an 'economic creep' for the commodification of national social spaces, designating the latter as indicators of fiscal and macroeconomic health.[58] Furthermore, it would seem that the hierarchization of these objectives falls in line with the post-crisis intensified trend of positioning price and euro stability at the pinnacle of European practical and constitutional normativity. Unless and until the practical and legal governance principles between the social and economic spheres are clearly segregated, it is worth remembering the EU's *dirigisme* tendencies are almost exclusively founded upon economic competences and therefore reflect and are bound to

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[55] The much-cited work on this subject is J. Zeitlin and B. Vanhercke, 'Economic Governance in Europe 2020: Socialising the European Semester against the Odds?', in D. Natali and B. Vanhercke (eds.), *Social Policy in the European Union: State of Play 2015* (ETUI and OSE 2015). See also Zeitlin and Vanhercke, 'Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond', (2018) 25 *Journal of European Public Policy* 149. For a short, but poignant, account and critique, see M. Dawson, above n 49. See also Armstrong, 'The New Governance of EU Fiscal Discipline', 38 *European Law Review* (2013).

[56] One need not look much further than the provisions of Art 3.4 of Reg (EU) 1176/2011 which legally conditions the choice of indicators and thresholds of the scoreboard to 'be conducive towards promoting competitiveness in the Union.'

[57] After all, 'social policy surveillance is to take place but within a policy cycle whose overarching goal is the need, under Art. 121 and 136 of the Treaty, to coordinate economic policies (and thereby ensure fiscal stability).' Dawson, above n 49, 196)

[58] To this end and in support, see generally Crespy and Menz, 'Commission entrepreneurship and the debasing of Social Europe before and after the Eurocrisis', (2015) 53 *Journal of Common Market Studies* 753; Dawson, above n 49, and F. Costamagna, 'National social spaces as adjustment variables in the EMU: A critical legal appraisal', (2018) 24 *European Law Journal* 163.

amplify the normative perturbations of this primary regime in their extended communications.

1.9 Social Partners

Moreover, it is precisely in this context that we must address a seeming 'curiosity' of the macroeconomic and competitiveness framework – the systemic disclaimers for 'full observance' of the role of social partners, as stipulated with Art 152 TFEU and 'taking into account' of the right to collective bargaining and action protected within Art 28 of the Charter of Fundamental Rights of the European Union.[59]

It would be bizarre, to say the least, that a regulatory framework intended to bring to fore a 'socialisation' of economic considerations would find the need to include a pre-emptive legal defence of the boundaries (competences) of the social matters concerned. In fact, these conflict of interest provisions should be seen as symptomatic of an awareness for the MIPs capabilities to serve exactly the opposite purposes and that macroeconomic and competitiveness governance is meant to be implemented on the fault lines between the social and economic, national and supranational legal competences in the Union.

These provisions would become a reoccurring feature in crisis-law economic governance, whenever the above-stated conditions for intrusiveness seemed applicable to the legal provisions.[60]

2. Excessive Imbalances Procedure | Ownership | Intensifying Procedure in Law[61]

Where the IDR assessment of MS macroeconomic indicators identify *excessive imbalances*, in line with Art 2(2) of Reg (EU) 1176/2011, this triggers the 'corrective' arm of the MIP – the Excessive Imbalance Procedure (EIP) outlined in Articles 7-12 and complemented with further enforcement measures, i.e. financial sanctions applicable to eurozone members with Reg (EU) 1174/2011.[62]

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[59] Recital 25, Art 1.3 on general provisions for the entire regulation and again specifically in Art 6.3 on Preventive Action in the MIP (CSRs). These provisions were only introduced with the final version of the regulations underpinning the MIP.
[60] This is especially true of the Two Pack Regulations, reviewed in Chapters 5 and 6.
[61] For an infographic of the procedural steps, see: this section, Figure X on the Excessive Imbalances Procedure, courtesy of the European Commission, MIP Compendium (2016).
[62] In fact, however, 'the corrective arm can be triggered at any time for Member States where excessive imbalances have been identified. The MIP regulation does not require a recommendation under Article 7.2 of Regulation No 1176/2011 to be issued immediately after the identification of excessive imbalances in the IDR. Article 7.2 of Regulation No 1176/2011 also states that the Recommendation by the Council establishes the existence of excessive imbalances.' European Commission, MIP Compendium (2016) 27.

Aside from the generally expected notification regime of the European Parliament, Council and the Eurogroup, the Commission is bound to inform the relevant European Supervisory Authorities (ESAs) and European Systemic Risk Board (ESRB). The latter move triggers an entirely separate mechanism of European governance – the financial oversight sector – whereby the ESRB 'is invited to' take parallel actions, within its own competences, based on the information gathered through the regular surveillance of the Semester and a procedure of the MIP.

Simultaneously, the Council, on recommendation by the Commission, *may* adopt its own recommendation formalising the Commission's findings and recommending that the troubled Member State take corrective action (Art 7.2). In there, the Council is expected to specify policy proposals for addressing the excessive imbalances, as well as a deadline for the submission of a corrective action plan (CAP). It also might consider making this act public.

This point in the MIP procedure makes a clear move to allocate ownership of recommendations – and therein stipulated reforms – i) away from the Commission and to the Council and, thereafter, ii) away from the Council and onto Member States.

The first point is simple enough – in a deliberate break with the direction of crisis law, the MIP generally refrains from employing RQMV.[63] Instead, the procedure seeks to ensure political ownership of the process by providing a committed majority vote in Council. On the second point, ownership is relocated by engaging in a simple – yet effective – formulation of language on recommendations. According to the original intent of Art 7.2, Council recommendations were to 'set out the nature of the imbalances and *specify the corrective action to be taken in detail,*' but ended up more loosely 'specify[ing] a set of policy *recommendations* to be *followed*.' Ownership of the actual reforms initiated by this process is thus firmly placed with the monitored Member State, avoiding the politically unattractive look of forced conditionality. Doubtless, this approach is identical to that undertaken with financial assistance programmes' notorious Memoranda of Understanding and also carries analogous legal consequences. Not only does ownership relocation avoid political trouble, but it could theoretically prevent the justiciability of thus-associated European legal acts as the procedure provides for Member States alone to tie themselves to the mast of reform.

[63] The exception being the heightened sanctions procedure provided in Reg (EU) 1174/2011.

2.1 Law | Language | New Governance

This opens the door to the underlying philosophical discussion about the relationship between law and language. Simply put, legal systems have to somehow mould the evasive, contextual and fluid medium that is language into succinct and readily comprehensible communications – if/then postulates, which clearly assign rights, responsibilities and consequences. Language determines effect. In this regard, crisis-law's bias towards ambiguity is, in fact, an intentional 'negligence' towards a *sine qua non* of legality.

Arguably, this is a recognisable trait of New Governance/soft law practice, which seems to have been wholeheartedly adopted into a forum previously reserved for hard law.

This is a highly troublesome approach reminiscent of the working practices of the crisis adopted with the negotiations over financial aid and associated conditionality programmes (MoUs). Also, it is symptomatic of legal communications operating at the cusp of competence. Could this 'hybridity' be the result of another quintessentially European procedural compromise between a commitment to strengthening the supranational domain, absent readiness to surrender national sovereignty?

With the MIP, but also crisis-reform at large, Council ownership is to be based on 'deliberations,' enforcement through 'peer pressure,' while conditionality governance is framed through 'peer advice' in legally non-binding opinions and recommendations, complemented by alleged voluntarism in compliance. Legislating the MIP in this manner was a deliberate act, which succeeded in instrumentalising the otherwise-horizontal New Governance rulebook for a revisionist take on competence hierarchies between the supranational and national domains in the Union, while simultaneously sidestepping the 'shadow of the law'-proper altogether.

This, unfortunately, is an observation valid across the crisis-reformed economic governance legislation of the Union.

2.2. Corrective Action Plans |CAPs|

At any rate, once an EIP is opened, this prompts the submission of a corrective action plan (CAP) by the troubled MS. The CAP is expected to outline detailed policy actions, i.e. structural reforms, of the Member State's own making, designed to fulfil the reform orientations issued in the Council recommendations. These *may* be made public. This is yet another instance of ownership displacement, whereby the Council's original reform proposals are externalised for appropriation by the Member State in preparing its CAP.

This initiates a review process, whereby, on the basis of a Commission report, the Council 'assesses' the virtues of the CAP, but mostly falls in line with Commission recommendations on whether the CAP is sufficient or insufficient in addressing the excessive imbalances.

In the former case, the plan would be endorsed through a recommendation, which lists 'the specific actions required' and sets up a surveillance schedule for the CAP's implementation, wherein the MS is to submit regular progress-reports to the Commission until potential abrogation of procedure. It is not clear, whether the 'specific actions' are to be selected from the reform menu offered by the Member State's CAP, or if these are entirely new measures.

Alternatively, should the plan be deemed insufficient, the recommendation can request that the MS submit a revised CAP within a two-month deadline, for the purposes of the same procedure. These *are* to be made public.[64]

The EIP foresees the potential for an 'enhanced surveillance mission' as soon as the EIP is opened, as per Art 13.2. These may include the participation of the ECB for eurozone and ERM-II Member States, should the Commission deem it necessary. However, once the CAP is submitted, as part of its surveillance cycle, the Bank's assistance is mandated (Art 9.3).

Curiously, as part of the 'permanent dialogue' for compliance assessment between Member States and the Commission, the latter is mandated, 'where appropriate, [to] involve social partners and other national stakeholders in a dialogue during those missions.' While this provision is in keeping with the MIP's alleged respect for Art 152 TFEU and Art 28 of the Charter, seemingly providing for a balancing of interests, it is highly peculiar that the Commission itself will be the one to establish a direct line of coordination with *national* social stakeholders, as if the agency – and indeed sovereignty – of the MS under scrutiny has evaporated into thin air.

The EIP and associated CAPs are a true *tour de force* of the first wave crisis reforms of EU economic governance. The corrective instruments build upon the already intrusive preventive procedure, which encompasses a wide array of national policies in an attempt to straighten out the underlying causes of fiscal troubles (otherwise addressed in the SGP) through any policy and trend even remoted capable affecting imbalances. At the time of its introduction with the Six Pack, the MIP was a more complete governance framework than the

[64] Procedural details as per Reg (EU) 1176/2011, Art 8.

SGP, which would have to wait two more years to achieve the same kind of severity in procedure with the Two Pack's Reg (EU) 473/2013 on *common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area*. Therein, and in retrospect, the potential of the CAP will be fully revealed, with the intensified SGP fully assimilating the instrument for the correction of excessive deficits, establishing a hierarchy of severity vis-à-vis its own provisions.[65]

2.3. Wrapping up Procedure | MIP Causality

With every cycle of Commission monitoring and Member State reporting, the Council, on the basis of a Commission surveillance report, is to assess whether the Member State is fulfilling its CAP obligations. One outcome is a Council decision establishing non-compliance and a new deadline for taking action. This is to follow a Commission recommendation on the matter through RQMV. Alternatively, a Member State may be found compliant, whereby the EIP is put in abeyance.

What benefits abeyance brings for Member States is, however, hard to tell. The back and forth surveillance is mandated to carry on *until the excessive imbalances are no longer* (Art 10.5). This means that, once triggered, the EIP cycle is almost impossible to escape. This is especially true in the context of the Regulation's own recognition that 'there may be long lags between the adoption of the corrective action and the actual resolution of imbalances.'[66]

This approach nearly mimics the Task Force Report's musings on the macroeconomic and competitiveness framework from the Blueprint, which indicated the entire process (and especially sanctions) would be advanced through the proceduralisation and sanctioning of procedure, as opposed to the actual correction of imbalances, i.e. to their *raison d'être*.[67] While this seems like an unavoidable approach borne of the aforementioned 'long lags' between prescription and resolution, it is also – and more importantly – an implicit admission of the debatable existence of direct causality between prescription and resolution.

In fact, in its 2016 Compendium on the MIP, the Commission concedes that 'the precise extent to which the policy recommendations derived from the procedure have contributed to foster the observed correction of imbalances and reduce macroeconomic risks is difficult to accurately assess.'[68]

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[65] These measures will be discussed at length in Chapter 5 on national fiscal governance.
[66] Reg (EU) 1176/2011, Art 8.2.
[67] President's Task Force Report (2010) 9, para 39.
[68] European Commission, MIP Compendium (2016) 68 [emphasis added].

Judging from the above, it would seem that recommendations cannot establish their efficacy and relation to the prevention and correction of macroeconomic imbalances beyond reasonable doubt or within a reasonable timeframe. Are we then to conclude causality as either genuinely absent or generally suspect? Reducing the MIP to recommendation compliance in the absence of causality contradicts its own rationale for intervention – the prevention and correction of macroeconomic imbalances. The framework thus risks becoming a self-fulfilling loop of technocratic recommendations without connection to the real-world problems supposedly at stake. Moreover, it begs the question of whether this procedure would not be biased towards overcorrection. Furthermore, can the discretionary nature of the scoreboard indicators and thereof-stemming recommendations be enough to initiate the hard law corrective procedure foreseen with the MIP in the context of such deficiencies?

At any rate, the only means for breaking the vicious circle and formally abrogating the EIP is for the Commission to 'consider that the Member State concerned is no longer affected by excessive imbalances.'[69]

3. Financial Sanctions | Regulation (EU) 1174/2011

Guaranteeing the timely prevention and correction of excessive macroeconomic imbalances was deemed in need of strengthened enforcement through sanctions, albeit with limited eurozone application through Art 136 TFEU.

The legislative proposal on Reg (EU) 1174/2011 *on enforcement measures to correct excessive macroeconomic imbalances in the euro area* was a rather reserved document, in keeping with the pre-crisis flexibility-approach to sanctions.[70] The only penalty foreseen by the proposal stipulated a 0.1 percent of GDP annual fine should a MS breach *two successive* deadlines for compliance with the prescribed corrective action at the opening of the EIP and the CAP.[71] Furthermore, exceptional circumstances were to be considered allowing for political discretion on the size and adoption of sanctions.[72] No special voting regime was foreseen.

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[69] This may happen at any stage of the EIP, as provided with Art 11.
[70] Proposal for a Regulation of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area, 29 September 2010, COM(2010) 525 final.
[71] Art 3 proposal
[72] Art 2 proposal

As with the rest of economic governance reform, during the legislative process, the ECB took special note of sanctions and followed its established reform agenda with a suggestion for graduation (Am 1) and intensification (Am 5) of sanctions, fines to be reverted to the ESM (Am 2, 6), and the removal of any references to exceptional circumstances (Am 4). The results of these interventions were mixed.

Upon the insistence of the ECB (Am 5), Art 3.1 introduces a 0.1 percent of GDP interest-bearing deposit as soon as the Council adopts a decision that a Member State under EIP has failed to take recommended corrective action.[73] The originally-intended annual fine is to be imposed or the interest-bearing deposit converted, should the Member State fail to comply with the second round of corrective action recommendations,[74] or to provide a satisfactory CAP twice.[75]

While the amount for fines remains as intended, the final version of Reg (EU) 1174/2011 does comply with the ECB's insistence on reverting any collected revenue to the ESM. Surprisingly unrelated to any formal ECB intervention, the final legislation provides that these sanctions be applied in line with the RQMV procedure in Council, essentially ensuring that Commission recommendations are always followed. This is in contrast from the soft-law political ownership approach of its sister Regulation (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances, where the Council's more active role in procedure was a sought-after effect.[76] Flexibility is retained with exceptional circumstances providing for the potential reduction or cancellation of sanctions for both interest-bearing deposits and annual fines.[77]

3.1. Sanctioned Recommendations

Most importantly, however, we must address the very idea of sanctioned non-mandatory legal acts, such as the MIP recommendations represent.[78]

The phenomenon is an obvious artefact of the New Governance pedigree of the MIP. The provisions of the framework are kept just within their competence bounds by merely

[73] Issued under per Art 8(2) Reg (EU) 1176/2011.
[74] (Art 3(2b) Reg (EU) 1174/2011)
[75] (Art 3(2a) Reg (EU) 1174/2011).
[76] This, however, is not a trend of crisis-law. Some frameworks actually adopt the opposite approach with RQMV advancing early procedure, only to give way to political discretion when it comes to financial sanctions.
[77] Art 2.6 Reg (EU) 1174/2011 final
[78] Art 288 TFEU

'advising,' not unlike the exchange of best practices established with the OMC. The sanctions regime is completely legal, seeing as Member States are theoretically (legally) free to ignore the recommendations, even if at a serious cost for doing so. This set-up and the need to insulate the EU from being perceived as enforcing policies outside of its Treaty competence manage to sever the inextricable bond between authority and responsibility intrinsic to legal hierarchies.[79]

Disturbingly, empirical studies on the implementation success of the MIP tend to argue that the framework is not as strengthened or severe as it seems in the legislative provisions, since it does not show for much compliance or will to utilize its sanctions regime. This approach has contributed to dismissing any normative – and strictly legal – discomfort these developments should elicit.[80] Moreover, even when aware of the inherent conflict between hard and soft law measures and the ensuing difficulty in categorising the resultant legislation, scholars versed in the field do not recognise the justiciability issue ingrained therein.[81]

3.2. Conditionality with ESI funds

The MIP, in both its preventive and corrective iterations, has another enforcement strategy at its disposal – cross-legislative conditionality. With Regulation (EU) 1303/2013 laying down the common provisions for European Structural and Investment Funds (ESI Funds),[82]

[79] Furthermore, this translates into a problem for democracy in the Union, with the Commission often advising on measures on labour, healthcare, and pensions of direct relevance to the national budgetary – and political – schemes of Member State governments.

[80] The current work argues that the empirics of the law do not invalidate its normativity and potential legal strength, should an executive authority resolve to exercise it.

[81] For instance, Mark Dawson, in his otherwise brilliant piece on New Governance practices in post-crisis economic governance, only concerns himself with the loss to judicial protections if the hybridity of the novel legislations disqualifies their full-blown legal status, altogether ignoring the fact this is already the case through the advisory/non-mandatory nature of the provisions. M. Dawson, 'New Governance in the EU After the Euro Crisis: Retired or Reborn?', in M. Cremona and C. Kilpatrick (eds.), EU Legal Acts: Challenges and Transformations (Oxford University Press 2018). P. 22 See generally C. Kilpatrick, 'The EU and its Sovereign Debt Programmes: The Challenges of Liminal Legality', (2017) 70 *Current Legal Problems* 337.

[82] These include: the European Agricultural Guidance and Guarantee Fund, Guidance Section, the European Social Fund, the European Regional Development Fund, the European Investment Bank and other instruments. Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 *laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.*

compliance with Council recommendations, issued under either Art 121 or 148(4) TFEU, has been linked to European investment fund disbursements.

Essentially, the content of ESI Fund programmes has to follow the priorities set by CSRs or EIP (CAP) recommendations. To this end, the Commission *may* even require a MS to 'reprogramme part of its commitments and payments,' should it consider the investment better spent elsewhere – on priority economic and employment challenges, 'identified through different economic governance mechanisms.'[83] If the MS fails to comply with these instructions, which would undoubtedly have severe consequences for its budgetary planning, then the Commission is *under obligation* 'to propose a suspension of part or all of commitments and payments' coming from the ESI Funds in yet another hit on national financial sovereignty.[84] Furthermore, should a Member State fail to provide a sufficient CAP or engage in effective action twice consecutively, as per the provisions of the MIP framework, the Commission '*shall* make a proposal to the Council to suspend part or all of the commitments or payments for the programmes of a Member State concerned.'[85]

This legal bridge between the distributive and regulatory Union frameworks comes with consequences to both. On the one hand, investment instruments, once accepted as a balancing lever against the heightened inequalities of an open market in the absence of true convergence, are repurposed towards causing potentially greater divergences through across-the-board competitiveness policies in the Union. On the other, a 'soft law' regulatory framework, based on mere recommendations devoid of a mandatory legal character, secures the attainment of its goals.

As a result of the crisis, any type of financial transfer from the Union is leveraged against regulatory compliance under a pretext of mere economic performance enhancement to outright financial failure, running throughout crisis-reformed EU economic governance. In an implicit hierarchy, both frameworks are subsumed under an allegedly common pursuit of economic goals.[86] Clearly, then, categorising conditionality in accordance with the

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[83] (Article 23(1)-23(8)) Regulation (EU) 1303/2013 in European Commission, MIP Compendium (2016) 29.

[84] (Article 23(9)-23(12)) Regulation (EU) 1303/2013 European Commission, MIP Compendium (2016) 29.

[85] European Commission, MIP Compendium (2016) 30.

[86] A sufficient basis for conditionality intervention may simply be 'support for the implementation of Council Recommendations' in an effort to ensure a comprehensive economic governance framework during the regular surveillance process, or the need 'to maximise the growth and competitiveness impact of the ESI Funds' for Member States in dire straits, i.e. in receipt of financial aid. Art 23.1 Regulation (EU) 1303/2013

rationale for intervention is a false distinction. Whether it is in the pursuit of regaining financial health or enhancing economic growth, the ultimate goal of financial assistance conditionality is the achievement of some idealised form of 'Pareto optimality' between the EMU and financial markets.

In both form and substance, MIP-ESI Fund conditionality is not a much more tolerable configuration of the practice best associated with the austerity politics of the crisis. MIP CAPs amount to a slightly milder version of structural reform programmes, not unlike crisis MoUs.[87] Moreover, the matters covered by ESI Funds can reach just as deep into national budgetary considerations, affecting social or infrastructure spending for example, implementing fiscally-prudent austerity-oriented policies.

Apart from a strong operationalization of ESI Fund conditionality, neither the EIP – in its full Article 7 to 12 Regulation (EU) 1176/2011 glory – nor related sanctions with Reg (EU) 1174/2011, have ever been instrumentalised.[88] The following section takes a brief note of these developments.

4. Intensifying Procedure in Practice| Categorisation of Imbalances[89]

In practice, the MIP does not operationalise its legal provisions in accordance with the neat divisions between 'imbalances' and 'excessive imbalances,' summarized in Article 2 of Reg (EU) 1176/2011.[90] As the Commission's MIP Compendium clarifies, there may be instances when, in spite of identified excessive imbalances, the procedure is kept within the bounds of the preventive arm without triggering the EIP.[91]

This loose approach to the letter of the law is enabled by the loose instructions of two core provisions of the MIP – the awfully broad definition of excessive imbalances designating them as '*severe* imbalances, *including* imbalances that jeopardize *or* risk jeopardizing the proper functioning of the [EMU]'[92] and the complementary boundless discretion awarded in interpreting the signs of the scoreboard of indicators.[93] In an effort to avoid the full force of the EIP, the Commission has fully utilised the flexibility of these provisions, specifically with

[87] As will be discussed in the analysis of Reg (EU) 473/2013 in Chapter 5, the MAPs of EU financial assistance greatly overlap – in content and legal form – with the CAP of the MIP.
[88] On ESI Funds, see for example: European Commission, 'Strategic report 2017 on the implementation of the European Structural and Investment Funds' of 13 December 2017, COM(2017) 755 final.
[89] For a detailed overview, see: European Commission, MIP Compendium (2016), Section 3.2.1.
[90] As we already saw with the case of specific monitoring.
[91] European Commission, MIP Compendium (2016) 25.
[92] Art 2.2 Reg (EU) 1176/2011 [emphasis added]
[93] Art 3.2 Reg (EU) 1176/2011.

regards to another Blueprint-theme – graduated surveillance. Thus, the categorization of imbalances and associated control over advancing MIP procedure came to rest on a much more nuanced spectrum of IDR conclusions, differentiated across monitoring and policy action and subject to technocratic discretion.

As soon as the MIP was launched in the 2012 Semester cycle, the Commission engaged in some creative categorization and devised a scale out of the otherwise binary set-up of the provisions of Regulation (EU) 1176/2011. In between 'imbalances' and 'excessive imbalances' now lay 'serious' and 'very serious' imbalances, which made all the difference for France, Italy, Hungary, and Slovenia in the first category, and Cyprus and Spain in the second.[94]

The following year, instead of avoiding the EIP, the EIP itself was further broken down with the introduction of a new monitoring category, essentially sidestepping the full force of the MIP corrective arm. While Spain and Slovenia were again found to exhibit excessive imbalances, a new process of 'specific monitoring requiring decisive policy action' was put in place, which included intensified on-site missions and frequency and detail of reporting, basically utilizing the instruments already available in the preventive arm on a scale.

With permutations on monitoring/specific monitoring and policy action/decisive policy action, this allegedly successful approach broke down the MIP into six categories, until a 2016 streamlining which brought them down to four: no imbalances, imbalances, excessive imbalances, and excessive imbalances with EIP.[95] These are subject to further distinction as 'monitoring is modulated according to the severity of the challenges and depending on whether the identified imbalances are excessive or not.'[96]

But, while breaking with the letter of the law, the Commission's diversified categorization of imbalances actually mirrors the *intent* of the law. The detailed structural reform plans required by the CAP generally correspond to the novel 'decisive policy action' category, whereas 'specific monitoring' can intensify missions analogous to the provisions of Art 9.3 of Reg (EU) 1176/2011 on the EIP. Therefore, the basic conditions of an 'EIP with a CAP' (the most severe procedure under law) are readily encompassed by an 'EIP with decisive policy action and specific monitoring' (the most intensified procedure in practice), with the only palpable difference being a decisive abstention and post-legislative editing-out of the financial sanctions provided for with Reg (EU) 1174/2011.

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[94] European Commission, MIP Compendium (2016) 32.
[95] European Commission, MIP Compendium (2016) 33.
[96] European Commission, MIP Compendium (2016) 33.

Why does any of this matter and should it even matter?

The establishment's change of heart evident with these developments may be symptomatic of a winding resolve on the strengthening of supranational governance in the aftermath of the crisis-reactionary Great Reformation of EU economic legislation, especially with regard to financial deterrents. It might also just represent a refinement on the originally intended procedure, making full use of the allotted discretion, that is beneficial to Member States in avoiding fines and to the Commission in having to pick fights.

What we must understand is that these deviations between law and practice do not amount to a sufficient basis to extrapolate normative conclusions about the MIP framework. Strictly speaking, the practical effects of law ought to be a function of its normative core. Empirical investigations into EU law test this relationship based on the implicit possibility of incongruencies between norm and rule. This line of logic should *a priori* preclude the possibility to theorise 'in reverse' about the originating norm.

To this end, quantitative studies, of an arguably New Governance persuasion, have unfortunately coalesced around conclusions on the non-threatening nature of legal novelties, such as the MIP, based on data on the implementation success of MIP recommendations (CSRs specifically), the here-discussed deviations between law and more lenient practice, or the working practices in committees involved with CSRs.

This study begs to differ. Whether the law is applied as written and to the real extent of its legal capacity does not change its inherent competence. Weaker implementation, especially with EU economic governance, is most often conditioned on the Commission's discretion and – doubtless – EU political climate, both of which present feeble indicators of future normativities (the job of any law) and therefore, outright refuse meaningful critical appraisal.[97] In fact, the fact that a law may leave that much discretion in regards to its practice, raises a plethora of issues as to its clarity, effectiveness, and – overall – legal certainty.

[97] To this end, a recent thesis out of UVA under the mentorship of J. Zeitlin, which – among other claims – argues the weakened sanction procedure means the MIP does not operate in a hierarchical position to national governments, but even if it did – the MIP 'does not force action' but only 'increases the political costs of inaction.' Again, we see here the power of language, especially as utilised by New Governance, soft law. Moreover, and in direct conflict with another theme of the present work, the national ownership of structural reforms in the MIP is actually interpreted as a symptom of 'the non-hierarchical character of the MIP,' rather than an escape of responsibility. For more, see: Bokhorst, D.J., 'Governing imbalances in the economic and monetary union, A political economy analysis of the macroeconomic imbalance procedure' PhD Thesis, University of Amsterdam (2019) 393, Accessed 8 March 2020: https://dare.uva.nl/search?identifier=85d7b956-00d5-47ac-95d2-284115ca9bbf; Citing a good number of empirical sources on the effectiveness of various Semester recommendations, Mark Dawson also draws conclusions on post-crisis economic governance based on their lack of practical effect, even if he is also

5. Conclusion

The macroeconomic imbalances and competitiveness framework is built along the fault lines of hard and soft law, correction and prevention, negative and positive integration.[98] This highly enterprising approach has greatly expanded supranational oversight and enforcement into national policy areas previously undisturbed by EU interests by obscuring the boundaries of Treaty law.

The multiple legal arrangements and discretion built into the framework cause for highly questionable practices, such as – for instance, the discretionary labelling of country specific recommendations (CSRs) which can initiate procedures of distinctly varying consequences for Member States in terms of both content and enforcement.

The particular blend of social and economic Treaty base and recommendations of the MIP further confused the already unsettled relationship between these policy fields. Labour, welfare, health or education indicators can quickly turn into the subject of recommendations themselves, whereupon these otherwise socially-focused recommendations can become optimized for best economic purposes. Protecting the competence distinction between national and EU spheres of influence becomes all but impossible in the context of this 'economic creep' commodifying national social spaces.

The MIP is a fully sanctioned regime with interest bearing deposits, fines and cross-legislative conditionality which repurposes EU funding as a balancing lever against non-compliance or triggers additional oversight by the European Supervisory Agencies. These are the exact kind of procedural sanctions advocated by the ECB early on during the Blueprint.

Just as the crisis experience with Memoranda of Understand, the procedure is formulated for the purpose of obscuring supranational agency and thereby sidestepping any

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aware of the hard legal novelties introduced therein. See: M. Dawson, 'New Governance in the EU After the Euro Crisis: Retired or Reborn?', in M. Cremona and C. Kilpatrick (eds.), *EU Legal Acts: Challenges and Transformations* (Oxford University Press 2018); Another example is an argument in favor of the socialization of the Semester-thesis by Zeitlin and Vanhercke's much cited work on the topic, where the authors claim the Irish Presidency's practice of consulting a wider array of committees on social policy CSRs has resulted in more amendments beneficiary to the fiscal freedom of Member States. While, at first glance, this might indeed seem like a positive development where inclusivity has resulted in more balanced policies, it is of utmost importance to remember how it came about – as a result of the Irish Presidency's *political discretion*. As mere practice, whether established or not, it is a non-enforceable and non-dependable right to balanced input. J. Zeitlin and B. Vanhercke, 'Economic Governance in Europe 2020: Socialising the European Semester against the Odds?', in D. Natali and B. Vanhercke (eds.), Social Policy in the European Union: State of Play 2015 (ETUI and OSE 2015), 83.; For an alternative point of view, see: M. Dawson, 'New governance and the displacement of Social Europe: the case of the European Semester' (2018) 14 *European Constitutional Law Review* 199.

[98] Integrating Articles 121 and 148 TFEU, SGP's Reg (EU) 1175/2011, the MIP's Reg (EU) 1176/2011, and/or the Integrated Guidelines for Growth and Jobs (IGs).

legal issues with EU oversight of highly contentious national competences. Recommendation provisions are kept just within their competence bounds by merely 'advising,' with their ownership transferred firmly onto Member States creating the illusion of voluntary compliance with macroeconomic and competitiveness reforms. This not only avoids politically unattractive look of forced conditionality, but most disturbingly also inhibits the justiciability of thus-associated EU legal acts.

As is the case with the better part of the Great Reformation of EU economic governance, the ECB again proved on the right side of legislative history. Although it met with adamant resistance on the flexibility and discretion built into the framework – which, in turn, made the Bank's tenacious and futile insistence on the inclusion of 'vulnerabilities' all the more unfortunate – the ECB did secure a number of other significant reforms.

Most success stories have been pointed out throughout the chapter – including ESRB involvement, reputational sanctions of publicizing the MIP, the competitiveness focus of the indicators, the structure of the monitoring and enforcement process (graduated surveillance and sanctions), the voting procedures (comply or explain principle), as well as the details of the financial sanctions regime.[99]

But the real triumph of the Bank legislating the EU macroeconomic and competitiveness framework came through the introduction of surveillance missions. While these had already been embraced with the SGP budgetary surveillance procedure, they made a particular difference in the context of the MIP. For one, with MIP missions the ECB would come to partake in the direct oversight of matters entirely extracurricular to its mandate. Moreover, the practical implications of the missions-scheme reached much further than originally intended, since they became the core means of intensification and enforcement of the MIP due to the general aversion to triggering the Excessive Imbalances Procedure (EIP).

[99] Reputational sanctions of publicity, and graduated surveillance were, in fact, cross-institutional policy agreements during the Blueprint process.

CHAPTER 5

NATIONAL FISCAL FRAMEWORKS
DIRECTIVE 2011/85/EU | TSCG | Regulation (EU) 473/2013

Fiscal governance reform in the European Union was not limited to the *supranational* supervisory framework of the Stability and Growth Pact. As was deemed self-evident during the Blueprint period, Member State 'ownership' of the process would be essential for the proper functioning of the post-crisis system. This approach was, of course, owed to one of the fundamental doctrines of the crisis – claimed to have been caused by fiscal profligacy. Thereby followed an ambitious legislative endeavour, which institutionalized an entirely novel set of *national* fiscal rules and enforcement procedures.

Organizing the content of the current section is most logically done by following the legislative evolution of national fiscal governance reform themes outlined in the Blueprint period, but more specifically - the tacit, yet clear, division between stakeholders on how to go about instituting said ownership.

When it came to reforming national frameworks of fiscal governance, the Blueprint brainstorm concluded on a variety of themes, succinctly grouped in two different courses of action. While the first one focused on an abundance of national budgetary framework technical rules and procedures, the other was overwhelmingly consumed with the enforcement of the said rules and procedures through the institutionalization of entirely novel forms of policing for compliance. Interestingly enough, even though these represent two sides of the same coin, the institutional stakeholders approached them separately, and importantly for our purposes – also differently.

On the one hand, the Commission focused almost exclusively on rules, in effect arguing that national ownership of fiscal discipline could be delivered through the replication of the European rulebook into national law rulebooks. The logic was in favour of a closer-to-the-source 'alarm' system in cases of non-compliance, which, however, very much lacked associated national level enforcement options.

At the opposite end of that spectrum, unsurprisingly, stood the ECB. The Bank did not venture into much detail regarding national rulebooks, save of course for the explicit and exceptional proposal that the incorporation ought to be on the constitutional level (I.7 ECB Note). It did, however, more than make up in contributing ideas with regards to enforcement

on both the national and supranational levels of governance. With the crisis having raised awareness over rule implementation – specifically in the case of the SGP, the ECB focused on the formalisation of a novel framework enforcing compliance, endowed with high degrees of independence and technocratic expertise.

The Council's Task Force, perhaps influenced during its own stock-taking process, fence-sat on the set of reforms proposed by the ECB, but was still overwhelmingly focused on the much more technical and, arguably, more realistic agenda set forth by the Commission. It proposed a consensus between the above two approaches, trying to ascertain a balance between rule and enforcement, seemingly categorizing them in terms of legal feasibility and political willingness to go forth. In a two tier approach the Task Force suggested that reforms ensue with the *sine qua non* minimum rule requirements on national fiscal frameworks, which fully covered the Commission's proposal and ECB assumptions on the topic (but only in as far as the reforms could apply to *all* Member States, as opposed to a eurozone-focused approach). Associated compliance mechanisms would fall in the 'voluntary' category of measures, where the Task Force suggested fiscal councils and Commission/Council review for national and supranational level enforcement, respectively.[1]

Indeed, national budgetary framework reforms would be instituted in three legislative waves, whose content closely resembled the arrangements proposed by the Task Force Report and one of which has been rippling through with the discussions about a possible restitution of the TSCG into EU law. Each of these is considered as complementary to the strengthening and enforcement of the SGP and, therefore, presents its own procedural supplement to the existent economic governance framework. The only caveat is that past the Six Pack Directive, sanctions intensified for eurozone Member States – and non-eurozone volunteers – only.

The discussion will begin with Directive 2011/85/EU of 8 November 2011 on *requirements for budgetary frameworks of the Member States*,, which laid the groundwork for reform of Member State fiscal space. As part of the Six Pack, it exercised a more conservative approach, focusing on immediately attainable goals. While the Directive established the EU-mandate national fiscal rulebook, it stopped short of entertaining enforcement measures. Eventually, the reach and significance of its provisions would, in effect, be amended by ensuing legislation, seeking to operationalize the Directive further than had been seemingly intended.

[1] President's Task Force Report (2010) 7-8.

To this end, the work will turn to an analysis of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 11 December 2012 (TSCG)– a significant legal intensification of the previously introduced reforms – both with fiscal ownership and SGP. The treaty bridges the gap between the 'quantum leap' aspirations from the Blueprint period, specifically those of the Bank, and their earliest and fragmentary fulfilment through the Six Pack reforms. The analysis of the TSCG will include the proposals for formal incorporation of the treaty in the EU Treaty framework, which provide valuable insight into the continued reformation negotiating process within the EU, and more specifically – between the Bank and the political establishment.

The section will conclude with an overview of Regulation (EU) 473/2013 of 21 May 2013 *on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area*, introduced with the Two Pack as the next level of reinforced reform of rules applicable to the surveillance and enforcement of the national fiscal domain. The Regulation anchors a significant amount of TSCG novelties into the EU legal framework for a truly significant reformation of economic governance. Perhaps even more importantly, it confirms the interconnectedness between macroeconomic and budgetary surveillance extending the legal ramifications to the framework for crisis management and financial assistance in the Union, which will be analysed thereafter.

1. DIRECTIVE 2011/85/EU

When real work on instituting the reforms began, they started with the bare minimum to be contained within the Six Pack's Council Directive 2011/85/EU, focused overwhelmingly on the 'minimum' budgetary framework requirements for Member States, regarding '(i) public accounting systems and statistics; (ii) numerical rules; (iii) forecasting systems; (iv) effective medium-term budgetary frameworks; and (v) adequate coverage of general government finances.'[2] The content of the Directive also incorporated part of the 'non-binding additional standards,' which the Task Force had argued for as voluntary measures – namely, top-down recentralization of government budgetary business and the introduction of 'fiscal councils' entrusted with the purveyance of independent analysis of domestic fiscal developments.[3] The latter, however, were taken onboard in extremely diluted form, subject to extensive further

[2] President's Task Force Report (2010) 7, para 28.
[3] President's Task Force Report (2010) 7, para 29.

clarification with the TSCG and Regulation (EU) 473/2013 in the future. As such, it could be argued that while, formally, the Directive did move beyond the bare minimum of national fiscal rules envisioned in the Blueprint, it nevertheless stuck to thematic constraints by refraining from the institutionalization of concrete enforcement measures. This will become more evident as we proceed.

In most basic form, the set of enhanced technical rules contained in Directive 2011/85/EU are a means of mitigating technical disparities between the national and supranational levels by establishing a uniform code for the SGP surveillance framework utilized in the European Semester. It is, in this sense, a 'standardisation' of budgetary framework rules and methods, so as to ensure that i) Member States can directly adopt Union recommendations in the beginning stages of the Semester (AGS and AMR), ii) the Commission – and any other monitoring body – can easily and correctly analyse MS data and follow with appropriate recommendations, which iii) can be directly and transparently applied as corrective measures onto the national level. The uniform code is meant to increase accountability and compliance – the very definition behind the euphemism of 'national ownership,' leading towards the consolidation of economic policies across the Union through the enhancement of rules.[4] These are legally anchored with the Excessive Deficit Procedure, namely Art 126(14) TFEU, which stipulates the detailed rules and further provisions related to 'the obligations of national authorities to comply with the provisions of Article 3 of Protocol No 12 to the Treaties on the excessive deficit procedure.'[5]

As has already been pointed out in Chapter 2 on The Blueprint, this national ownership enterprise is a highly curious approach and prime example of discipline enforcement and risk aversion. On the one hand, the question arises as to why Member States ought to replicate EU-level rules, which they are already under obligation to comply with. These are, moreover, rules that are highly constraining on the democratic process and lead to the direct involvement of national judicial systems in the policing of European economic governance. On the other hand, an argument might be made, that if Member States intend to – in good faith – follow the EU economic rulebook, the standardisation of EU rules on the national level should make no practical difference to their conduct.

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[4] Council Directive 2011/85/EU of 8 November 2011 on *requirements for budgetary frameworks of the Member States*, Recital 28, where "uniform compliance with budgetary discipline as required by the TFEU' is defined as the objective of the Directive.

[5] Proposal for a Council Directive on requirements for budgetary frameworks of the Member States, 29 September 2010, COM(2010) 523 final, Explanatory Memorandum, 3.

The Bank's opinion on the Directive did not contain much controversy and stayed the course of the ECB's traditional protestations – against discretion, for automaticity and increased sanctions. While it did not meet with much approval, it is important to keep in mind the story of the Bank's influence on the 'enhancement' of national fiscal rules is significantly more elaborate, spanning from Blueprint into three legislative stages over a number of years, legalizing its vision of *enforcement*. What is more, the work on this legislation developed almost simultaneously, so that if the Directive did not quite meet reform expectations, it was abundantly clear there would be yet another chance to make up for shortcomings.[6] Therefore, even if partitioned into multiple legislations with different legal bases, the Great Reformation of national budgetary frameworks should be treated in concert, as the legal manifestation of a well-structured and methodical reform process.

While the ECB did not include specifics on rule enhancement in its reform proposals, it nevertheless took the opportunity to contribute to the field with an Opinion on the provisions of Directive 2011/85/EU.[7] As already established, the Bank did not stray from its reform orthodoxy, with the points of contention pre-established. The ECB mainly raised issues with discretion, the weak sanctions mechanism envisioned, and most importantly – the strengthened presence of independent auditing.

1.1. Budgetary frameworks

In essence, Directive 2011/85/EU is an instruction manual to Member States on how to structure their national budgetary frameworks. These are defined rather comprehensively as the 'set of arrangements, procedures, rules and institutions that underlie the conduct of budgetary policies of general government' (Art 2) and are elucidated upon with each successive chapter of the legislation. The best means of understanding the substance of the Directive is to analyse it as a standardised national-level corollary to the amended SGP rulebook, encompassing the entire cycle of economic coordination between Member States and the Union.

[6] While Council Directive 2011/85/EU came into force with the rest of the Six Pack on 8 November 2011, only a month later - on 9 December 2011, the European Council laid the groundwork for the future TSCG in a statement of the heads of state and government. Meanwhile, the Two Pack regulations were already in the works with the legislative proposals issued by the Commission as of 23 November 2011. So while these are separate pieces of legislation with different legal bases, they can and should be treated as the legal manifestation of a well-structured and methodical reform process.

[7] European Central Bank, Drafting proposals regarding the proposal for a Council Directive on requirements for budgetary frameworks of the Member States (COM(2010) 523), Annex, Opinion on economic governance reform in the European Union (COM/2011/13), 16 February 2011.

1.2. Numerical Fiscal Rules

The Directive requires that Member States somehow institutionalise rules that guide their budgetary frameworks in a manner conducive to achieving the commitments made on the EU level with the revamped SGP.[8] This includes compliance with the debt and deficit 3/60 Maastricht criteria and an alignment of MS budgetary planning with the procedural horizon of its EU-level assessment in the Semester – multiannual with a continuous adherence to MS medium term budgetary objectives (MTOs). These, and any associated escape clauses, are to be strictly defined, monitored for compliance and subject to 'consequences' in case of non-compliance (Art 6(1)). Most significantly, the latter responsibility is to be carried out by a novel institution – 'independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States' (Art 6(1)). We shall return to discuss these at length by the end of the section.

The ECB did not miss the opportunity to weigh in on enforcement. To this end, it made an unsuccessful attempt to define the latter – rather vague – reference to consequences to 'involve a clear political and financial cost for the authorities responsible for non-compliance among which the imposition of timely redemption of additional debt incurred.'[9] Alas, recital 16 of the final legislation reconfirms the original intent that the political establishment is not (yet) willing to fully proceduralize national ownership of fiscal rules. The text pays lip service to enforcement, only to settle on a distinctive soft law approach on 'reputational costs.'[10]

1.3. Medium-term Budgetary Frameworks

With the new framework, Member States are expected to adopt a long term fiscal planning perspective of at least three years and formalize procedures that ensure transparency in preparing their multiannual budgetary objectives, which put expenditure and revenue on equal footing while respecting numerical fiscal rules and take into account government sub-sectors (Art 9.2). The inclusion of expenditure as an explicit budgetary objective is courtesy of ECB involvement with Amendment 16. Any foreseen government policies are quantified into revenues and expenditures to be factored in and assessed for impact on long term MTO adjustment and long-term public finance sustainability (Art 9 (2c-d). Member States are

[8] Chapter IV of the Directive on Numerical Fiscal Rules

[9] ECB Opinion Directive 2011/85/EU, Amendment 15 on Art 6 and Amendment 3 on Recital 12. The recital shows up as number 16 in the final text.

[10] 'Policy experience has shown that for numerical fiscal rules to work effectively, consequences must be attached to non-compliance *where the costs involved may be simply reputational*.' Directive, recital 16.

expected to prepare their annual budgets based on these considerations. Discrepancies are to be 'duly explained,' though, to whom remains unclear (Art 10).

And while Article 11 argues that 'no provisions of this Directive shall prevent a Member State's new government from updating its medium term budgetary framework to reflect its new policy priorities,' the reality seems different. That is, within the hypothesis of Art 9, the legal options for reconfiguring new political – democratic – priorities are limited within the bounds of medium term budgetary objectives in a zealous reflection of EU fiscal prudence.

1.4. Forecasts

When planning their brighter and consolidated fiscal future, Member States are expected to use the most likely or more prudent scenario of their budgetary and macroeconomic forecasts (part of the Stability and Convergence and National Reform Programmes of Semester surveillance). This is yet another instance of the crisis-borne risk aversion approach with significant implications towards further constraints on budgetary policy in a move towards greater fiscal consolidation. Doing more in 'good times' – as the crisis mantra went – is supposed to allow room for manoeuvre should economic conditions change unexpectedly.

In the interest of ensuring uniformity and preventing accounting ingenuities so early on in the Semester process, the ECB helps establish that Member States have an 'obligation to take into account' Commission forecasts when preparing their own (Amdmt 13). Should the MS and Commission have arrived at different conclusions as to what constitutes a 'realistic and most prudent' fiscal scenario, the MS is under obligation to explain the discrepancies. Additionally, Member States are to take into account the work of independent bodies working in parallel to their national fiscal institutions (Article 4.1).

Beyond the regular surveillance process of the Semester, budgetary and macroeconomic forecasts are to be subjected to 'regular, unbiased and comprehensive evaluation based on objective criteria, including *ex post* evaluation' (Art 4.6). As a clear example of the weaknesses of the pre-crisis economic governance framework, the provision is wrought with uncertainty and omissions, in spite of its potential for intrusiveness. The ECB tries, in vain, to clarify that the said evaluation shall be independent, likely in an attempt to involve the independent bodies stipulated elsewhere in the proposal (Art 6.1(b)). Not only is the idea rejected, but there is no certainty as to the identity of the institution to be tasked with the audit in question. Furthermore, the only means for enforcing compliance borne out of this legal provision remains the 'naming and shaming' approach resulting in the evaluation being

'made public and taken into account appropriately in future macroeconomic and budgetary forecasts.'

1.5. Standardised Accounting

All technical data used in the national budgetary frameworks and submitted as part of the EU economic coordination cycle is also to benefit from the adoption of uniform statistics and public accounting standards based with the European system of national and regional accounts in the Community, adopted by Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community, i.e. ESA 95. This was a Blueprint period concern of all stakeholders involved in the process. These are to be publicly available, with data broken down for each government sub-sector in the interest of transparency.[11] And while the original legislative proposal considered some form of internal control for the national accounting systems, the ECB saw and successfully ceased an opportunity to introduced the further scrutiny of independent audits.[12]

1.6. Top Down | Recentralisation

In another effort at standardisation, the Directive reaches into national government hierarchies, attempting to ensure that its rulebook is applicable to all sub-sectors of general government. This is a step towards a balanced budget on all levels of government, which ought to remove the possibility of rogue budgeting in cases of highly regionalized and decentralized states. It is a measure designed to addresses federalist/regionalist national governance arrangements, to promote accountability and remove the possibility that a central government may shirk the responsibility of prudent budgeting with the excuse of local subsectors. It is, also, undoubtedly inspired by the voluntary non-binding additional standards proposed by the Task Force Report, namely 'the use of top down budgetary processes'[13] and in compliance with paragraph 2 of the Bank's Amendment proposal 18.[14]

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[11] Dir 2011/85/EU, Chapter II, Art 3.

[12] Art 3.1, ECB Amendment 11

[13] President's Task Force Report (2010) para 29.

[14] Curiously, on two occasions in its opinion on the Directive, in Amendments 8 and 18, the ECB makes a clear statement that although these are generally welcome developments, the top down budgetary process ought to be given 'due consideration,' which – in comparison to the mandatory character of the introduction of fiscal councils, does not seem like a very serious commitment on part of the Bank.

In the interest of ensuring Member States follow through on their commitment to the EU rulebook, taking on genuine ownership, Art 15 of the final provisions encourages Member States to draw up correlation tables to explain how the Directive has been transposed into national law. And while these tables are to be drawn up 'for themselves and in the interests of the Union,' the Commission is due to prepare a progress report on the implementation of the Directive, no doubt to be largely based on the former data.

1.7. Independent Bodies

But as has become evident throughout the above review, Member States are not entrusted to self-police these novel budgetary arrangements. For this purpose, the Directive – almost haphazardly – introduces the novel instrument of independent monitoring bodies, bound to become an integral component of national budgetary frameworks.

The proposal for the Directive designated these as 'independent national budget offices' which were intended to engage in an *analysis* of national budgetary processes in the interest of enhancing transparency. The Bank eagerly and successfully sought to reinforce this competence with additional arrangements for independent monitoring and analysis. [15]

We must note that the final version of the Directive loses most direct references to 'independent bodies,' with Article 6(1b) as the only serious mention. The remainder of the relevant provisions only imply their use. But in just a few years the 'independent bodies' would be known as 'national fiscal councils' and endowed with extraordinary competences *vis-à-vis* Member States. Indeed, at their inception with Directive 2011/85/EU, they are severely limited entities, not yet instrumentalised into direct monitoring or enforcement of compliance. Their relationship to the fiscal governance framework at the time consisted of the production of independent material to serve as a benchmark in the assessment of compliance. Their constitution, thereby, did not need to be specified past a 'functional autonomy *vis-à-vis* the fiscal authorities of the Member States' (Art 6(1b)), allowing for a significant number of eligible possibilities as what bodies exactly qualify to take on that role.

This state of affairs was not without objection from the ECB. In Amendment 18 the Bank proposes an entirely new chapter to the Directive – 'specific provisions for the Member States whose currency is the euro.' This is the first text we have seen in the entire process of EU economic governance reform stipulating the detailed design of what national fiscal

[15] Directive 2011/85/EU Proposal COM(2010) 523 final, Art 2(f).; ECB Opinion on Directive, Amendment 10; Directive final Art art 2(f) final.

councils are to entail. The envisaged competences include the provision of 'independent monitoring, analysis, assessments and forecasts in all areas of domestic fiscal policy which may have an impact on the compliance by the Member States whose currency is the euro with their obligations deriving from Articles 121 and 126 of the Treaty and from any legislation and measures adopted under any of these Articles or under Article 136 of the Treaty.'[16]

We must note, this is an entirely novel proposal of the Bank and not an amendment provoked by a weak provision in the legislative proposal. The endeavour clearly identifies the Bank as the originator – both ideologically and legally – of one of the most controversial crisis reform measures introduced on the national level concerning budgetary competences, and formalises the Bank's vision for independent rule enforcement spanning across the entire legal basis of economic governance in the Union.

The amendment is rejected, but only temporarily. The proposals contained therein would eventually come to serve as the golden standard in adopting measures to this end with every consecutive crisis legislation on the matter. The Treaty on Stability, Cooperation and Governance (TSCG) and Regulation (EU) 473/2013 will soon thereafter institute the ECB's complete vision for surveillance and enforcement of national fiscal frameworks, independent bodies included. But we get ahead of ourselves.

What is more, the Bank also encouraged voluntary participation in the scheme by non-eurozone Member States, 'in particular [in] the establishment of independent fiscal councils.'[17] In this particular context – considering the content matters covered by Council Decision 2011/85/EU, voluntary participation should give us pause. The EU's and ECB's competence to legislate on national fiscal frameworks is based on the acknowledgement of the *de facto*, even if not *de jure*, connection between monetary and fiscal policy *in a currency union*. Furthermore, national ownership of economic rules is meant to support the achievement of the objectives of the Union – price and euro stability. Simply, the logic of associating non-eurozone Member States whose economies are, at least formally, unperturbed by the monetary-fiscal relationship, with the new rulebook, somewhat negates the logic behind the legislative intrusion in the first place.

Conclusion

[16] ECB Opinion Directive 2011/85/EU, Amendment 18.
[17] ECB Opinion Directive 2011/85/EU, Amendment 18, para 3.

This largely sums up the substantive impact of Council Directive 2011/85/EU on European economic governance. As was already noted, as a first step in laying the groundwork for the reform of Member State national fiscal space, Directive 2011/85/EU was a lot more successful in establishing the rulebook, absent much enforcement. As with the rest of the Six Pack, it was focused on feasible, immediate reform, which is why – in comparison to the grandiose scheme of crisis-reform – its impact at the time seemed understated. Furthermore, the Directive did not benefit much in substance from ECB intervention in the formal legislative process and remained a very limited version of what the Bank had originally envisioned in reforming this field of supervision. In fact, the Directive hardly touched on the ECB's short, candid, and tenacious list of reforms. That would be left to the TSCG and Reg (EU) 473/2013 to eventually fulfil in operationalizing the national ownership rulebook.

2. A COALITION OF THE WILLING | the TSCG

While the establishment was still busy learning the lessons and institutionalising the working practices of the Greek crisis into the Six Pack reform legislations, the spiralling sovereign debt crisis threatened to engulf Italy, Spain, Portugal and Ireland and created another wave of 'exceptional circumstances' to enable the second round of crisis reform – with the ESM, TSCG, and Two Pack.

These would not be limited to the approach of putting one's house in order by strengthening rules and enforcement – a more system friendly approach still somewhat respectful of boundaries. Instead, they would exploit the available couplings highlighted by the negative spillovers of the crisis. In doing so, the new framework sought to restructure the allocation of competences and reconstitute the rules of independent spheres of sovereign governance. This is where we can historically and politically situate the rest of national ownership-focused reform legislation, namely the TSCG and Two Pack's Regulation (EU) 473/2013 discussed hereafter.

This section of the work will analyse the enforcement of national fiscal rules introduced with Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). It is a peculiar element of European crisis reform in terms of context (both past and current), content, and form. First and foremost, the TSCG is a non-European legal source designed to enhance European law, the SGP specifically, by making use of EU institutions. It took shape in a remarkably short time frame – only a few months from draft to final. It introduced limited legal novelty, but where it did – it did so categorically. The

discussions about its repatriation into the Treaty framework, moreover, reveal a lot about the nature of crisis-law. Its legal rationalisation is based with the same line of logic adopted with the ESM Treaty in *Pringle* (to be discussed in the following chapter), claiming that the couplings of the EMU and budgetary discipline rediscovered with Art 125 TFEU, somehow translate into 'tighter fiscal constraints in the Euro-zone member states.'[18]

Even though we do not have access to ECB involvement in mid-wifing the treaty, as it was developed outside the formal legislative procedure,[19] we can confidently confirm the Bank's complicity starting with the ideological genesis. Which is to say that the most notorious reforms instituted by the TSCG can be traced to Bank's June 10 Note on reform of European economic governance. Most importantly, perhaps, the ECB recognised in the TSCG an opportunity 'towards further strengthening the economic union to make it commensurate with monetary union.'[20] That is, the TSCG was a chance at re-balancing the responsibilities of the fiscal sphere towards the monetary. The ECB's own assessment of the TSCG in its May 2012 Monthly Bulletin – a formal channel of communication for the Bank – will supplement our analysis, as we examine how much of the Bank's reform ideology was formalized into (international) law.

2.1. |Political| Context

The TSCG began as a failed attempt at Treaty change at the European Council meeting of 9 December 2011. Amendment procedures under Art 48 TEU requiring unanimity were vetoed by the UK on matters unrelated to the substance of the TSCG, in an attempt to engage in horse-trading over financial sector regulation.

There is general academic agreement that, nevertheless, the majority of TSCG substance could have been enacted within the Treaties by recourse to Articles 121, 126, 136 TFEU, as well as through the enhanced cooperation mechanism under Articles 326 to 334 TFEU and Art 20 TEU.[21] But the decision remained political. Having pledged commitment to

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[18] 'The enactment of the Fiscal Compact reflects the understanding that the existence of a common supranational currency (the Euro), coupled with a no-bail-out clause in Article 125 of the Treaty on the Functioning of the EU (TFEU), requires tighter fiscal constraints in the Euro-zone member states.' F. Fabbrini, 'The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism' (2013) B.C. Int'l & Comp. L. Rev 36(1) 2.

[19] As per Art 126(14), 127(4) or 282(5) TFEU.

[20] ECB, *A Fiscal Compact,* Monthly Bulletin (May 2012) 80.

[21] P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 E.L.Rev. 232; Fabbrini, above n 19; M. Messina, 'Strengthening Economic Governance of the European Union through enhanced co-operation: A still possible, but already missed, opportunity', (2014) 39 *European Law Review* 404, and L .Azoulai, et.al. 'Another Legal Monster? An EUI Debate on the

fiscal discipline of the highest legal order to both the EU-wide and domestic crowds, Germany and France opted for the politically significant message of an international treaty as form of *primary* law.[22]

The episode is not much unlike the background to the ESM Treaty, where the choice of legal form was also dictated by political considerations. Moreover, learned observers of the process have claimed that the faiths of the two treaties were irrevocably tied together in a kind of quid pro quo, with the fiscal frugality of the TSCG exacted as a price for what was advertised as the 'financial solidarity' of the ESM.[23]

The irony in the context of the crisis is overwhelming. In order to satiate creditor nations' political demands, EU Member States collectively engaged in adopting measures curbing the exercise of their own democratic sovereignty, such as those demanded by the TSCG. As outlined with the introductory matter of Chapter 1, it is evident how the concerns over cross-border fiscal transfers inhibiting national sovereignty, circulating since the very inception of the EMU, caused the adoption of rules which only intensified such processes.

What is more, as Miguel Maduro has argued, this type of budgetary constraint should have – theoretically – been struck down by Karlsruhe as incompatible with German constitutionalism, save for the tiny detail that the golden rule of the TSCG was actually fashioned after German Basic Law.[24] In yet another political hypocrisy translated into legal form, while Europe fell in line to the wishes of the German demos, the very same extraordinary context was used to extinguish any such rights in ailing Greece, referendum notwithstanding.

Fiscal Compact Treaty' (2012) EUI Working Papers Law 2012/09 also seem to agree that the EU legal base would have sufficed for the adoption of the TSCG, which is also why the current efforts to adopt the substance of the measures are all the more perplexing as they currently stand.

[22] 'It is arguable that almost everything in the TSCG could have been legally enacted in the same way. This was not, however, politically feasible. Merkel and Sarkozy had committed themselves to change to the primary Lisbon Treaty. They could not be seen to back down in the light of the UK veto and accept change in the form of EU legislation. This explains the insistence on finding some other method of enshrining the desired precepts in "primary law", even if this had to be a treaty distinct from the Lisbon Treaty.' P Craig, above n 22, 233; At the same time, the EUI Working Paper group (L Azoulai, et.al.) find that this approach was chosen as symbolically more powerful (4).

[23] Maduro in L .Azoulai, et.al. 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty' (2012) EUI Working Papers Law 2012/09. See also F. Fabbrini, 'The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism' (2013) B.C. Int'l & Comp. L. Rev 36(1) 2.

[24] This notion is also advocated by Miguel Maduro in L Azoulai, et.al. (2012) EUI Working Paper, 5.

And so, a twenty-five strong coalition of the 'willing to do more' Member States agreed on the substance of the TSCG within a little over three months (from December 2011 to March 2012) and ratified it within the following year; the UK and the Czech Republic abstained.[25]

Apart from the desired political effect, the choice of legal approach would have further consequences to the legitimacy of the set-up and its relationship *vis-à-vis* the use of EU institutions (the Commission and CJEU), the exercise of established EU competences, and the potential granting of new competences unto said EU institutions outside the EU Treaties.[26] It has, nevertheless, been generally normalized in the context of similar such previous arrangements such as the Schengen treaty and the Social Protocol of the Maastricht Treaty, as 'yet another instance of Member States opting out of Union law for a more flexible and expedient solution but with practical use of Union institutions.'[27]

For the purposes of the present discussion, the form of the TSCG has limited relevance in as far as the cross-legal emanation and exercise of powers has served to separate rights and obligation across legal regimes, often times rendering them nonjusticiable. This chapter will address such issues whenever warranted, but mainly focus on tracing the substance of the Treaty as it has permeated EU law through various legislative instruments. Form would only continue to influence future discussions on the TSCG subject to the Treaty continuing its existence alongside duplicate EU rules, which is a matter as of yet undecided.

2.2. Crisis Exploitation

The TSCG bears symptoms familiar to the rest of crisis governance and especially so considering the exploitation of extraordinary circumstances. In terms of historical context, there seems to be general agreement that the TSCG was intended as a political instrument designed to send a signal to the markets of commitment to reigning in economic profligacy across the continent.[28] In its May 2012 Monthly Bulletin the ECB frames the TSCG as a 'broad

[25] In accordance with Article 14 TSCG the Treaty was due to enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification. Eventually, the TSCG entered into force 1 January 2013.

[26] P Craig's article deals with each of these in depth, from what seems to be the minority position in terms of TSCG form-acceptance. Bruno de Witte (in L Azoulai, et.al. (2012) EUI Working Paper) echoes some of Craig's concerns, specifically with respect to infringing the duty of sincere cooperation through de facto setting up of voting blocs with the TSCG RQMV and economic policy discussion provisions (5-6)

[27] B. de Witte in L Azoulai, et.al. (2012) EUI Working Paper, 6.

[28] In general concord: L Azoulai, et.al. (2012) EUI Working Paper.

approach to address the sovereign debt crisis and to break the negative interaction with the stability of the financial sector.'[29]

By most sensible accounts of the day, debt was not the only factor at fault and neither was the financial sector to be considered 'stable.' The picture presented by the Bank reduced a multi-faceted and fraught relationship to simple cause and effect at the height of the crisis. It was, however, telling of the general institutional attitude across the Union – bound on internalising the causes of the crisis. The political opportunism, which came over the EU establishment with the state of exception, would serve to double down on the unshakable belief in the compromises made at Maastricht and transplant the critical circumstances into the legal system in an attempt to institute control through discipline and ensure normalcy through predictability.

It is a manifest of this approach that the medium-to-long-term measures in weak intergovernmental form, instituted with the TSCG, were genuinely considered as a 'stop-gap solution'[30] to the raging financial storm. The crisis was not somewhere 'out there' with the financial markets, but rather 'in here' with fiscal profligacy leading to Member States' inability to withstand crisis. And for the latter – there was a solution.

The legal form of the TSCG under public international law makes no exception in this line of reasoning, having been identified as the most expedient manner in undertaking collective progress towards fiscal frugality in the absence of unanimity in the European Council. Most recently the Commission has claimed this was a general understanding amongst all stakeholders involved in the process.[31]

We must also acknowledge an epistemological detail regarding the drafting context of TSCG. As is evident from the preamble of the Treaty, the TSCG developed in conscious awareness of the legal substance of the Two Pack regulations under proposal since 23

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[29] European Central Bank, 'A Fiscal Compact For A Stronger Economic And Monetary Union,' *Monthly Bulletin* (May 2012) 80.

[30] 'The Fiscal Compact was adopted as a stop-gap solution at a time of deep crisis, but its basic tenet remains entirely valid…' TSCG Proposal COM(2017) 824 final, Explanatory Memorandum, 2. Illustrative of the level of reality disengagement is the fact that while the US Federal Reserve and the Bank of England had been steadily slashing interest rates, the ECB was methodically fixated on maintaining inflation by *raising* interest rates well into the politically hot summer of 2012 when Draghi had to commit to doing 'whatever it takes' (26 July 2012); the ECB had reluctantly engaged in some limited interest rate easing as the global financial crisis raged some three years earlier, A. Mody, *EuroTragedy: A Drama in Nine Acts* (OUP 2018), 476-7.

[31] Most recently, the Commission has claimed that 'the intergovernmental approach used to adopt the TSCG was always understood by all stakeholders as a way to take necessary steps *immediately* when, at the height of the economic and financial crisis, progress was blocked within the European Council.' TSCG Proposal COM(2017) 824 final, Explanatory Memorandum, 1.

November 2011, one of which was directly intended to operationalise the TSCG into EU Law.[32] This goes to show that, firstly, negotiations over the substance of the TSCG were informed by the possibility of another horizon for reform, so that redactions were not forever lost allowing for what would have seemed like greater flexibility in negotiations. And secondly, something this study has advocated consistently, that crisis-reform of European economic governance – both within and outside the Treaties – developed in consciously and methodologically towards shared outcomes, in spite of the adamant insistence on extraordinary circumstances and therefore implied reactionary patchwork of legal reform advocated publicly.

2.3. Substance

The following is a brief overview of the substance of the TSCG with commentary related to the national fiscal reform framework and the ECB's respective involvement. At this stage, in the absence of a formal legislative procedure, where we may have been privy to the ECB's contribution in the form of an opinion, it is worth taking note of another official form of ECB communication – the Bank's Monthly Bulletin. The ECB is candid and methodical in its assessment of the TSCG found in the May 2012 Monthly Bulletin article entitled 'A Fiscal Compact for a Stronger Economic and Monetary Union,' which will serve as appended commentary to our discussion of TSCG legal content alongside reference to any instances where the instituted legal reform echoes Blueprint considerations of the ECB's June 10th Note.

The TSCG is not an elaborate document, although it sets the stage for somewhat elaborate procedures to be adopted in national legal frameworks. Simply, it is cast as an enhancement of and supplement to existent eurozone economic governance. It substance generally applies to the freshly reformed Stability and Growth Pact Regulations and Directive 2011/85/EU of 8 November 2011 on *requirements for budgetary frameworks of the Member States*, but also touches upon the competitiveness framework.

In fact, the supposed improvements on economic governance are considered so significant that the granting of financial assistance through the European Stability Mechanism becomes conditional on committing to the TSCG.[33] The Treaty thus comes to embody a form of legalised conditionality bridging a fundamental proposition of the crisis –

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[32] 'WELCOMING the legislative proposals… and TAKING NOTE of the Commission's intention to present further legislative proposals for the euro area concerning, in particular, ex ante reporting of debt issuance plans, economic partnership programmes detailing structural reforms for Member States in excessive deficit procedure as well as coordination of major economic policy reform plans of Member States.' Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [2012] Preamble, 3.
[33] TSCG final, Preamble, 7.

the connection between budgetary discipline and financial crises. The merits of the approach may be contentious, but it is hardly surprising in the context of the second wave of crisis reform: the amendment to Article 136 TFEU constitutionalizing conditionality, the contemporaneous ESM Treaty, and concurrently negotiated Two Pack regulations – all of them on some level concerned with weaving a web of conditionality between otherwise varying and independent fields of competence.

Article 2 clarifies the treaty's relationship with EU law, which – as has already been briefly covered in the previous section – is not without complication. The TSCG is to be 'applied and interpreted… in conformity with the Treaties,' while its provisions 'apply insofar as they are compatible with the Treaties.' Bruno de Witte singles this out as the 'mobile conflict rule', which 'recognizes not only the primacy of EU law as it stands today but also as it might become in the future: if, for example, new provisions of secondary EU law will be enacted that conflict with the Fiscal Compact Treaty, they will prevail.'[34]

The Fiscal Compact

2.3.1. The Golden Rule

The best known, and rather notorious, reforms introduced by the TSCG are to be found with the colloquial namesake for the entire Treaty in Articles 3-8 comprising Title III – the Fiscal Compact.

This genuine core of the TSCG is wrapped around the 'balanced budget rule' (or 'golden rule'), which – for all intents and purposes – outlaws budgetary deficits. Article 3 stipulates that Contracting Parties' government budgets will be at balance or in surplus, evaluated against Member State specific medium term objectives with a lower limit of a structural deficit of 0.5% of GDP at market prices.[35] These rules further restrict the freshly reformed 1% range specified in Art 2a of Reg (EU) 1175/2011 for eurozone and ERM II Member States, yet not quite outright, given that the 0.5% could potentially increase back to 1% should the debt to GDP ratio of the MS in question significantly outperform the 60% Maastricht threshold. The ECB is unimpressed, noting these provisions do not bring enough novelty to the preventive arm of the SGP. While budgetary deficits are indeed acknowledged as generally unacceptable, the Bank laments that 'in practice the new balanced budget rule

[34] B. de Witte in L Azoulai, et.al. (2012) EUI Working Paper, 6.
[35] MTOs are defined in the revised SGP (more specifically in Reg (EU) 1175/2011, Art 5)

will not be more ambitious than the EU regulation already demands, since all euro area countries currently have an MTO that equals a structural deficit of 0.5% of GDP or less.'[36]

Further, with Art 3 TSCG and in general keeping with SGP rules, Member States are expected to ensure rapid convergence towards their MTOs, but, in this case, within a time frame to be proposed by the Commission. Progress evaluation follows SGP rules as well, to be 'evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures.' (Art 3(1)(b)) The Bank fully endorses this reform, provided 'the Commission proposes ambitious and biding calendars of convergence.' Such an approach, according to the Bank, ought to restore the credibility of the eurozone fiscal policies.[37]

The practical implications of this provision were a further constraint on the boundaries of Member States' national competences. Where the original SGP only applied once boundaries had been crossed, like the 3/60 rule for example, the post-crisis iteration overcompensated for risk by instructing Member States' regular budgetary communications preemptively. This approach naturally gave rise to the plethora of novel procedures borne of the crisis. Rapid convergence was just the latest development in this otherwise well-established theme of reform.

2.3.2. Constitutions

And while the idea of doing away with budget deficits altogether was contentious enough, the genuine novelty of the TSCG was its demand that these rules of the Fiscal Compact 'take effect in the national law of Contracting Parties… through provisions of binding force and permanent character, *preferably constitutiona*l or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary process.'[38]

This was, to say the least, a rather unconventional approach in clear break 'with the tradition of ordinary international law, which leaves member states free to choose the domestic means to give effect to the commitments undertaken at the international level.'[39] In fact, the demand for national constitutional amendments was almost cynical in light of the

[36] ECB, *A Fiscal Compact,* Monthly Bulletin (May 2012) 88.
[37] ECB, *A Fiscal Compact,* Monthly Bulletin (May 2012) 90.
[38] Art 3(2) TSCG [emphasis added]. For a comparative overview, see M. Adams *et al*. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart 2014). See also Biebricher, 'Neoliberalism and Law: The Case of the Constitutional Balanced-Budget Amendment', (2016) 17 *German Law Journal* 835
[39] F Fabbrini, above n 19, 8.

background leading to the TSCG's own legal form.[40] More to the point, such reforms sought to directly involve MS judicial bodies in the policing and enforcement of EU budgetary responsibility. Federico Fabbrini rightly points out that the general development is 'in itself quite remarkable since, until now, the role of the judiciary in this area of the law has been negligible in almost all the countries here considered. The empowerment of state Constitutional Courts in reviewing governmental budgetary policies raises, however, serious questions as to judges' capacity to master the technically complex economic variables condensed within the "golden rule," and makes it difficult to predict the degree of deference that Constitutional Courts may be willing to grant to the political branches.'[41] Furthermore, this raises more practical issues with relation to the subject under advisement – national budgets, and exactly how feasible a judicial decision on any level of EU law would be in what is almost inevitably bound to be an *ex post* setting involving democratic (Parliamentary) procedure.

For those mindful of the German political and ideological influence on the TSCG – and, in fact, the entirety of crisis reform – this statute is hardly surprising and not unique in directly drawing on the 2009 revision of the Basic Law (German Constitution) with Article 109 GC.[42] More importantly, for our present purposes, it is also the design of choice advocated solely and uniquely by the ECB. In fact, as far as publicly available documents on legislative reform related to the crisis are concerned, the ECB had been the only institutional source entertaining that in the interest of 'national ownership' of EU numerical fiscal rules, the latter be transposed into national legal frameworks, *possibly in the constitution*.[43] Indeed, in its Monthly Bulletin the ECB proudly welcomes the rather idiosyncratic approach of transposing EU secondary law into national primary law as a contribution towards increasing national ownership.[44]

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[40] As has already been established – due to resistance to the necessary EU Treaties Amendment, i.e. constitutional amendment.
[41] F Fabbrini, above n 19, 128.
[42] So does the new general direction of re-centralization of government spending also in the Six Pack. Article 3 of the Fiscal Compact largely draws from the "golden rule" that Germany enacted in its Basic Law—the German Constitution (GC)—in July 2009. In the context of a broader reform of the German federal system, in fact, the so-called *Föderalismusreform* II (Federalism Reform II) introduced a number of relevant amendments to the *Finanzwesen*, the chapter of the GC dedicated to the fiscal relationship between the *Bund* (Federation) and the *Länder* (Regions). In particular, the new Article 109 GC, besides reaffirming the budgetary autonomy of the Federation and the *Länder*, and noting their joint responsibility in the maintenance of the budgetary discipline set at the EU level in the SGP, states...' F Fabbrini, above n 19,10.
[43] ECB, Note (June 2010) I.7, 8/14.
[44] ECB, *A Fiscal Compact,* Monthly Bulletin (May 2012) 90.

2.3.3. Automatic Correction Mechanism | Independent Bodies

Keeping with one of the major lessons of the crisis that no good rule should go without enforcement, the TSCG introduces an 'automatic correction mechanism' (ACM) framework to operate on the Member State level in the interest of compelling compliance with the previously outlined Fiscal Compact regulations. It is intended to catch and correct any deviations from EU fiscal discipline at the national level before they have a chance to mount into a collectively European problem worthy of more stringent EU-level procedures.

The TSCG itself does not provide much details on the ACM, but tasks the Commission with proposing a set of common principles to operationalise these provisions. To that end, the Commission published a Communication on 20 June 2012, specifying seven criteria to be followed by MS in setting up their national correction mechanisms.[45] These cover legal status, consistency with the EU framework, activation of the mechanisms, the nature of the correction detailed for size and timeline, operational instruments, the working of possible escape clauses, and the role and independence of monitoring institutions.

It is the last of these that we shall here concern ourselves with as a most significant provision, which introduces and enables a wholly alien body with responsibilities for monitoring the national budgetary framework of Member States through an upgrade on the competences of the independent national bodies that originated with Directive 2011/85/EU only a year earlier.

A Member State which is a contracting party to the TSCG shall have in place independent bodies or 'bodies with functional autonomy acting as monitoring institutions' to assess the need for activating the national correction mechanism, the quality of said correction once underway, as well as evidence for the presence of mitigating circumstances in cases where escape clauses are considered. To be clear – these competences cover the entirety of competences invested with national ACMs. The implicit meaning of this approach is that, *de facto,* independent bodies will be evaluating whether national fiscal authorities (whatever form they might take) are properly following the EU-transposed rulebook.[46] Coupled with the *comply or explain* principle 'whereby the advice of these monitoring

[45] Commission Communication COM(2012) 342 final 20 June 2012

[46] Independent Monitoring Bodies are 'expected to evaluate the working of the correction mechanisms in conformity with national rules at the various stages of activation and implementation of the correction, including also the possible recourse to escape clauses.' European Commission, *Communication from the Commission on Common principles on national fiscal correction mechanisms*, 20 June 2012, COM(2012) 342 final, section 3, para 1.

institutions would either be followed, or the concerned Member States would explain why it departs from it,'[47] the procedure amounts to nothing short of oversight and delegated competence over national fiscal governance.

While the Commission is fully conscious this approach is aimed at ensuring that independent body assessments are not 'just ignored,' it somehow imagines this power relationship to be fulfilled 'without infringing on the policymaking responsibilities of fiscal authorities,' as if putting it in text would somehow make the entire proposition logical and legitimate.[48] It is with significant effort that the Commission attempts to steer the conversation on the true nature of independent bodies to the more politically-correct and generally-accepted New Governance approach of expertocratic consultancy. To that end, they are primarily advertised as a benevolent method for 'the fostering of credibility and transparency of the correction mechanism.'[49]

Lastly, the Commission delves into guaranteeing the functional autonomy of independent bodies by legal design, in terms of financial and operational independence with recourse to communication with the public in yet another reverberation of New Governance methods – the sanctioning threat of public shaming.

Unsurprisingly, the Fiscal Compact automatic correction mechanisms, which generate the independent fiscal bodies, is a welcome development for the ECB. They are hoped to act as a 'debt break' capable of 'reduc[ing] incentives and possibilities to postpone fiscal consolidation to later periods' and prevent and correct unsustainable public finances.[50] Moreover, the novel competences of independent bodies begin to approach the schema envisioned by the ECB during the early reform period. In essence, their powers amount to a review of national draft budgets, although not yet to the extent that Regulation (EU) 473/2013 would introduce.[51] Generally, the provisions of Art 3.2. TSCG taken in concert with the Commission's clarifying

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[47] European Commission, COM(2012) 342 final, section 3, para 2.

[48] Additionally, Art 3(2) TSCG explicitly states that the correction mechanism is bound to 'fully respect the prerogatives of national Parliaments.' Yet, it remains difficult to define what advice with ensured compliance amounts to. Save for the fact the TSCG scheme does not bolster a formal sanctions regime in the case of inexcusable non-compliance with independent bodies' advice, it comes dangerously close to a formal rule. In fact, a great part of the EU economic governance legal rulebook (both primary and secondary law) from before the crisis was also without sanctions and continues to be so for non-eurozone Member States in the SGP. Soft law, new-governance rules trumping national prerogatives in the guise of 'mandatory advice' (whatever that might mean) is a somehow more acceptable arrangement that hard law doing so. And apart from the façade of benevolence and questionable justiciability, it is hard to see why this state of affairs perseveres.

[49] European Commission, COM(2012) 342 final, section 3, para 1.

[50] ECB, *A Fiscal Compact,* Monthly Bulletin (May 2012) 89-90.

[51] ECB, Note (June 2010) Section I.1, p. 5/14.

Communication, are a verbatim fulfilment of section I.7 concerning the enhancement of national fiscal frameworks from the ECB Note on economic governance, even in their nonchalant dismissal of democratic conflict:

> 'Sound national fiscal policies are a crucial element of the policy framework of monetary union. The rules of the SGP should therefore specify that countries anchor the objectives of the EU fiscal framework in national law, possibly in the constitution, and give concrete meaning to the Treaty obligation that adequate national budgetary procedures are in place for meeting these objectives. All Member States should establish independent budget offices or fiscal monitoring institutions. Assuming that compliance would be monitored by independent national budget offices or fiscal institutions, as well as by national parliaments, their enforcement does not raise issues of sovereignty.'[52]

2.3.4. Additional Reporting | Economic Partnership Programmes

But the originality of the Treaty does not cease there. Article 5 TSCG introduces yet another significant provision to be eventually incorporated into EU legal practice. Although it is framed as merely obliging an additional reporting requirement if a Member State Contracting party is placed under the SGP's excessive deficit procedure (EDP), the procedure in question is highly invasive, not unlike the MoU reform programmes imposed upon Member States in receipt of financial assistance. Art 5 TSCG stipulates the submission of 'budgetary and economic partnership programmes' (EPPs), which are to include 'a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable corrective of their excessive deficits.'

This is a serious break with the acting – and just reformed – SGP procedures of the time. Firstly, the EPPs allow that the monitoring of corrective measures is moved up to an *ex ante* basis, turning the programmes into something more akin to contractual obligations on reform between the troubled MS and the EU establishment. In contrast, the reporting requirements with the corrective arm of the SGP were only stipulated on an *ex post* basis within the 6 to 3 month deadline for effective action set by the Council, as per Art 3.4 of Council Reg (EU) 1177/2011.

Furthermore, EPPs formalise MoU-styled conditionality with significant focus on structural reforms through the heavy involvement of macroeconomic and competitiveness policies. This effectively turns them into an administrative bridge between the two separate arms of the European Semester – the MIP and EDP, merging budgetary and competitiveness

[52] ECB, Note (June 2010) Section I.7, p.8/14.

policies, as well as separate Treaty competences with Articles 121 and 126 TFEU, respectively. Borne of this mix is yet another competence bestowed upon the Commission – the monitoring of EPPs and consistency with yearly budgetary plans.

EPPs are a welcome development for the Bank – even if some two years later, they fulfil the ECB's call for additional reporting on national budgetary framework surveillance, specifically identifiable with Amendment 3 to COM(2010)522 on the corrective SGP. Whatever reform ideas remain unaddressed with the TSCG, its formalisation into EU law through Reg (EU) 473/2013 (per Art 5 TSCG) provides ample legal ground for development, resulting in a number of additional concerns. We will turn to these in the following section of the analysis.

2.3.6. RQMV

The TSCG manages another significant procedural reinforcement of the EDP. Art 7 TSCG establishes RQMV commitment to Commission proposals and recommendations throughout the excessive deficit procedure's deficit criterion arm. These provisions go beyond the novelty of the originally-introduced SGP RQMV, further constraining the possibility that Council may amend any Commission recommendations on sanctions, such as fines and deposits, before it is required to adopt it by RQMV (as with the original iteration of Reg (EU) 1173/2011).[53]

This is, of course, a noteworthy and welcomed improvement on automaticity as far as the ECB is concerned.[54] It is a limited win though. The RQMV+ introduced by the TSCG has limited application conditioned solely on the deficit criterion. Debt remains unaddressed within the regular decision-making procedure of Art 126 TFEU.

2.3.6. The Court | Only for Enforcement

Wrapping up Fiscal Compact provisions, the TSCG finds yet another, and highly peculiar, avenue for the enforcement of its provisions – the CJEU. Based on a special agreement between the contracting parties within the meaning of Article 273 TFEU,'[55] Art 8 TSCG positions the CJEU as an arbiter between Member States on their compliance with the TSCG rulebook.

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[53] (See review of Reg (EU) 1173/2011, Chapter __). – third SGP regulation from Six Pack

[54] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 90. This includes Art 126.5-6 TFEU on establishing the existence of an excessive deficit and opening proceedings, Art 126.8 TFEU on effective action, as well as stepping-up the procedure.

[55] Art 8(3) TSCG.

The foreseen procedure is indeed striking. The Commission is to present a report to the contracting parties on their compliance with the provisions of Art 3(2), i.e. transposition into national law, preferably constitutional, of the budgetary rules and automatic correction mechanism. Should this report observe a failure in compliance, a Member State is mandated to bring a complaint against its peer before the CJEU. There is no clarity as to how one takes upon this enforcer status, but it would seem it is on a voluntary basis. Additionally, irrespective of the Commission's report, contracting parties are free to decide whether a peer has failed to comply and then bring proceedings to the Court. How they may arrive at such a conclusion – a Member State monitoring the national legal and budgetary framework of another Member State! – remains a mystery. The judgment of the CJEU shall be binding and measures expected to be adopted in compliance.

The Court's ruling itself constitutes yet another roundabout sanction regime imposed by the TSCG, based on Art 260 TFEU. Article 8(2) TSCG stipulates that, again based on a Commission's or their own assessment, a Contracting Party may bring further proceedings before the Court should it consider that a peer has failed to comply with a standing CJEU decision on Art 3(2) TSCG implementation. Again, the process informing such conclusions – especially as they relate to Member State on Member State legal action – is left unaddressed. The Court may then impose a 'lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1%' GDP.' Interestingly, such 'revenue' is to revert to the ESM – following the framework established with the Six Pack new sanctions regime and firstly introduced by the ECB with its Six Pack opinion amendments.

This effort to ensure national ownership of fiscal rules seems like a cynical, yet shamelessly candid, take on the political tensions between Member States borne of the crisis. It undoes the foundational understanding of the constitutional legal order of the EU, defaulting on a sort of financial intergovernmental barbarianism, with the possibility of Member States exercising their economic supremacy against one another, not unlike the events which transpired during the financial aid negotiations with Greece, Ireland or Portugal, for instance. The association is simple – as with the rest of the Great Reformation of EU economic governance, the post-crisis rulebook is designed to apply to those in need of discipline. If the provisions of Art 8 TSCG are to be taken seriously, they should have ensured the 'coalition of the willing' that signed the Treaty should have been far more compact.

Furthermore, we must address the perversity that the involvement of the CJEU does nothing for the justiciability of the TSCG treaty – as even though it relates directly to EU law

and its institutions, the TSCG remains outside the bounds of Court jurisdiction. The Court is only there for enforcement.

Paul Craig remarks on yet another issue with this set up. Generally averse to the entire legal set up of the TSCG and highly doubtful of its legitimacy, he takes the proposition of Art 8 TSCG to its logical conclusion arguing that 'if the precepts contained in the TSCG are taken seriously it will lead to increased EU oversight over domestic economic affairs and to inter-state legal actions through Art 8 TSCG. This is unlikely to generate inter-state harmony between the 25 signatories. It is one thing to subscribe to the principles in the TSCG, it is another to have them applied within one's own domestic polity, and yet another to have them applied against one's own state via legal means.'[56]

Perhaps unsurprisingly, the ECB begs to differ. The Bank welcomes the involvement of the CJEU in verifying rule transposition and extended threat of sanctions. More specifically, it takes satisfactory note of the limited role of the Commission in reporting absent decision making capabilities. This, of course, relates to the leitmotif of mistrust of political discretion exercised by the Commission, which the Bank has attested to throughout the crisis reform process and supports the notion that the ECB would rather entrust the protection of its interests to the creditor Member States.[57]

2.3.7. General Provisions

We then move onto Title IV of the TSCG, which deals with more general provisions united under the theme of economic policy coordination and convergence. Article 9 touches on the content of Regulations 1174/2011 and 1176/2011 (the MIP) – the EU's newfound fondness of competitiveness and macroeconomic policy at large. It is, also, an indirect reference to Euro Plus Pact with an acknowledgement of its objectives – fostering competitiveness, promoting employment, making public finances sustainable and reinforcing financial stability. Article 11 stays on the topic of economic convergence stipulating best practices benchmarking and *ex ante* discussion and coordination of MS major economic policy reforms, also involving the relevant EU institution as required by the applicable EU law.

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[56] Craig, above n 22, 248.

[57] In fact, in noting that TSCG improvements are highly dependent on strict implementation, the ECB notes 'it is crucial that the Commission uses its increased influence under the [EDP] by taking a rigorous approach when assessing fiscal deficits and avoids politically influenced decisions.' ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 91.

In support of such heightened cooperation and coordination on economic policy, Art 10 TSCG declares the contracting parties 'stand ready to make active use' of the enhanced cooperation procedure (Art 20 TEU and Art 326-334 TFEU) as well as Art 136 TFEU related to potential sanctions for eurozone MS on matters which are deemed 'essential for the smooth functioning of the euro area.' The TSCG, hence, foresees further legal developments in the field of economic competitiveness and macroeconomic policy, or in other words – further transfer of national competences *within* the confines of EU law.

And while the contents of Title IV seem to be generally unassuming in substance, the ECB Monthly Bulletin commentary allots a significant amount of space to the Bank's grievances over the lack of specificity as to economic policy coordination in the interest of promoting convergence and competitiveness, or otherwise put – to missed opportunities. 'Overall,' the Bank laments, 'the TSCG reconfirms that economic policies remain largely the competence of MS.'[58] There are no formal commitments towards greater coordination, including a missed chance to turn the Euro Plus Pact into a *binding instrument*. Moreover, the TSCG provides for no 'new instruments or a further strengthening of existing instruments enabling the EU to *instruct countries to implement specific reforms* should they endanger the smooth functioning of EMU.'[59] This is taken to mean that any such ambitious steps would be limited within the confines of the existent EU legal framework, which is – arguably – precluded from any such 'instruction' absent competence.

And while Art 11 TSCG supports eurozone economic policy convergence with *ex ante* discussion and coordination of major national reforms, the ECB would like to see this practice operationalized into concrete results – echoing Blueprint proposals on the competitiveness framework – whereby 'for cases where failure to implement urgent reforms has the potential to affect other countries, it should be made possible to instruct the country concerned to undertake the necessary steps.'[60]

2.3.8. Euro Summits & EuroGroup

Title V deals with Governance of the euro area, summed up in Euro Summits in Article 12 and a pan-European Parliamentary conference in Article 13.

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[58] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 85.

[59] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 85 [emphasis added]. This is an ambition of the ECB which it has carried since the Blueprint June 2010 Note on economic governance. The Bank is nothing if not consistent.

[60] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 85.

The TSCG is the first formal attempt at institutionalising Euro Summits – the eurozone's political avatar of the European Council, not unlike the relationship between ECOFIN and the Eurogroup. It is an awkward attempt, which starts off by explicitly specifying they would remain as *informal* gatherings (Art 12(1) TSCG). Euro Summits are to take place at least twice a year to deal with any and all euro-specific business, including a coordination of economic policies. The new-old formal-informal institution is to now have a President to be appointed by the Heads of State or Government of the Contracting Parties, eurozone only. This is to take place 'at the same time as the European Council elects its President and for the same term of office.' (Art 12(1)).

With Euro Summits institutionalising the political will behind eurozone governance, it is perhaps unsurprising that the TSCG assigns the President of the Eurogroup – yet another informal body – with the preparation of and follow up to Euro Summits, for which purpose he may also be invited to attend (Art 3.4 TSCG). In essence, this would mean that the Eurogroup sets the agenda and eventually manages the exercise of eurozone politics in the EU. The fact that the President of the Commission is also involved throughout this process, but the Commission itself kept outside the preparatory or implementation ('follow-up') stage, further supports this claim. The ECB is also guaranteed a seat at the table – unsurprisingly so, as it is an official member of the Eurogroup. European Parliament is to be kept at arm's length with a report by the Euro Summit's President at the conclusion of each meeting. The President of the Parliament *may be invited to be heard* during a Summit, but the procedural grounds remain unclear.

The ECB enthusiastically endorses Euro Summits, which it perceived as the platform most conducive to furthering economic policy orientations of eurozone Member States, especially so with regards to competitiveness and labour market reforms. 'In this way, the Euro Summits can provide strong guidance in various areas, thus *compensating partly for the lack of hard constraints on economic policies*.'[61] This is in general keeping to the Bank's evaluation of the Eurogroup as a body inherently limited by finance ministers' democratic mandates, unable to reach beyond their own competences into what the ECB sees as the underlying causes of economic troubles lie, i.e. public spending, social and labour policies. Nevertheless, the ECB remarks on the missed opportunity for further strengthening eurozone governance. The Bank suggests enhanced decision-making capabilities of the euro area,

[61] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 87. [emphasis added]

which – according to academic commentators are already bordering infringement of the sincere cooperation principle of EU law,[62] and 'regular monthly meetings between the Presidents of the Euro Summit, the Commission and the Eurogroup.'[63]

2.3.9. PanEuropeanism

Apart from the general and final provisions on ratification and matters of administrative character, the TSCG's substantive contribution to the legal framework of EU economic governance concludes with Article 13 – a delightfully awkward and in all likelihood useless provision for the organization of a pan-European Parliamentary representatives conference intended to *discuss* the substance of the TSCG, in line with the content of Title II of Protocol (No 1) on the role of national Parliaments in the EU annexed to the Treaties. Undoubtfully inspired by aspirations for transparency and democratic legitimation, this rather toothless instrument, whereby the said conference 'may submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission,' (Article 10 Protocol 1) seems designed as an attempt to offset the limited amount of justiciability and institutional balance of power introduced by the TSCG.

Indeed, in keeping with the general approach to crisis-reform, the ECB concurs with this evaluation, professing the parliamentary pan-European conference as a platform of democratic accountability with potential for increasing national ownership of EU fiscal rules.[64] That is, the deliberative democracy is employed as entrapment, where participation is spun to amount to legitimation.

Conclusion

The TSCG was the second wave of institutionalisation of the crisis reform theme focused on national fiscal frameworks, demanding that even stricter rules on national budgets and associated correction mechanism be instituted into national laws, preferably constitutional. The Treaty introduced additional reporting standards regarding national reform commitments in the corrective SGP framework; increased the automaticity of the deficit criterion EDP through wholesale RQMV commitment; further operationalized, rather than

[62] For more detail, see F Fabbrini, above n 19, and P Craig, above n 22.
[63] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 87.
[64] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 88.

formalized, Euro Summits; and heavily involved Euro-institutions across legal bounds throughout the entire process.

The TSCG also checked off quite a few boxes on the ECB's crisis reform to-d0 list, especially on matters, which seemed to have been completely set aside during the first wave of crisis reform with the Six Pack and happened to be, almost entirely, exclusive ideas of the Bank. These include the entire set up of the fiscal rules framework, including independent bodies, as well as the *de facto* European review of national budgets.

But its legal standing under public international law remained an unresolved issue. Even the ECB conceded such arrangements only further complicate the already complicated-enough economic governance framework of the Union.[65] The TSCG was meant to affect national fiscal framework by operating as an enhancement of the existent EU legal framework – in a superior standing to national law. At the same time, of course, as a function of public international law, the TSCG remained theoretically subordinate to national legal frameworks, save, of course, for the perversity of Article 3 provisions.

Importantly, however, its existence outside of EU law came with the caveat of Art 16 TSCG stipulating an eventual attempt for the incorporation of TSCG *substance* into the EU legal framework. We shall return to the latest developments on Article 16 at the end of this chapter. Before such attempts were made, a good amount of the TSCG was first utilised directly into EU law with the Two Pack's Regulation (EU) 473/2013 in the second wave of crisis reform.

3. REGULATION (EU) 473/2013 | in Relation with TSCG

Already subject to discussion, the Two Pack and TSCG were contemporaneous legal developments in the reform of European economic and crisis management governance. While the TSCG took a record few months for negotiations to conclude from first draft to final, the

[65] ECB, *Fiscal Compact,* Monthly Bulletin (May 2012) 93-4; However, we must note the Bank's concern with this matter is less so of the goodness of its heart and more because complicated unclear rules make for weak compliance. Paul Craig concurs with the notion at large: 'The TSCG will exacerbate problems of transparency and complexity that already beset this area, even for those skilled at navigating this complex terrain. There were, prior to the TSCG, three layers of legal rules pertinent to control over national economic policy: provisions of the Lisbon Treaty, EU legislation and the broad economic policy guidelines. These rules were complex and created difficulties in terms of transparency, because they were spread across primary Treaty provisions, complex EU legislation and high level soft law. The TSCG adds a fourth layer to the existing schema, thereby exacerbating difficulties of complexity and transparency, more especially because, as seen above, there is very significant overlap between detailed obligations incumbent on states through the six-pack of EU legislation, and the obligations in the TSCG.' P Craig, above n 22, 247.

work in the formal legislative procedure of the Two Pack regulations stretched over a year and a half (from 23 Nov 2011 to 21 May 2013). The timing of the Two Pack was an important development in the reformation of EU governance with consequences for the rest of crisis-reform legislation. That is, the protracted legislative period enabled the content of the Two Pack to serve as both a bridge between the intergovernmental and EU legal realms as well as a resolution to any remaining unresolved weaknesses with existent or concurrently developing legislation.[66]

The Two Pack consists of Council Regulation (EU) 472/2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability* and Council Regulation (EU) 473/2013 *on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area*. This chapter concerns itself with the latter Regulation as it relates directly to the current discussion on the governance of Member State fiscal policies, anchors the substance of the TSCG, and strengthens Directive 2011/85/EU. Regulation (EU) 472/2013 will be analysed as part of the institutionalisation of crisis management alongside the European Stability Mechanism in the following chapter.

As advanced as the content of Regulation (EU) 473/2013 ended up being, it was not always intended to be so. While the original Commission proposal covers some truly unprecedented reform ideas (such as Draft Budgetary Plans), it did not establish a clear legal relationship with the substance of the TSCG. The simplest explanation is, indeed, that at the time of original drafting of the proposal the TSCG had not yet been finalized. So, as of November 2011, the Commission prioritised the introduction of direct oversight of national budgets with a common budgetary timeline and draft budgetary programmes (Proposed Art 3, 5, 6); an intensified monitoring of Member States in an excessive deficit procedure, which only implicitly built upon the TSCG-introduced Economic partnership programmes (EPPs);[67] the introduction of a completely novel surveillance procedure monitoring for *risk* of non-compliance with obligations under EDP (Proposed Art 8); and the weaving in of new procedural recommendations, reports, and opinions into a strengthened excessive deficit

[66] The Two Pack was tabled before the Six Pack had even been finalized, and concurrently to the TSCG and ESM, whose substance the regulations were to formalize into and connect with EU law.
[67] This connection was clarified in the final text of the regulation.

procedure (Proposed Art 9). These were focused on enhancing the preventive and corrective arms of the SGP (Proposed Art 1).

The final version of Reg (EU) 472/2013, however, is a much more comprehensive document, worth a number of preliminary observations. Arguably, Regulation (EU) 473/2013 is one of the most intrusive and intricate pieces of legislation in the European crisis-reform framework. As such, unsurprisingly, it also fulfils some of the most ambitious crisis-reform proposals of the ECB's Blueprint agenda.[68] It establishes a regime of direct supranational oversight of Member State budgetary policies, putting an unelected and informal body such as the Eurogroup at the helm as a 'guardian of eurozone fiscal policy' – directly in line with the ECB's Blueprint reform agenda. It enshrines the competences of independent bodies previously outlined with the Commission's *Common principles on national fiscal correction mechanisms* (COM 2012) 342 final – a function of the TSCG, and enhances them with a direct review of national draft budgetary plans (Art 4(4)). The Regulation manages to tie in two – hitherto – separate legal procedures into a unitary oversight regime on draft budgetary plans by introducing considerations of the novel Macroeconomic Imbalance Procedure (Reg (EU) 1176/2011 and 1174/2011) into both the enhanced preventive and corrective frameworks of the SGP.[69]

Curiously, when it came to drawing inspiration from the legal novelties of the TSCG, the European political establishment drew a clear line at the Fiscal Compact. Even the adamant input of the ECB could not break the political resolve at leaving the core of the TSCG as a matter for another day. Only independent bodies, economic partnership programmes, and a mention of *ex ante* debt issuance plans would find their way into the final version of the regulation.

In effect, Regulation (EU) 473/2013 is part of the crisis-reform framework which legalizes the 'spill-over' coupling between individual Member States' fiscal policies, measured in terms of financial stability, and the 'proper functioning of the economic and monetary union.'[70] It operationalises an approach to governance thoroughly exploited by the European establishment's crisis response – if you can frame a policy as a threat, specifically to price or

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[68] Specifically – independent bodies' direct review of budgets, EU direct review of budgets, the role of the Eurogroup.
[69] Regulation (EU) No 473/2013 Regulation of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, Specifically Art 6(d) on monitoring requirements and Art 9(5).
[70] Reg (EU) 473/2013 Recital 20.

euro stability, you can establish a legal expedient to managing it, notwithstanding a lack of Treaty competence.

The function of the Regulation is truly remarkable. In essence, it does not introduce much new of substance into the Union legal framework. It does, however, *reconfigure* existent norms. On more than one occasion Regulation (EU) 473/2013 *elevates and repurposes* the national ownership rulebook for supranational oversight and takes a categorical step towards an unmistakable intent for merging the macroeconomic competitiveness and budgetary surveillance arms of European economic governance. In this sense, it seems to represent a 'second wave' of crisis reform, whose novelty lays more in form than content. Using the Six Pack 'quantum leap' in economic governance as legal groundwork, these later legislations *repurpose* early crisis reforms far beyond the originally-advertised intent of (most) authorities involved.[71] Considering the Six Pack had not yet entered into force when the ideas of the Two Pack were tabled, these events give serious cause for concern as to the legitimacy of crisis reform-law as introduced under false, or at the very least undisclosed, pretences.

3.1. ECB Opinion | Overview

In evaluating the ECB's opinion on the Two Pack, it is important to again take note of timing. While the Commission's proposal for the regulations was introduced before the finalization of the TSCG text, the Bank provided its learned opinion a week after its signing on 2 March 2012. So, it is rather unsurprising that a number of proposed amendments try to integrate TSCG content into the regulation.[72]

The ECB's opinion on the proposal for legislation that would eventually become Regulation (EU) 473/2013 laid down the hierarchy of the Bank's reform priorities. With the proposal divided into three thematic sections: i) the common budgetary timeframe, related ii) to additional monitoring requirements, and iii) an additional surveillance procedure complementary to the Excessive Deficit Procedure, it was indeed telling that in spite of the ECB's direct, Treaty-established access to the EDP, it instead chose to focus its reform efforts almost exclusively on Member States' budgetary policy.[73]

[71] The ECB, of course, being the exception.
[72] Particularly, Amendments 1, 2, 3, 7 to be discussed hereafter.
[73] A requirement for formal consultation under Art 126(14) TFEU.

In its assessment of the proposal, as usual, the Bank finds 'room for improvement to make the proposed regulation more forceful and effective,'[74] proceeding to identify two lines of reform inquiry. On the one hand, the Bank expends significant effort in maximizing the reach of draft budgetary plans (DBP) assessment. The ECB successfully introduces the reporting requirement of national medium-term fiscal plans to be submitted in the spring Semester alongside the SCPs and NRPs. The Bank also attempts to strengthen this procedure by i) language editing, ii) increasing the scope of assessment for what constitutes compliance infringement to give additional cause for an opinion,[75] as well as iii) expanding the list of circumstances in which the Commission can request a revised DBP.[76] While these are ultimately unsuccessful interventions, they nevertheless speak to the general reform ideology professed by the Bank and especially so to its attitude towards Member State economic and fiscal sovereignty.

On the second reform track, the ECB also styles itself the guardian of the spirit of the TSCG – taking every opportunity to either introduce amendments to the same legal effect or nudge a supportive legislative process. To that end, the Bank seemed to envision Union secondary law as a potential means for resolution of any perceived insufficiencies of the TSCG. To this end, on a number of occasions during its discussion of the Two Pack's relationship with the TSCG,[77] the ECB *invites* the Commission to use its legislative initiative on proposals related to the substance of the TSCG, should these remain excluded from the final version of Regulation (EU) 473/2013, as intended by the original proposal.[78] The Bank would supposedly welcome provisions on numerical fiscal rules, including specified conditions for temporary deviations due to exceptional circumstances; a reference to the

[74] European Central Bank, Opinion on strengthened economic governance of the euro area (CON/2012/18) 7 March 2012, General Observations, C141/8.
[75] ECB Opinion Two Pack (CON/2012/18) General Observations I.2, C 141/9 (Also in Amendment 5 to Proposal Reg 473/2013)
[76] ECB Opinion Two Pack (CON/2012/18) General Observations I.3, C 141/9 (Also in Amendment 4 to Proposal Reg 473/2013)
[77] ECB Opinion Two Pack (CON/2012/18) General Observations III, C 141/11.
[78] ECB Opinion Two Pack (CON/2012/18) General Observations III, para 2, C 141/11; Also, for instance: 'Regarding the introduction of a new range for the medium-term objectives as mentioned in the ninth recital of the TSCG, the ECB notes that if this range is not introduced into the proposed regulation the Commission could present a legislative proposal to introduce it. The ECB would welcome such a proposal.' (C 141/11, III, para 3)

essence of the automatic correction mechanism; the tasks of the independent fiscal councils; economic partnership programmes; and the *ex ante* reporting of public debt issuance.[79]

In spite of all the ECB's advocacy, the powers that be remained reluctant to anchor the Fiscal Compact into Union law. This topic will be explored further with the succeeding discussion on the legislative efforts for incorporation of the TSCG at the end of this Section. For present purposes, it would suffice we note that apart from the difficulties with the Fiscal Compact, the ECB's reform proposals related to the TSCG mostly met with success with the introduction of completely new sections on EPPs (Art 9 final), the powers and responsibilities of independent bodies (Art 5, Art 2(1a) final), a recital mention of exceptional circumstances (recital 27 final), and debt issuance reporting (Art 8 final).

This about sums up the better part of ECB reform proposals in its opinion on Regulation (EU) 473/2013. The strengthened EDP procedure seems of minimal concern to the ECB. The Bank limits itself to making the general – and by now standard – submission for 'stronger use of peer pressure in the Eurogroup, the Council and, ultimately, the European council, as well as a greater use of (reputational) sanctions,'[80] as outlined in Amendments 6 and 9. Further detail will be elaborated upon wherever warranted in the following discussion of the Regulation's content.

3.2. Reg (EU) 473/2013 | CONTENT REVIEW

This part of the study is a review and analysis of Regulation (EU) 473/2013 with special note as to any involvement therein of the ECB, whenever warranted. It is divided into two sections: i) the Economic Policy Coordination provisions, which include a common budgetary timeline, independent bodies, medium term fiscal plans – all of which ultimately relate to MS draft budgetary plans; and ii) Ensuring the Correction of Excessive Deficit provisions, centred around economic partnership programmes, additional reporting requirements, and risk of non-compliance procedure. General provisions of a more technical nature are only discussed as they relate to the substance of the two main sections above.

[79] Outlined in: European Central Bank, *Drafting proposals regarding the proposed regulation on monitoring draft budgetary plans,* Annex, Opinion on strengthened economic governance of the euro area (CON/2012/18), 7 March 2012, Amendments 1, 2, 3, and 7.
[80] ECB Opinion Two Pack (CON/2012/18) General Observations I.4, para 2, C 141/9.

3.3. ECONOMIC POLICY COORDINATION
(common budgetary timeline, fiscal plans, draft budgetary plans, independent bodies)

3.3.1. Medium term fiscal plans

Regulation (EU) 473/2013 weaves an intricate web of crisis law into a unitary instrument of surveillance and enforcement. In order to do so, the legislation is a 'mix and match' of measures previously reserved for the national legal space – for example, the national fiscal ownership rulebook elevated to the Union level, as well as a cross-pollination of the procedural products of different legal bases, such as that between the MIP and the EDP.

Economic policy coordination after the crisis is procedurally founded upon the European Semester surveillance framework. Regulation (EU) 472/2013 completes the common budgetary timeline, elaborated around the monitoring of a new instrument – Member State draft budgetary plans (DBPs).[81] The ECB invested significant effort in trying to maximize the reach of DBP assessment, starting with the successful introduction of comprehensive early reporting requirements with medium term fiscal plans.

While in the original iteration of the Semester – from two years earlier – Member States reported solely within the frameworks of general budgetary and competitiveness surveillance (SGP and MIP), Reg (EU) 472/2013 now adds a parallel reporting requirement on ex-ante EU coordination of national budgets. The first step is instituted with 'medium term fiscal plans,' which are reports borne of the national medium budgetary frameworks of Directive 2011/85/EU, to be submitted in the spring Semester (April 15-30) alongside the national reform and stability programmes (NRPs and SCPs).[82] They become an amalgam of

[81] The common budgetary timeframe was introduced with amendments to the preventive SGP and completed by the provisions of the currently-discussed regulation. (Reg 472/2013, Art 4 final, Art 3 proposal),

[82] In fact, as of 2015, the Commission has taken to evaluating the quality of medium-term budgetary frameworks in direct relation to five criteria based with national medium term fiscal plans: '(i) coverage of the targets/ceilings included in the national medium-term fiscal plans; (ii) connectedness between the targets/ceilings included in the national medium-term fiscal plans and the annual budgets; (iii) involvement of national parliament in the preparation of the national medium-term fiscal plans; (iv) involvement of independent fiscal institutions in the preparation of the national medium-term fiscal

all the procedural surveillance available in the Union framework: the general guidance issued at the beginning of the Semester, recommendations in the context of the SGP, and those coming from the MIP, newly introduced EPPs and national budgets. Medium term fiscal plans are fashioned as an enhancement of existent SCPs and may, in fact, be merged into the same document.[83]

While the European Commission may undoubtedly advertise this development as successful administrative 'streamlining,' it is also cause for legal concern with some outstanding questions.[84] With fiscal plans a legal hodgepodge of recommendations and opinions from across the board on EU economic governance surveillance, which regime's legal force would they assume? For instance, fiscal plans and NRPs overlap in their incorporation of macroeconomic imbalance and competitiveness indicators (see Art 4.1, para 2). Which instrument would these underlying factors have a better chance of ensuring compliance through and would a choice of 'enforcement forum' be legally acceptable?

Returning to the Regulation's procedure, the Commission feedback on medium term fiscal plans is intended to follow the established trajectory of SCPs and NRPs in the early Semester, as per the procedure set out with the preventive MIP and SGP. These evaluations are to feed into the next stage of the Semester – the draft budgetary plans (DBPs), expected by October 15. As the Bank explains in its argumentation for the introduction of medium term fiscal plans, this is done to allow the Commission *ex ante* monitoring and assessment of 'the [DBPs] for the forthcoming year, taking into account the medium-term budgetary implications of new measures, as well as any country-specific risks to the sustainability of public finances.'[85]

3.3.2. Draft Budgetary Plans

Draft budgetary plans (DBPs) were always intended as a core procedural innovation of Reg (EU) 473/2013. They were, however, somewhat more limited in their original iteration. The

plans; and (v) level of detail included in the national medium-term fiscal plans.' European Commission, Medium-Term Budgetary Framework, Accessed Feb 19 2020: https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/fiscal-governance-eu-member-states/medium-term-budgetary-framework_en

[83] Generally, Stability and convergence programmes, but as the provisions of Reg (EU) 473/2013 only relate to Eurozone Member States, we are here concerned with stability programmes only.

[84] European Commission, MIP Compendium (2016) 21, in reference to the streamlining in case of overlaps between procedures stemming from Reg 472/2013 (MAPs) and Reg 1176/2011 (CAP), as per Art 11 of Reg (EU) 472/3013. .

[85] ECB Two Pack Opinion (CON/2012/18) Section I.1, C 141/8; as well as Reg (EU) 473/2013 Art 4 final.

legislative proposal did not provide for an opinion to be issued on each Member State's individual DBP, as the final version of Art 7(1) stipulates. Opinions, including a request for a revised DBP, were only intended in cases of identified 'particularly serious non-compliance' with the budgetary rules of the SGP framework.

With the final text, Member States submit their DBPs for the forthcoming year to the Commission and the Eurogroup by October 15. To clarify, Member Sttae governments are under obligation to share with the EU – including a non-body of the power establishment, which exists almost entirely outside the jurisdiction of EU law – the budget proposals they intend to submit for a vote to their national Parliaments, before the exercise of the national democratic process.[86] While these documents may anyways come to the attention of the Eurogroup, as the economic avatar of eurozone Member States, the fact that an EU legislation stipulates legal obligations towards the Eurogroup is perhaps the more disturbing matter in this set-up.

DBPs are expected to incorporate the same recommendations applicable to the medium term fiscal plans in the earlier stage of surveillance.[87] They contain plenty of detail, some of it operationalizing the substance of Directive 2011/85/EU,[88] and other more novel requirements which connect to the underlying conditionality objective of Reg (EU) 473/2013 in seeking to establish the capacity for structural reform. Article 6(3d), for example, stipulates that DBPs ought to include 'relevant information on the general government expenditure by function, including on education, healthcare and employment, and, where possible, indications on the expected distributional impact of the main expenditure and revenue measures.'

The true 'eureka' moment of the Regulation, its 'quantum leap' in European economic governance, however, comes with the procedure on the assessment of DBPs, which, in every practical sense, establishes direct supranational oversight of national budgetary processes – an idea formally espoused solely by the European Central Bank with the Blueprint.[89]

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[86] Absent legal recognition as a formal EU body, the acts (statements) of the Eurogroup are not subject to legal review and procedural protections, as they were found by the Court of Justice of the EU incapable of 'producing legal effects with respect to third parties.' CJEU (Court of Justice of the European Union) (2015). *Mallis And Others v Commission and ECB*, Joined Cases C-105/15 P to C-109/15, Judgment of 20 September 2016, para 49.

[87] Art 6(1) in Reg (EU) 473/2013 final.

[88] Among provisions of Art 6(3) Reg (EU) 473/2013 final.

[89] ECB, Note (June 2010) Section I.1; See also Section II.1.3 of the previous chapter (Blueprint).

Unsurprisingly then, and in spite of the win, the Bank seized the opportunity to legalize its vision for the procedure in full.

As noted, the content of the Regulation undergoes significant changes during the legislative process. In a break with the original, the Commission is to issue an opinion on *each* DBP as soon as possible or at the latest by 30 November (Art 7(1)). If, in its review, the Commission identifies 'particularly serious non-compliance' with the budgetary policy obligations laid down in the SGP, it shall issue its opinion within a stricter deadline (two weeks from submission and after consulting with the Member State in question), in it requesting a revised DBP to be submitted no later than within three weeks.

Same rules of review apply to the content of the revised DBP, which the Commission is to again review and opine on within three weeks. The results are to be presented to the Eurogroup with no specification as to the procedural consequences thereof. Either the parliament of the Member State concerned or the EP can make a request to have the Commission explain the situation by presenting its opinion formally before them (Art 7(3)). Both procedures are to be made public. As with the rest of economic governance crisis-reform, we must assume the underlying rationality behind this type of reputational sanction is to provoke and enlist financial market pressure in the form of increasing bond yields/interest rates in order to ensure Member State compliance.

This is no small development in European economic governance. Not only are Member States to restrict their budgetary plans in line with the Union rulebook and recommendations, but they shall directly report on their intentions and be held to account for failing on either count.

But it is, unsurprisingly, not quite enough for the ECB. In attempting to strengthen this enforcement procedure even further, the ECB suggest three – ultimately unsuccessful – revisions. The first concerns language editing from 'particularly serious non-compliance' to just 'serious non-compliance' in an effort to lower the discretion threshold for Commission interference in DBPs (Amendment 4). The second is an attempt at increasing the scope of assessment for what constitutes compliance infringement in order to give additional cause for the issuance of an opinion (Amendment 5). That is, however, a moot point in the final version of the Regulation, as the Commission is to adopt an opinion on DBPs in any case. The third intervention (again with Amendment 4) copies this approach in trying to expand the list of circumstances in which the Commission can request a revised DBP to include non-compliance 'with the deficit and/or debt path specified in the stability programme of a

Member State, taking into account any Council opinion on the stability programme, or when it identifies risks to fiscal sustainability.'[90]

None of these ideas are adopted in the final version of Regulation 473/2013, but their very existence on the record speaks loudly to the reform agenda and rationality at play in the ECB, and especially so to its attitude towards Member State economic and fiscal sovereignty.

3.3.3. Independent Forecasts | Independent bodies

The enhancements of economic policy coordination introduced with Regulation (EU) 473/2013 do not end there. We turn now to the incorporation of the TSCG regime on national independent fiscal councils.

Article 4(4) Reg (EU) 473/2013 stipulates that the national medium term fiscal plans and draft budgets are to be based on independent macroeconomic and budgetary forecasts. While the approach is in keeping with the provisions of Directive 2011/85/EU of the Six Pack, specifically Article 4 thereof, there is one seemingly small, but significant difference. With the Directive, Member States were at liberty to decide on the institution to produce these forecasts, with the minimum requirement that those be subject to 'regular, unbiased and comprehensive evaluation' by some unidentified authority (Art 4(6) Directive). Regulation (EU) 473/2013 categorically resolves this uncertainty by specifying said forecasts be either 'produced or endorsed by an independent body.'[91] The ECB sees to it that these are the very same independent bodies-turned-fiscal councils first hesitantly introduced by Directive 2011/85/EU, shaped up in the public international legal space by the TSCG, now being re-incorporated in the EU Treaties.

The legislative proposal of Reg (EU) 473/2013 always intended on formalizing the relationship between independent bodies and budgetary and macroeconomic forecasts. It did not, however, provide much detail on the general legal standing and responsibilities of these bodies in relation to the budgetary framework. This is the first objection raised by the ECB in its Opinion on Reg (EU) 473/2013. In Amendment 1 the Bank argues that the tasks of independent fiscal councils ought to be clearly outlined in accord with the substance of the TSCG, Article 3(3) in particular, where they had been previously stipulated. The Commission obliges. Article 2(1a) incorporates the substance of its own communication on *Common*

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[90] ECB Opinion Reg (EU) 473/2013 Amendment 4 and ECB Opinion Two Pack (CON/2012/18) I.3, C 141/9.
[91] (Art 4(4) 473/2013)

principles on national fiscal correction mechanisms (COM 2012) 342 final,[92] while the brand new Art 5 details independent bodies' role with respect to monitoring compliance with numerical fiscal rules, in line with the substance of the preventive SGP and Directive 2011/85/EU as they relate to European Semester surveillance.

This ultimate formalization into EU law of an instrument of international public law is not unexpected. It is mostly in line with the general trajectory of crisis law reform – in fact, years earlier the ECB had unsuccessfully tried introducing 'independent auditing' for the Directive forecasts.[93] It does, however, have an important impact on post-crisis EU governance framework since, in effect, Regulation (EU) 473/2011 takes a framework supposedly designed for national ownership (with the Directive) and further proceduralizes it on the Union level. While independent bodies only produce or endorse forecasts, these forecasts set the groundwork and boundaries of Member State budgets. As such, they constrain the exercise of budgetary sovereignty within what is formally being presented as a separate and independent national competence. The logic is rather straightforward: Member States draft budgetary plans are to be evaluated against fiscal plans, the latter based on forecasts either directly produced or endorsed by independent bodies. That is, in the post-crisis European economic governance framework, the statistical genesis of Member State budgets lies with independent institutions.

This development may still be argued to follow the implicit intent of the Six Pack Directive on national budgetary frameworks. There are, however, two novelties: budgetary frameworks are now to also be *evaluated* and *enforced* on the Union level.[94] While in the early Directive-iteration the quality of forecasts was only subject to a closed-loop evaluation system with publicised feedback simply expected to feed into the next cycle, Reg (EU) 473/2013 establishes a direct connection between the quality of forecasts - through either authorship or endorsement - and the Commission's evaluation of Member States fiscal plans and DBPs. These latter assessments, in turn, become factors for the escalation of excessive deficit procedures. [95]

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[92] Borne out of the provisions of Art 3 TSCG on national correction mechanisms.
[93] ECB Opinion Directive 2011/85/EU (CON/2011/13), Amendment 10.
[94] As per Chapter IV of Reg (EU) 473/2013.
[95] With its Amendment 5 the ECB even recommends 'making it explicit… that the Commission assesses the quality of the process of collecting the underlying data, which could lead for example to an opinion on the quality of budgetary statistics or the lack of independence of macroeconomic and/or budgetary forecasts.' ECB Two Pack Opinion Two Pack (CON/2012/18) General Observations, I.2, C 141/9.

This is all to say that the consequences to ignoring the 'advice' of national fiscal councils have been heightened both literally and figuratively - feeding into a corrective economic governance procedure and relocating from the national to the Union level. In essence, the independent oversight of national budgetary frameworks, as established by Directive 2011/85/EU, has been transformed into the European means of external *legitimation* for one of the most fundamental exercises of national sovereignty.

The legitimacy of national budgets is, therefore, conditioned upon the parameters of the quintessentially New Governance independent budgetary and macroeconomic planning in yet another crisis-reform iteration of the governance of governing. Absent complete overlap between national and independent fiscal authorities, full compliance with the new rulebook thus amounts to a transfer of competence with the partial surrender of Member State sovereignty in the interest of supranational oversight.[96]

3.3.4. Normative Perturbations

Before concluding the section on enhanced economic policy coordination reforms, we must take note of two legal details with significant normative implications. They concern the novel take on opinions and exploitation of New Governance legitimacy in the crisis-reformed EU economic governance framework.

Sanctioned Opinions

In no uncertain terms, Article 12(1) Reg (EU) 473/2013 states that the opinions issued with the assessment of DBPs are to have a direct impact on the SGP's excessive deficit procedure. It is a strange proposition in the face of Art 288 TFEU, which stipulates opinions to have no legally binding force of their own. And yet, with Reg (EU) 472/2013, a negative DBP opinion may inform the Commission's investigation into potential excessive deficits with Art 126(3)

[96] The importance of this novel legitimating relationship is taken seriously by EU authorities, as was recently tested in the technocratic brawl between the Commission and the Italian government during the pre-2019 Semester cycle. That much was made clear in an admonishing Commission letter issued to Italy as part of the preliminary consultation procedures with a MS prior to issuing an opinion on the existence of a particularly serious non-compliance requiring a revised DBP (as per Art 7(2)). In clarifying the circumstances, the Commission crosses the t's and dots the i's of Reg 473/2013 procedure, including a special note that 'the macroeconomic forecast underlying Italy's budgetary plans has not been endorsed by the Parliamentary Budget Office (PBO), Italy's independent fiscal monitoring institution.' This led to a demand on part of the Commission that the Italian government – in defending it Draft Budgetary Plans – produce arguments for disregarding the PBO's opinion. See: Letter 18 October 2018 from Valdis Dombrovskis, Vice President of the European Commission, and Pierre Moscovici, Member of the European Commission, to Prof. Giovanni Tria, Minister of Economy and Finance, Government of Italy.

TFEU and decision making process on sanctions in the hypothesis of Art 5 Reg (EU) 1173/2011 of the SGP, as well as the Council in their decision on the existence of an excessive deficit in accordance with Art 126(6) TFEU.

So, it would seem, generally-unenforceable opinions become cause for various forms of sanction in the larger economic governance framework, where the promise of future penalties – even if legally outsourced to another procedure – may serve to enforce compliance with the original opinions. All the while, EU economic governance is 'merely' issuing friendly advice and guidance on otherwise exclusive national competences, such as the most sovereign exercise of them all – budgets. The approach may in fact ensure legality, but it is extremely unsettling in terms of legitimacy.

Paper Tigers

Opinions issued on DBPs and the overall budgetary situation assessment of the Commission are to be discussed by the Eurogroup behind closed doors (Art 7.5). To what end is unclear. Furthermore, these are only to be made public 'where appropriate.' The extent of suspicious confidentiality with regards to the workings of the Eurogroup is further validated by the provisions of Article 15 on the Economic Dialogue – the New Governance euphemism for compensating the lack of democratic process with accountability and transparency through 'enhanced dialogue.' Here, the 'competent committee' of the European Parliament is invested with these uninspiring powers meant to apply to the Presidents of the Eurogroup, the Council and the Commission – tellingly placed on par with each other. And yet, these awesome powers practically amount to nothing in relation to the Eurogroup. Art 15(1b) stipulates that while the President of the Eurogroup may indeed be invited to discuss the Eurogroup's inner discussions on Commission opinions on DBPs, he may do so only with regards to the part of these opinions, which have already been made public – themselves a function of a decision taken by the Eurogroup itself.

Even though, or precisely because, they amount to little more than paper tigers, Economic Dialogue provisions have become a staple of crisis-reform legislation. They clearly demonstrate the agility of New Governance-styled measures and parlance to be utilised for purposes diametrically opposed to the advertised objectives. This study claims that, in this particular iteration, they are particularly detrimental to the integrity of EU law as placating measures designed to give a false sense of security as to the legitimacy of the Great Reformation.

3.4. ENSURING THE CORRECTION OF EXCESSIVE DEFICIT (economic partnership programmes, additional requirements, risk of non-compliance)

The following section of the work will focus on the second reform theme of Regulation (EU) 473/2013 – the enhancement of the excessive deficit procedure (EDP) of the Stability and Growth Pact. Rationalised as mere 'closer monitoring,' additional reporting requirements were proceduralized into ensuring the 'early correction of any deviation from the Council recommendations' to correct excessive deficits.[97]

3.4.1. Economic Partnership Programmes |EPPs|

The most noteworthy provision of this structure – the TSCG's Economic Partnership Programmes (EPPs), seems almost unintended with the original proposal. The Commission's proposal for legislation made an implicit reference to EPPs, but never clearly specified their role and content.[98] The Bank sought to resolve this uncertainty with Amendment 7 in direct reference to 'the main principles of the TSCG,' specifically Article 5 thereof, which bore fruit with the addition of an entire section on EPPs in the final text of the regulation (Chapter V).

Should a MS be placed in an EDP subject to a Council decision under Article 126(6) TFEU, it will have to submit to the Commission and Council an EPP 'describing the measures and structural reforms that are needed to ensure an effective and lasting correction of the excessive deficit.' The EPP is expected to draw on information from NRPs (which otherwise feed into the MIP procedure under Art 121 TFEU) and SCPs (or medium term fiscal plans, part of the preventive SGP under Art 121(6) TFEU).

The underlying rationale behind EPPs cannot be emphasised enough.

Analogous to the logic of the MIP, the EPPs are understood as an instrument capable of ensuring a lasting correction of excessive deficits, where budgetary measures – the stuff of the SGP and Art 126 TFEU – have failed.[99] The only problem is that, in order to achieve this

[97] Proposal for a Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, 23 Nov 2011, COM(2011) 821 final, recital 11.
[98] Reg 473/2013 Proposal COM(2011) 821 final, Art 7.2.
[99] Reg (EU) 473/2013, Recital 28: 'Also, since budgetary measures might be insufficient to ensure a lasting correction of the excessive deficit, Member States whose currency is the euro and are subject to an

objective, the new regime under Reg (EU) 473/2013 unites two otherwise separate legal instruments, based on different legal sources, into a comprehensive reform programme reaching deep into Member State competence. That is, EPPs transfer procedure and content stipulated under Art 121(6) into an enforcement instrument under Art 126 TFEU. While these arrangements are indeed analogous to the EPP's TSCG iteration (Art 5), never were they part of Union constitutionalism, bringing about a serious conflict of legal and normative sensibility.

The convoluted relationship between the two governance arms is summed up in Art 9(5) Reg (EU) 473/2013, which clears up the hierarchy between the reporting requirements of the MIP and SGP – the corrective action plan (CAP) (Art 121(6) TFEU) and the economic partnership programmes (Art 126 TFEU), respectively. Should a Member State be subject to a MIP before finding itself in an EDP (i.e. if it already has a CAP), *the CAP under the corrective MIP (Art 8(1) Reg 1176/2011) can be amended to replace the EPP*. If, however, the order is reversed with a Member State placed in a MIP after an EDP, *measures of the EPP 'may be included in the corrective action plan.*' CAPs are – by all evidence – to be monitored and enforced within the hypothesis of an excessive deficit procedure, part of the SGP. This brings direct consequences regarding differences in reporting requirements and the possibility of monitoring missions, for instance, and a number of normative concerns. This may very well be the ultimate merger of legal procedures of economic governance in the Union.

This means that the reach of the CAP (under the macroeconomic imbalances and competitiveness framework) is actually far more significant than the EPP's (in the budgetary-focused Stability and Growth Pact). It means that where and when it really counts, the true target of EU governance over Member State economic discretion are structural reforms identified as macroeconomic and competitiveness measures: a wide assortment of public spending, social and labour policies, such as education, healthcare, pensions, social security. While much better suited to the governance regime of the Social Pillar, under the MIP, these policies are cast as 'underlying' structural issues to be resolved and corrected in the interest of growth, jobs and economic competitiveness. Moreover, in the context of crisis-reformed EU economic governance, this is the new battleground over Member State sovereignty,

excessive deficit procedure should present an economic partnership programme detailing the policy measures and structural reforms needed to ensure an effective and lasting correction of the excessive deficit, building on the latest update of their national reform programme and their stability programme.'

subject to both lines of EU legal influence over Member State business – Article 121 and 126 TFEU.

In this regard, Article 1(2) issues a disclaimer – previously associated solely with the substance of the MIP[100] – stipulating compliance with Art 152 TFEU, Art 28 Charter, and respect for national practice and institutions for wage formation.[101] It is a peculiar detail. While certain aspects of Reg (EU) 473/2013 do indeed relate to the MIP, the 'no-conflict' clause in question is meant to apply to the *entirety* of the regulation. The presence of such clauses should be seen more as a red flag signalling the potential reach of any legislation, than a promise of sufficient protections. There can be little doubt this attempt at balancing is borne out of awareness for the premeditated conditionality that Reg (EU) 473/2013 formalizes into law through its incorporation of macroeconomic and competitiveness indicators related to structural reform in the corrective SGP (the EPP).

Hopefully, it is easy to recognize this as a worrisome development, considering the close affiliation in both content *and* form of the CAP to the notorious Memoranda of Understanding signed by Member States receiving financial aid. We shall come back to this topic with the next Chapter's discussion on EU crisis governance based with Regulation (EU) 472/2013, wherein MoUs have become legalized into the Treaty framework under the pseudonym 'macroeconomic adjustment programmes.' In fact, these are the only instrument which supersedes the CAP-based framework of the MIP in the aftermath of the Great Reformation of EU economic governance.

3.4.2. Additional Requirements | Normative Perturbations

Thereafter, Chapter V Reg (EU) 473/2013 provides further assurance on the correction of excessive deficits with multiple provisions for additional reporting requirements. While these do indeed successfully deepen the intrusion of the procedure, they also carry normative implications important for the purposes of this study.

Articles 10(2) and 10(3) introduce supplementary requirements in the existent reporting framework and as novel procedure, respectively, both sets of which are a reflection

[100] Reg (EU) 1176/2011 and 1174/2011.
[101] The application of this Regulation shall be in full compliance with Article 152 TFEU and the recommendations issued under this Regulation shall respect national practice and institutions for wage formation. In accordance with Article 28 of the Charter of Fundamental Rights of the European Union, this Regulation shall not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice.' (Reg 473/2013 Art 1(2))

of the provisions of Directive 2011/85/EU for national budgetary frameworks.[102] We must note here that national budgetary frameworks were originally introduced in an effort to encourage national ownership of SGP fiscal rules by ensuring the early correction of deviations. With the aforementioned provisions of Reg (EU) 473/2013, then, the content of Directive 2011/85/EU is clearly taken out of its original context. In yet another instance of legal repurposing between the first and second wave of the Great Reformation of economic governance, legislative provisions are 'lifted' out of their otherwise independent existence in national fiscal domains, to now enhance the *supranational* corrective framework. At its core, this additional reporting is a reflection of the provisions of Directive 2011/85/EU for medium term budgetary frameworks, and thus represents another relocation of Six Pack instruments from the national ownership framework to the Union space. Its contents are to be further specified by the Commission, which is empowered to adopt delegated acts to this end.

There is also a second category of reporting requirements, which deal with the inherent mistrust assumed between Member States and the establishment in the hypothesis of an excessive deficit procedure. To this end, Art 10(6a) instructs a Member State under EDP to 'carry out and report on a comprehensive *independent* audit of the public accounts of *all* subsectors of the general government conducted preferably in coordination with national supreme audit institutions,' upon the request of the Commission.

The regulation does not provide this request be reasoned against any criterion, but in speaking to the objectives of the measure lets us infer the potential cause as doubt in the 'reliability, completeness and accuracy of those public accounts for the purposes of the [EDP].' It is a curious rationalisation, especially given the established standardisation of national accounting procedures with the ESA-95 requirements two years prior with Directive 2011/85/EU, and not the least because it openly admits the possibility that Member States may be engaged in deliberate obfuscation of the process. To alleviate suspicions, Article 10 concludes by investing Eurostat with the quality assessment of Member State statistical data, based on the provisions of Regulation (EC) 479/2009.[103]

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[102] These include 'a comprehensive assessment of in-year budgetary execution for the general government and its subsectors [and] the financial risks associated with contingent liability with potentially large impacts on public budgets' (Art 10(2)); and data 'for the general government and its subsectors, the in-year budgetary execution, the budgetary impact of discretionary measures taken on both the expenditure and revenue side, targets for the government expenditure and revenues, and information on the measures adopted and the nature of those envisages to achieve the targets' (Art 10(3)). Reg (EU) 472/2013

[103] Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community

We should also remember here that Chapter V of Regulation (EU) 1173/2011 on *the effective enforcement of budgetary surveillance in the euro area* established a sanctions regime for 'intentionally or by serious negligence misrepresent[ing] deficit and debt data relevant for the application of Articles 121 or 126 TFEU, or for the application of the Protocol on the excessive deficit procedure annexed to the TEU and to the TFEU' (Art 8). What this means, in essence, is that in weaving the coherent wholesale framework of EU economic governance after the crisis, even reporting requirements, such as those of Reg (EU) 473/2013 under discussion, come complete with their own enforcement framework and the threat of sanctions.

3.4.3. Risk of non-compliance procedure

We conclude this section of the work with another remarkable novelty introduced in the EDP, which successfully manages to transform the continuous and dynamic surveillance of the new regime into a legally meaningful enforcement mechanism. Article 11 of Reg (EU) 473/2011 stipulates that the Commission is to assess whether a MS is at *risk* of non-compliance with the *deadlines* to correct an excessive deficit, as set by a Council recommendation under Art 126(7) TFEU or a Council decision to give notice under Art 126(9) TFEU. Before we delve into the anyways-sparse details of this procedure, we ought to make a number of essential observations as to the fundamental premise behind the legal provision.

First, this is not the first time that the reformed governance framework has attempted to proceduralize risk assessment. The enhanced surveillance procedure set up by Art 10a of Regulation (EU) 1177/2011 (the corrective SGP) claims one of the objectives of on-site missions as 'the identification of *any risks or difficulties* in complying with the *objectives* of [the] Regulation.' This provision, however, only applied to Member States 'which are the subject of recommendations and notices issued following a decision pursuant to Article 126(8) TFEU and decisions under Article 126(11) TFEU for the purposes of on-site monitoring.'[104] In other words, enhanced surveillance was utilized as an additional sanction in the case of *already established* non-compliance with Council recommendations. In conjunction, then, Regulation (EU) 473/2013 completes the risk assessment of the EDP, applying *before* an infringement of the rules has been proven, or rather – *during* the period a Member State is expected to be working on compliance.

[104] Reg (EU) 1177/2011, Art 10a(2).

However, the two risk-related provisions do not constitute a uniform approach.

The assessment of Reg (EU) 1177/2011 for compliance with objectives is, in fact, a far more comprehensive monitoring regime, based on the foregone conclusion of missions. There need not be suspicion of risk of non-compliance for the enhanced surveillance to take place in the hypothesis of Reg (EU) 1177/2011. Risk evaluation does not itself instigate procedure, but is merely a part of it.

That is not the case with Reg (EU) 473/2011, where the identification of risk actually generates the entire enforcement procedure. In this case, the Commission assesses the possibility of risk based on an analysis of available information submitted by the Member State – presumably anything within the Semester economic governance framework. What constitutes a measure of risk in this assessment is unspecified. Notwithstanding, if risks are in fact somehow identified, that would result in further recommendations, which may include the prescription of additional measures, leading to yet another reporting requirement for Member States. Based on this cumulative report, the Commission is to assess whether *compliance with the requirements stipulated within Article 11* – and not the excessive deficit procedure at large – are met.[105] Furthermore, these results are to impact the Commission's assessment on effective action under Articles 126(8) and 126(11) TFEU.[106]

This new form of surveillance is significantly removed from the original EDP, even if we take the Six Pack reforms as a baseline. The marked difference is in the very nature of the procedure – while previously the EDP could be reduced down to a back and forth of decisions, recommendations, self-reporting and evaluation potentially leading to more decisions and recommendations between the Commission (and Council) on the one side and a Member State on the other, the current provisions erect a framework of relentless surveillance whereby even the timing and actions *in between* the administrative back and forth become subject to legalized proceduralised scrutiny.

3.3.5. It's Complicated | the Fiscal Compact | Leftovers

The relationship between Regulation (EU) 473/2013 and the TSCG had indeed proved itself complicated. The establishment had refused to take on the truly trail-blazing provisions of the Fiscal Compact, such as the balanced budget rule, the stricter structural balance upper limit of 0.5% GDP, or rapid convergence towards MTOs. This was not for lack of trying on

[105] Reg (EU) 473/2013, Art 11(4).
[106] Reg (EU) 473/2013, Art 12(3).

part of the ECB, having styled itself the champion of TSCG EU law incorporation.[107] To no avail.

The political resistance to formally 'Europeanising' the Fiscal Compact is a notable development and all the more-so in the context of the TSCG's far reaching provisions and its enforcement mechanism's dependence on Member States. And yet, reforms in the framework of national fiscal governance and attempts at the TSCG did not cease with the provisions of Regulation (EU) 473/2013, in spite of its undeniably *avant-garde* nature. The Commission would have one (final) go in the winter of 2017 with a comprehensive legislative package designed to incorporate leftovers matters from the crisis. Yet again, its attempts would be frustrated.[108]

5. Conclusion

Taking stock of how the national fiscal governance framework has developed in terms fulfilling Blueprint expectations, it is no overstatement to claim that the ECB did exceedingly well. Not only are the most egregious reforms fruit of the Bank's agenda, but few – if any – legal provisions of the final set-up can be identified as running contrary to the ECB's plans for the national space (as is the case with any flexibility or discretion clauses, for instance).

Thus, to recap the ECB's success in this venture is to recap the essential reforms introduced in national fiscal governance – independent bodies, supranational direct budgetary oversight and enforcement, Eurogroup prominence, and constitutionalized budgetary prudence. With the Commission having been exceedingly conservative on the topic during the Blueprint period, the major reforms were – as a rule – proposed by the ECB with some overlap with the Task Force on the bare minimum.

As a result, the ECB's legacy legislating the regulatory framework of the national budgetary realm is clearly identifiable. Codifying numerical fiscal rules in national constitutions or legal instruments of analogous mandatory and permanent character had

[107] To this end, Amendment 2 of the Bank's Opinion on Reg (EU) 472/2013 was packed opportunities inviting the executive to take on the balanced budget rule, the stricter structural balance upper limit of 0.5% GDP, the national-level automatic correction mechanism for significant deviations from medium-term objectives, and rapid convergence towards MTOs.

[108] A serious discussion on the incorporation of the TSCG in EU law never really took hold after the Commission's Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, 6 December 2017, COM(2017) 824 final. The ESM, however, was an entirely different matter – a process rife with political drama in conflict to the united front presented by the ECB and European Commission. This story – and the latest iteration of the ESM (draft) Treaty – are examined at length in Annex I.

been a distinctive idea of the Bank. It would take until the second stage of institutionalisation (with the TSCG), its status subject to the precarious future of the Fiscal Compact, but has nevertheless been legalized. Independent national fiscal councils were developed across the three stages of reform, with each new legislation building upon the preceding provisions. Here, again, the ECB had the Task Force's faint support, but the final version of the legalized framework far surpasses the minimum consensus of the Blueprint period, into a set-up bearing rather accurate resemblance to the Bank's original intent. Economic partnership programmes represent yet another level of the sought-after intensification of budgetary rule enforcement. They might stop short of the total loss of fiscal sovereignty that the Bank had advocated for in its reform Blueprint, but maximise the same intent within the confines of the Treaties.

While the above provisions are indeed foundational for the post-crisis national fiscal governance set-up, the ECB's *tour de force* in this reform strand must be the 'new normal' supranational review of Member State draft budgetary plans. Completing the surveillance cycle of the European Semester, the direct management of budgets introduced yet another level of risk management against fiscal insubordination. Furthermore, it is within the legal configuration of DBPs that yet another reform idea of the Bank was instituted – the promotion of the Eurogroup as guardian of fiscal responsibility in the eurozone.

The comprehensive legal construct and deep competence reach of post-crisis national fiscal governance is perhaps the reform strand with the most direct connection to the idealized Maastricht contract embodied and pontificated by the Bank. It secures the operations of the synthetic fiscal union through EU *and* national (constitutional) judicial and independent councils' oversight, designed to severely constrain – if not outright decouple – the exercise of political discretion over the national budgetary realm.

CHAPTER 6

FINANCIAL AID AND CRISIS GOVERNANCE

1. Legalising Crisis | The ESM and Regulation (EU) 472/2013

In the midst of crisis, the assembly of the future crisis management framework moved fast.[1] The eager endorsement of institutionalising for posterity the working practices of the crisis during the crisis itself was symptomatic of the conviction Member States possessed about the righteousness, and perhaps even inevitability, of their approach. The post-crisis iteration of EU economic governance culminated at its own beginning – with the rationality and methods of the state of exception, normalised into law. The exercise resulted in the EU crisis management and prevention mechanism laid out with the ESM Treaty and Regulation (EU) 472/2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*.

Together, the Treaty and Regulation utilized crisis rationale and formalized the *ad hoc* arrangements of the crisis for posterity, incorporating both the discipline and scandal of

[1] By October 2010, the Council had agreed over the establishment of a permanent mechanism, prompting an agreement over general features for the future ESM, drafted by the Eurogroup and incorporating the Blueprint ideas of the ECB (EU Council Statement 28 Nov 2010; EU Council Conclusions 28-29 Oct 2010; EU Council Conclusions 16-17 Dec 2011.) This was followed by the proposal for amending Art 136 TFEU (16 Dec 2010). By March 2011 the Council adopted the decision for the amendment, thereby legitimating the conditionality arrangements of the crisis into EU primary law, and presented the most complete vision of the future ESM until then with the Term Sheet on the ESM (Annex II – Term Sheet on the ESM, EU Council Conclusions 24-25 March 2011). The Art 136 TFEU amendment took place in the heat of crisis, even though the consequent and anticipated legal instrument – the ESM was not ready for signing until almost a year later in Feb 2012 to take effect not until September, but before the CJEU had had a chance to rule on the legal challenge brought forth in *Pringle* (judgment 27 Nov 2012). In fact, in arguing the Member States do not need permission by the Treaties for the ESM the Court in *Pringle* explicitly pointed to the fact the Art 136 TFEU Amendment will not come into effect until after the ESM becomes operational. The Term Sheet on the ESM built upon the Eurogroup's proposals and clearly foresaw the supporting role of the future Regulation (EU) 472/2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*. (Council Conclusions 24-25 Mar 2011, Annex II, p.28.) Furthermore, the Commission openly advertised the fact that Reg (EU) 472/2013 embeds in the EU legal framework the working practices established under the special financing instruments operating at the time and about to be incorporated with the ESM/EFSF. The Commission prepared the relevant ESM/EFSF guidelines and discussed them with the Member States with the Two-Pack in mind, thus ensuring natural consistency between the texts. 'Two-Pack' enters into force, completing budgetary surveillance cycle and further improving economic governance for the euro area' Brussels, 27 May 2013, EU Commission, MEMO/13/457, Accessed 8 Oct 2019: https://europa.eu/rapid/press-release_MEMO-13-457_en.htm?locale=en

the crisis into the Union legal framework. This is especially true of policies subject to intense political and academic debate, such as the forced conditionality of financial aid programmes. In terms of content, severity and reach, the two legal acts represent the pinnacle of legislative reform enacted in the wake and the name of crisis. As the last piece of the puzzle of EU economic governance, they elucidate the comprehensive character of the legislative structure beneath them and hereto analysed in this study.

The two legal acts were developed simultaneously with due regard of each other's provisions – reflecting the intent they function as a unitary legal instrument on crisis prevention and management across legal bounds.[2] Any analysis of EU crisis management and prevention at the nexus between the ESM and Reg (EU) 472/2013 must first decipher the unique dynamic at play between the two legal acts. Neither the significance nor reach of one of them can be understood without the other.

The ESM Treaty provides an *ultra-vires* rationale for the existence of Reg (EU) 472/2013. In turn, the regulation operationalises the entirely exogenous competence of the ESM within EU law. This unholy legal union results in a double movement which conditions the function of law in accordance with economic circumstances.

In this sense, the ESM is both the beginning and the end of the Great Reformation of European economic governance. It is both outside and inside the EU Treaties, at the nexus between two legal regimes – managing crisis from within and from without simultaneously. It sits at the apex and the foundation of the new framework, closing off the perfect circle of self-rationalisation, which defines post-crisis economic governance reforms in the EU. Regulation (EU) 472/2013 enables these arrangements with an adaptable top-down/bottom-up approach – the difference between crisis management and crisis prevention.

As a consequence of the legal intersect between the ESM Treaty and Reg (EU) 472/2013, the entirety of the EU economic governance framework can act as either a top-down punitive disciplinary construct ensuring the repayment of loans in the more straightforward crisis management sense we have become familiar with, or as a bottom-up preventive disciplinary construct designed to minimise risk of crisis in normal times through the enforcement of rules and pre-emptive financial aid.[3]

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[2] The proposal for regulation was tabled in November 2011, already taking into consideration the architecture of the ESM. Notably, the ECB did not provide its opinion on the regulation until the ESM Treaty was ready for signing in March 2012. Albeit with some time lag in between, the framework would be fully operational by spring 2013 (Regulation final May 2013, ESM in force Oct 2012).

[3] As soon as aid is distributed, the top-down function of the regime is re-engaged with the rationalisation of crisis and legal circle closing off.

Even theoretically, the former and more familiar approach is disturbing enough in its 'subcontracting' of the EU legal framework for the purposes of an exogenous normative regime. It is, however, the latter iteration, which clearly signifies a definitive step in the normalisation of exception, whereby the punitive powers borne of the crisis are incorporated into the Union legal framework and exercised upon the sole threat of crisis. These are powers borne of a system trying to minimise the danger on its horizons by regulating it down to calculated, rule-based risk.

Academic concern for these developments has predominantly focused on the more straightforward top-down approach with limited acknowledgment of its counterpart.[4] But it is the bottom-up iteration, which should warrant our undivided attention for two main reasons. Firstly, the potential for such a significant intensification of EU economic governance is damaging to the legal unity of the Treaties. Simply put, repurposed economic governance legislation in the EU has been retroactively refitted to serve a post-crisis normative agenda, severely distorting the fundamental constitutional link between rule and norm. Secondly, in contrast to the statistically limited probability of 'real' crises that might warrant the activation and justify the contents of the top-down approach, its complementary bottom-up iteration is now utilised on a regular basis having become part and parcel of the logic of economic governance in the Union.

1.1. Top-Down

It its top-down iteration, the Reg (EU) 472/2013 anchors the ESM into EU law, fleshing out the details of the otherwise barebones financial conditionality *quid pro quo* of the Treaty. The legal provisions of the regulation cover Member States which have requested or already receive financial aid from any mechanism within or without the European framework, including international financial institutions (Art 1.1(b)). The associated procedures are based with Articles 121(6) and 136 TFEU, with special emphasis on the latter's March 2011 Amendment.[5] The purpose is to utilize existent European legal instruments towards the enforcement of ESM conditionality with regular competitiveness and budgetary surveillance indicators and procedures repurposed and recast in light of dire financial circumstances. This

[4] See e.g. J.-V. Louis, 'The unexpected revision of the Lisbon Treaty and the establishment of a European stability mechanism', in D. Ashiagbor *et al.* (eds.), *The European Union after the Lisbon Treaty* (CUP 2012), 284, and M. Rüffert, 'The European debt crisis and European Union law', (2011) 48 *Common Market Law Review* 1777.

[5] Formally allowing for a financial aid mechanism rooted in strict conditionality.

arrangement develops under the heading of ‘strengthened economic and budgetary surveillance’ towards a ‘return to stability and the repayment of ESM loans.’

But this is just the more obvious and straightforward connection between the two legal regimes.

1.2. Bottom-Up

A more distressing development is the bottom-up variation, whereby Reg (EU) 472/2013 positions powers borne of and solely rationalised with crisis at the pinnacle of EU law. This is the ultimate intensification of economic governance in the EU, advertised as ‘crisis prevention’ under the ESM-Reg(EU) 472/2013 framework.

In this iteration, the regulation singles out Member States experiencing or *threatened* with serious financial difficulties (Art 1.1(a)) that might pose a threat to the euro area (Art 121(4) TFEU). To this end, it utilises existent – and retroactively repurposed – EU competences and procedures, geared towards identifying ‘critical circumstances.’ Should that be the case, the regulation’s provisions can go as far as to compel a Member State to prepare a draft macroeconomic adjustment programme (MAP) – the EU law counterpart of the notorious crisis Memoranda of Understanding – in the absence of disbursed financial aid. Alternatively, short of forcing governments into ESM management,[6] the regulation provides that member states volunteer themselves for it.[7]

It is worth noting that by the time regulatory procedure arrives at these ultimate measures, it would be a small miracle if the preceding actions had not themselves already caused the need for financial aid by spooking the markets, considering the better part of this process is public.

This bottom-up approach stretches the legal base of Regulation (EU) 472/2013 to its limit. The common concern for and coordination of economic policies based on Art 121 TFEU mutates into an outright usurpation of national economic and budgetary sovereignty with punitive sanctions – originally foreseen for crisis management – applied to budgetary discipline transgressions of an almost metaphysical nature. This development is neither of a purely corrective or preventive nature; such as with the crisis, the conditioned reforms are severely corrective, but recourse to them is justified on a completely pre-emptive risk-mitigating basis.

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[6] As we shall see, that was very much the original intent of the Regulation.
[7] As we shall see, the free will involved therein is subject to serious conditions.

1.3. Sideways

This unnatural union across legal regimes has borne other troublesome fruit. The 2021 ESM Reform Treaty has shaped the Mechanism into a second centre of gravity for EU economic and crisis governance, mimicking the EU economic surveillance framework for its own preventive purposes outside the bounds of EU law. The reforms are an attempt at ESM autonomy through added competences and a breakaway from the dependence on EU institutions.

For all their defects, the previously outlined bottom-up and top-down legal mechanisms develop *within* EU law, even if in connection to extraneous powers. In contrast, the latest developments with the ESM erode competences already under EU custody, diminish EU authority and collective ability to act within the Treaties, set a dangerous precedent for parallel legal frameworks whenever further integration looks politically unacceptable, and endorse the naïve pretence that the EMU project can be sustained without shared risk and solidarity.

Annex I of the study will review the 2021 ESM Reform Treaty in the context of the failed attempts and resistance to the incorporation of the ESM into EU law.

2. The Following Chapter

The chapter will begin with a brief look into the institutional set-up of the ESM, in order to inform the conversation on ingrained conflicts of interests borne of its hybrid nature. These should speak directly to the distinctly politicised character of the EU crisis governance. The narrative will then follow the framework for economic surveillance of troubled Member States and prevention of crises with the analysis transitioning between the provisions of the ESM and Reg (EU) 472/2013 as foreseen by the legal procedure.

The discussion on the ESM will be more conceptual, since the treaty itself only provides the parameters and mandate which Reg (EU) 472/2013 then fills with competence. Unless concerning regulation provisions which directly apply ESM competences, the analysis will approach Reg (EU) 472/2013 in its bottom-up preventive iteration. However, it is important to remember that the majority of outlined procedures may be exercised in either direction, depending on the Member State's circumstances.

As with the rest of the study, any involvement of the ECB will be presented and analysed alongside the legal provisions under scrutiny. This includes the ECB's legislative

opinions on Art 136.3 TFEU and Reg (EU) 472/2013, as well a number of informative positions presented with the Bank's Monthly Bulletins on the ESM and the Two Pack.

The regulatory flow chart on EU crisis prevention and management outlining the procedures foreseen with the ESM and Reg (EU) 472/2013 could be a useful guiding tool (Figure 1, pp.12-3).

3. ESM | Preliminary Notes on Institutional Set-Up

Taken out of context, the ESM Treaty comes across as a somewhat underwhelming document, especially considering its ultimate purpose. The analysis need not go beyond four major themes discussed at different junctions in the Chapter: i) its institutional set-up and inherent conflict of interest *vis-à-vis* the Eurogroup and EU law in general; ii) its financial stability instruments and associated procedures actualised across legal boundaries with Reg (EU) 472/2013; iii) the confused situation of the nature of the ESM somewhere between an LLR mechanism and a for-profit intergovernmental hedge-fund; iv) and last but not least, as a return to the logic circumventing both Articles 125 and 123 TFEU.

The ESM is a for-profit multinational shareholder corporation established in Luxembourg as the successor to the EFSF. The Mechanism mobilises funding through various instruments (Art 14-19) in order to provide stability support to eurozone governments experiencing or threatened with financial difficulties, provided their troubles would affect the stability of the entire euro area.[8] In essence, the ESM carries out 'lender of last resort' (LLR) functions for sovereigns.[9]

Financial assistance from the ESM comes with strict conditionality, which is supposed to i) act as a legal bypass to the EU Treaties' financing prohibitions embedded with Articles 125 and 123 TFEU; ii) ensure the enforcement of disciplinary structural reforms in borrower Member States; iii) and protect against the moral hazard of a financial safety net, dissuading governments from becoming overly reliant on others' help (Art 3 ESM).

The ESM is set up as a treaty under public international law, not EU law. However, it actually operates *between* legal regimes. The Mechanism is i) understood to be borne of EU legal arrangements with the amendment to Art 136 TFEU, which allowed for its creation on the grounds of conditionality; ii) designed to operate for the purposes of the European Union

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[8] Treaty establishing the European Stability Mechanism (ESM Treaty), Art 3.

[9] And will soon take over this function for the banking sector with the Common Backstop mechanism due to be incorporated with the ESM Reform Treaty, reviewed in Annex I.

in that it supports the economic and financial stability of the eurozone; iii) proceduralised and governed through EU regulations, most prominently Regulation (EU) 472/2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*; iv) and operationalised through EU institutions – the Commission and ECB, to which the ESM outsources the assessment of debt sustainability, negotiation of terms for financial help, and monitoring of compliance, amongst other responsibilities.

3.1. Split Personality | The Eurogroup and the ESM Board of Governors

The ESM is managed by its Board of Governors (BoG) and a Board of Directors (BoD). An important figure is the Managing Director – currently Klaus Regling, who is appointed by the BoG and is responsible for conducting the daily activities of the ESM on the instruction of the BoD.

The BoG is comprised of the eurozone ministers of economics and finance, also known as the Eurogroup (EG). Similarly, the BoD is comprised by the same individuals who compose the Eurogroup Working Group (EWG), which supports the work of the EG. While these are all literally the same people, their interactions are indeed quite distinct in the context of the ESM and EU. In Luxembourg, unlike in Brussels, there is no pretence that EU sovereigns are somehow equal peers. That is to say that the ESM quantifies and operationalises sovereign financial power. It does so by equating the voting rights of members in the Board of Governors with their ESM buy-in based on the capital key of the European Central Bank (Art 4.7 ESM Treaty). This means that governments' ESM shares and respective voting rights are determined by the size of their population and gross domestic product (GDP) relative to the entire eurozone, i.e. by their economic prowess.[10]

This turns the ESM into a corporate iteration of the Eurogroup. Even if the Mechanism's formal function is *ad hoc* stability support for the eurozone, it has to manage this responsibility without prejudice to its 'fiduciary duty to act in the interest of its shareholders.'[11] This 'shareholder interest' comes down to minimising the risk of debt-sharing by ensuring loans are repaid in full. Moreover, the financial operations and governance

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[10] Incidentally, these are the same voting arrangements advocated for the European Central Bank at the dawn of EMU by Karl Otto Pöhl. See Pöhl, 'The further development of the European Monetary System,' in *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 129

[11] Statement of the Hanseatic League, 8 November 2018.

considerations of the ESM are carried out for profit – the ESM actually stands to benefit from its operations and especially those conducted on the secondary bond markets.[12]

Here we see the always-stunning potential of the law to create meaning – two distinct legal entities out of a single real one.[13] But this purely synthetic variation does not translate into practice due to the lack of essential safeguards, which may well be claimed as an intentional part of the design. The approach results in an information and competence spillover between legal regimes and an ensuing legal lacuna with legitimacy problems inherent therein. These have come to define the operations of the EU crisis management framework.

The informal status and fluid powers of the EG/EWG lend themselves as the perfect nexus for the two-way spillover of competences and information borne with the new crisis governance arrangements.[14] It is impossible to prove a negative – that the Eurogroup's and Working Group's access within EU law does not inform their decisions outside of it in their roles as the ESM BoG and BoD, and vice versa. This information flow might be a sought-after effect occurring for sheer convenience when both legal regimes authorise dependent communications (e.g. Art 6 Reg and Art 13.1 ESM), but it is also quite organically – and uncontrollably – possible without formal consent (e.g. Art 3.1 Reg). It may occur horizontally

[12] Per Article 18 ESM Treaty. The calculation is indeed quite simple – the ESM intervenes in the sovereign bond markets when a certain government's bonds are already trading at spectacularly low prices with uncomfortably high interest exacted by the markets. Once financial panic has been pacified – in part due to the ESM's interference and buying up of otherwise unpopular government bonds – the borrower government restores its market access and bond prices rise. At this point, the ESM – now a major creditor of the troubled government, has automatically made a profit on the extended credit.

[13] Distilling information into meaning, which is 'meaningful' for either subsystem. With the ESM – risk and return of economy and investment, for the Eurogroup – economic coordination and responsibility to the larger group.

[14] While the provisions of Reg (EU) 472/2013 heavily involve the EWG, the working mechanisms of the body remain but a mystery even to the EU professionals at the office of the EU Ombudsman, so that we may analyse the consequences to such information sharing. See: Follow-up response from the European Ombudsman to the reply of President Dijsselbloem to her letter concerning Eurogroup transparency, 30 Aug 2016, Accessed 9 Feb 2020: https://www.ombudsman.europa.eu/en/correspondence/en/70708; Moreover, for the most part, the role that the EG plays in crisis governance concerning the financial assistance instruments of the ESM and Reg (EU) 472/2013 is not legally specified anywhere – perhaps fitting for an informal body. Information is randomly available off EU internet publication without reference to authorising documents of any kind. With that, on matters of crisis governance and financial aid, 'The Eurogroup politically endorses: decisions on granting financial assistance to a euro area member state and on the conditions on which this assistance would be provided; memorandums of understanding; decisions to release tranches of financial assistance following reviews of the progress achieved in implementing a programme. The Eurogroup acts once the approval processes in the euro area member states are complete. These processes may involve consultation with or approval by national parliaments.' European Council, Financial assistance for euro area member states, Accessed 25 Jan 2020: https://www.consilium.europa.eu/en/policies/financial-assistance-eurozone-members/

or diagonally across legal regimes, depending on the body empowered with specific legal tasks. This much will become evident in the following analysis.[15]

Moreover, this situation further strengthens the intergovernmental approach to EU governance with the acts of finance and economy ministers remaining firmly outside EU law with either EG or ESM BoG configuration. In this sense, crisis governance arrangements at the interface between the ESM and Reg (EU) 472/2013 consolidate power away from the Union towards Member States, in either Eurogroup or ESM configuration, as guardians of fiscal discipline and financial stability of the Union. This takes place outside the Union as the only legal repository of sovereignty outside the nation state, and outside the national democratic control of the sovereign under scrutiny.

3.2. A Short Exchange | the Ombudsman and the Eurogroup

Unsurprisingly, moonlighting in Luxembourg has raised additional concerns over the plethora of legitimacy issues already at play with the Eurogroup.[16] Their response proves the preceding discussion is not just a theoretical conjecture. In 2016, the offices of the President of the Eurogroup and Chairman of the ESM, Joroen Dijsselbloem, and of the EU Ombudsman, Emily O'Reilly, engaged in a lively and telling back and forth on transparency and accountability issues, specifically concerning public access to documents. While the topic does not seem immediately relevant to our current discussion, the context of the exchange is.

In her initial letter, the Ombudsman 'accuses' the Eurogroup of being a *decision-making body*, whose powers hold significant 'economic, financial and societal impact.'[17] Dijsselbloem would have none of it, reminding Ms O'Reilly that the EG is but 'an informal gathering of Finance Ministers,' exempting it from the responsibilities of Union 'institutions, bodies, offices and agencies taken within the meaning of Art. 15(3) TFEU or Art. 42 of the Charter of Fundamental Rights.'[18] In case this is not enough to shield the workings and deliberations of the eurozone finance ministers from public scrutiny, Mr Dijsselbloem

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[15] For instance, as we will see, Reg (EU) 472/2013 has a heavy dependence on information sharing with the EWG, which eventually makes its way to the ESM absent formal provisions. (See pp _____)

[16] See generally P. Craig, 'The Eurogroup, power and accountability', (2017) 23 *European Law Journal* 234.

[17] Letter from the European Ombudsman to the Chairman of the Eurogroup on Recent initiative to improve Eurogroup transparency, 14 March 2016, Accessed 9 Feb 2020: https://www.ombudsman.europa.eu/en/correspondence/en/65359

[18] Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency, 16 May 2016, Accessed 9 Feb 2020: https://www.consilium.europa.eu/en/press/press-releases/2016/05/31/peg-letter-ombudsman/

brazenly points out they may also meet under the ESM iteration, which offers clear immunity from Union oversight – especially that of Reg (EC) 1049/2001 on public access to documents.[19] There appear to be no rules which warrant specific circumstances for the choice of legal regime. In fact, in their report on the inner workings and transparency procedures of the Eurogroup, Transparency International concludes this set up 'ensure[s] the secrecy of the Eurozone's economic governance.'[20]

The Ombudsman is unimpressed and proceeds to kindly point out a number of issues Dijsselbloem and his 'colleagues may wish to continue to reflect upon.'[21] She strikes a note with the access to documents, which are not held by Union bodies – the Council or the Commission, and yet exist within the 'jurisdiction' of the Eurogroup. The EG's reply speaks to the trend in political empowering through the intergovernmental and New Governance nature of the ESM/EG arrangements. In essence, the response from 25 November 2016 claims the Eurogroup itself – as an informal, deliberative collective of Member States, without decision-making powers and with its technical support outsourced to the EWG, does not possess control over its documents. Those, it is stated, are prepared by the ESM and the Commission. Any affiliated paperwork, which was not prepared by the Union bodies – and therefore subject to Union transparency rules – is to be considered within the possession of national delegations and thereby subject to individual Member State's rules on transparency.[22] While not a formal legal lacuna, this set-up would undeniably act as such in practice, making information access a highly complicated affair. Furthermore, Dijsselbloem uses the opportunity to double down on his earlier argument for the metaphysical existence of the Eurogroup, this time citing the official backing of the CJEU's judgment in Joined Cases

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[19] 'Furthermore, the Members of the Eurogroup may meet in their capacity of Governors under the European Stability Mechanism Treaty. ESM bodies are of an intergovernmental nature and hence, not covered by the EU Treaties' provisions on transparency or by Regulation n° 1049/2001 regarding public access to European Parliament, Council and Commission documents.' Para 2, Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency, 16 May 2016, Accessed 9 Feb 2020: https://www.consilium.europa.eu/en/press/press-releases/2016/05/31/peg-letter-ombudsman/

[20] Cornel Ban and Leonard Seabrooke, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) Transparency International, 8.

[21] Follow-up response from the European Ombudsman to the reply of President Dijsselbloem to her letter concerning Eurogroup transparency, 30 Aug 2016, Accessed 9 Feb 2020: https://www.ombudsman.europa.eu/en/correspondence/en/70708

[22] Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency, 25 November 2016, Accessed 9 Feb 2020: https://www.consilium.europa.eu/en/press/press-releases/2016/12/01/eurogroup-peg-letter-ombudsman/

C-105/15 P to C-109/15 P*, Mallis Malli*, wherein the EG was confirmed as an informal forum of discussion 'and not a decision-making body.'[23]

Sadly, this approach is not contained to this episode of inter-'institutional' exchange and speaks loudly to this study's narrative on the damage caused to EU Treaty constitutional unity through the exploitation of legal lacunae by soft law bodies such as the EG and the deconstruction of legal rights and responsibilities across legal regimes for the purpose of avoiding both public or judicial oversight in the pursuit of unrestraint exercise of powers.

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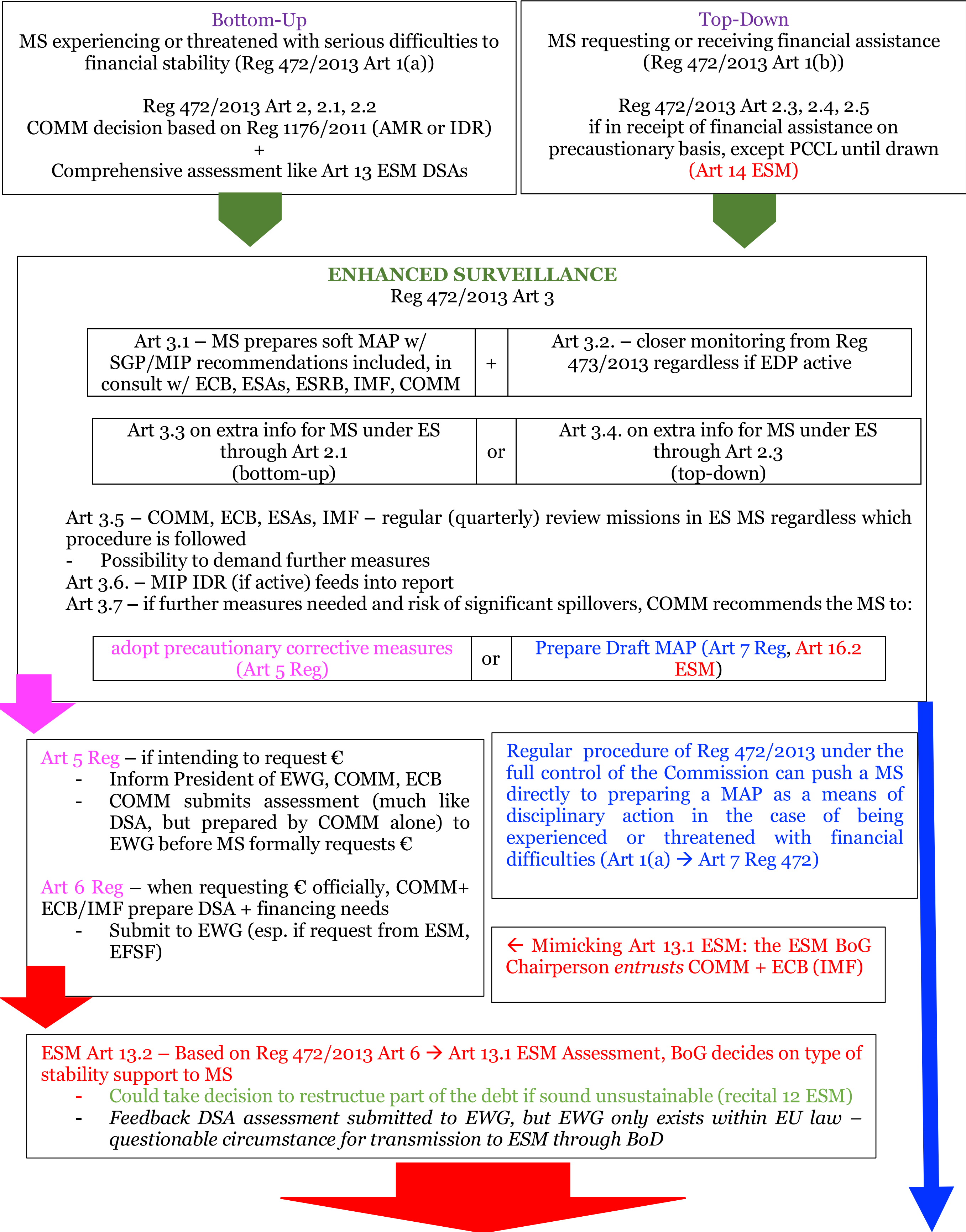
[23] Joined Cases C-105/15 P to C-109/15 P*, Mallis Malli, para 47, 49*. in Reply from the Eurogroup President to the European Ombudsman's letter on Eurogroup transparency, 25 November 2016, Accessed 9 Feb 2020: <https://www.consilium.europa.eu/en/press/press-releases/2016/12/01/eurogroup-peg-letter-ombudsman/> The most recent confirmation of the metaphysical status of the Eurogroup comes with Case C-597/18 P *Council v K. Chrysostomides & Co. and Others* [2020] ECLI:EU:C:2020:1028, 84-90.

Figure 1: Crisis Prevention | Crisis Correction Regulatory Flow – Reg (EU) 472/2013 & ESM



Art 14 ESM Precautionary Fin Asst	Art 15 ESM Fin Inst Recapitalisation	Art 16 ESM Loans	Art 17 ESM Primary Market Operations	Art 18 ESM Secondary Market Operations
- PCCL (closer monitoring COMM + ECB) - ECCL (enhanced surveillance)	- Direct (gone with SRM) - Indirect (Art 4 Reg 472 + MoU)	- MoU + MAP	- MAP if complementing Art 16 loans - Enchanced surveillance if drawing PCCL → ECCL	- MAP - Meeting PCCL conditions

In all cases except Art 13 ESM

Art 13.3 ESM - BoG entrusts COMM, ECB, IMF to negotiate MoU

Art 13.6 ESM - warning system

Art 13.7 ESM – ECM, IMF, COMM missions

Macroeconomic Adjustment Programmes (MAPs) – Reg 472/2013 Art 7

Draft MAP prepared by MS to be based on:
- DSA + negotiated corrective measures + any recommendations from regular Semester cycle (+some Charter considerations)

MAP = MoU

Art 7.2 - Council by QM approves COMM proposal, COMM ensures MoU=MAP
Art 7.4 – COMM, ECB, IMF monitoring, quarterly reports
Art 7.5 – review by Troika and MS after each report in case of discrepancies
- Council votes on changes by QM on COMM proposal

Art 7.7 – if significant deviation from a MAP:
- Decision on non-compliance
- New measures to appease markets
- Random education/healthcare protection from consolidation efforts

Art 7.6 – possibility for debt restructuring introduced at this stage
- Different from rectial 12 ESM; only b/w MS & COMM

Art 7.8 – technical assistance
- Basis for new Structural Reform Support Programme

Art 7.9 – comprehensive audit of publif finances

Questionable procedure for transfer. Possible criteria:
- end of financial aid disbursement
- successful implementation of mandated MoU/MAP reforms
- achieving MAP objectives (Reg 472/2013 Art 7.1 para 2): Eliminating spillover risk, sound and sustainable finance and fiscal stance, self-financing on the global markets

POST PROGRAMME SURVEILLANCE (PPS) – Reg 472/2013 Art 14

Art 14.1 – until at least 75% repaid from any fin inst
- Can be extended if 'persistent risk to fin stability or fiscal sustainability of MS concerned'
  - Council decides by RQMV on COMM proposal

Art 14.2 – Generally works like a lighter version of enhanced surveillance (ES)
- extra info as if under COMM enhanced surveillance per Art 3.3 Reg + enhanced fiscal monitoring from Art 10(3) Reg 473/2013

Art 14.3 – Semi annual reports on missions, but carried out only by ECB + COMM
Art 14.4 – COMM can request new corrective measures during PPS
  - Council adopts by RQMV on COMM proposal

But can also take form of regular full enhanced surveillance upon COMM recommendation (Greek example)
No provision for the formal closing of PPS

4. The EU Framework for Crisis Management and Prevention

We now move on to examining the bottom-up iteration of crisis-prevention in EU economic governance, initiated with the provisions of Reg (EU) 472/2013 and intensified by procedural interactions with the ESM. The following is an analysis of the preparatory work behind and the final provisions of the regulation and treaty.

At the pinnacle of EU economic governance, focused on the containment of financial contagion, Regulation (EU) 472/2013 provides for the ultimate intensification of crisis risk aversion in three succinct steps. First, the regulation establishes yet another level of 'regular' economic governance monitoring by introducing the enhanced surveillance procedure (ES), whose scope includes the competence to demand specific economic policy adjustments of Member States. Amongst other instruments, as the ES procedure intensified, the regulation provides for an EU law duplicate of the crisis-borne and ESM-institutionalised Memoranda of Understanding (MoU). These are the macroeconomic adjustment programmes (MAP), which detail the connection between regular economic governance with the conditionality arrangements for financial aid programmes, associated reporting requirements, and austere levels of surveillance. Beyond surveillance and far-reaching structural adjustments, Reg (EU) 472/2013 provides a procedure of post-programme surveillance (PPS), stipulating an unspecified amount of continued intrusion into Member State's business even after the conclusion of a MAP (Art 14).

These procedures are designed to operate in parallel and in conjunction with the European Stability Mechanism, whose involvement throughout serves to reinforce disciplinary action and muddle legal protections all at the same time.

4.1. Art 2 Reg (EU) 472/2013 | The Road to Enhanced Surveillance

The enhanced surveillance procedure (ES) is a genius contribution to the framework of EU economic surveillance introduced by Reg (EU) 472/2013. It is a path dependent bottom-up or top-down approach, based on a positive assessment of a Member State 'experiencing *or* threatened with *serious* difficulties with respect to its financial stability which are *likely to have adverse spill-over effects on the other Member States in the euro area*' and 'more broadly, to the Union as a whole.'[24]

[24] Art 2.1, para 2, and Recital 3, Reg (EU) 472/2013 [emphasis added]

This broad definition of the scope of ES is, to a large extent, owed to the ECB's intervention during the legislative process behind Reg (EU) 472/2013.[25] The original Commission proposal foresaw a more limited set of top-down circumstances warranting enhanced surveillance – Member States had to *already be experiencing* difficulties of a *severe* character. Risk analysis into the possibility of future such difficulties was not part of the job and neither was the qualification connecting these otherwise national events to the greater economic wellbeing of the eurozone.

The initially-proposed threshold of 'severe' difficulties was lowered to 'serious,' which the Bank then sought to keep within a loose definition in order to ensure wider applicability. An exhaustive list, the ECB argued, 'would not be prudent,' since 'such a definition would prevent the application of the proposed regulation to situations triggered by later market developments which could not have been foreseen at the time it was adopted.'[26] To be clear, the ECB argued to intentionally obscure the boundaries and mandate of the new rule, thereby ingraining the legal system with uncertainty antithetical to its very existence, all in the interest of expanding the web of EU surveillance over national economic policies.

4.1.1. One Road to Enhanced Surveillance | Bottom-Up

The first means for bringing a Member State under enhanced surveillance is the bottom-up preventive procedure for Member States experiencing or threatened with serious difficulties. It creates a new legal outcome to the macroeconomic and competitiveness framework procedures introduced with Reg (EU) 1176/2011.[27] With Art 2.1 and 2.2 Reg (EU) 472/2013, the Alert Mechanism Report (AMR) and associated in-depth reviews (IDRs) – part of the regular European Semester surveillance – are repurposed as indicators in the assessment of whether a country's finances present potential risk.[28] Additionally, the procedure is to conduct a comprehensive evaluation of borrowing conditions, the repayment profile of debt obligations, budgetary framework robustness, public finances sustainability, and risk of contagion, in order to ascertain whether a Member State warrants being subjected to enhanced surveillance (Art 2.1, para 2).[29] A kindness is extended to the Member State in

[25] ECB Amendment 4.
[26] C 141/9, General observations, II. On Proposed regulation on strengthening surveillance procedures, para 1)
[27] See above.
[28] 'Other parameters' for assessment are also mentioned, they are at no point identified.
[29] This looks very much like the DSA with Art 13 ESM, but at this point it is carried out solely by the Commission.

question to 'express its views' before the Commission decides on whether to go ahead with initiating enhanced surveillance (Art 2.1, para 3).

The Commission has exclusive control over the procedure throughout – surveillance, assessments, and final decisions, and is also under obligation to review its conclusions every six months.

Unsurprisingly, this setup did not sit well with the ECB, which actively sought to ensure the Commission holds neither full nor exclusive discretion. The Bank bluntly argued that in light of the potential far-reaching consequences of instability spilling over into the entire euro-area, decisions on enhanced surveillance cannot be trusted solely to the Commission. Even a hypothetical threat was too much for the EU's independent executive. Disenfranchising the Commission was attempted with amendments on language (*may* to *shall)* and the involvement of the Economic and Financial Committee (EFC) or 'any subcommittee the latter may designate for that purpose,' i.e. the Eurogroup.[30] The latter motion is an attempt to establish a parallel legal track empowering the intergovernmental route, whereby the EFC or its subcommittee can 'prepare an informed decision for the Council in relation to any steps of the procedure.' The presumption here is that the Council ought to have access to an 'independent' source of information – thus claiming the Commission cannot be assumed as such – which could empower it to prompt the Commission to initiate ES proceedings.[31]

The ECB Opinion pushed for this line of Council empowerment at another instance as well, with Amendment 7, attempting to use the Commission's powers to request information from a Member State under ES as an intermediary for the Council's interests in that regard. While both of these proposals were ultimately rejected, they speak loudly to the ECB's stance on the power constellation taking shape during the Great Reformation of the Union with more trust in the disciplinary potential of Member States vis-à-vis their peers, than that of the Commission.[32]

At any rate, once the Commission decides to activate ES of its own volition, it is to inform the selected Member State of 'all the results of the assessment' (Art 2.2). This raises the ultimately unanswered question of what kind of information is made available to the

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[30] Amendment 4, ECB Opinion.
[31] Explanation to Amendment 4, para 2, ECB Opinion.
[32] It is a curious approach, which does not seem to serve the ECB's interests directly, seeing as the Bank is itself widely included throughout the provisions of Reg (EU) 472/2013 with active participation in evaluations, missions, and in general – kept informed.

Member State before being granted the opportunity for a plea of defence foreseen with Art 2.1. Furthermore, this procedure triggers the involvement of the 'ECB in its supervisory capacity, the relevant ESAs and the ESRB accordingly.' The ramifications of this involvement remain unclear (Art 2.2).

4.1.2. A Second Road to Enhanced Surveillance | Top-Down

The second method for bringing a Member State under ES is the top-down approach for those intending to request or already in receipt of financial assistance 'from one or several other Member States or third countries, the EFSM, the ESM, the EFSF, or another relevant international financial institution such as the IMF' (Art 2.3). As with other involvements of the ECB, here too the Bank sought to move up surveillance, successfully qualifying the very request for aid as an automatic prompt for the highly invasive procedure and thereby widening the scope of the provision.[33]

The original proposal for legislation also held an exception to enhanced surveillance based on the form of financial assistance granted by the ESM. It did not intend that precautionary credit lines result in ES, so long as they are not drawn.[34] The ECB resigned itself to the rule, but it noted that it 'should not exempt [the Member State] from being monitored regarding compliance with the eligibility criteria.'[35] This much was eventually formalised, including this stipulation with the ESM Guidelines on Precautionary Financial Assistance.[36]

Finally, it must be noted that enhanced surveillance does not lack for one of the standardized methods of compliance insurance preferred by the EU establishment – it is to be a 'transparency' circus with the majority of procedures, warnings, analyses and decisions made public mandatorily, the rest – subject to a vote. (Art 2, 3.8, 3.9, 6, 7.7, 14). We shall eventually see that a good part of this accountability and transparency exercise is, in fact, just another form of disciplining compliance through public pressure.

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33 Amendment 3 on Art 1, ECB Opinion.
34 To be discussed at length below.
35 Amendment 6, ECB Opinion.
36 ESM, Guideline on Precautionary Financial Assistance, Art 2.3, Accessed 23 Jan 2020: https://www.esm.europa.eu/sites/default/files/esm_guideline_on_precautionary_financial_assistance.pdf]

4.2. Art 3 Reg (EU) 472/2013 | Once Under Enhanced Surveillance

As we saw above, it is not too difficult to subject a Member State to enhanced surveillance – there is little procedural certainty in Reg (EU) 472/2013 of what constitutes a 'serious difficulty' or, for that matter, how the latter may negatively affect the whole of the eurozone. And yet, this highly discretionary calculation opens the door to a significant amount of scrutiny, which – in its own right – comes close to constituting a sanction.

The structure of ES foreshadows the structure and demands of macroeconomic adjustment programmes (MAPs), albeit as a somewhat lighter iteration. Once under ES, a Member State 'after consulting, and in cooperation with, the Commission, acting in liaison with the ECB, the ESAs, the ESRB and, where appropriate, the IMF, [shall] adopt measures aimed at addressing the sources *or potential sources* of difficulties.'[37] If this seems like the notorious *troika*, that is because it is and what is more – in a reinforced version including the freshly minted supervisory agencies and ECB capacities in this regard, fully formalised within EU law.[38]

In a commitment to the working practices of the crisis, the ECB's role remains abstract. The Bank is present in an advisory capacity and carries out its unspecified tasks 'in liaison with,' absent decision-making capacity. Even where Reg (EU) 472/2013 mandates direct reporting to and oversight by the ECB, it is never clear which matters – exclusively monetary and financial or perhaps also fiscal and social – the Bank would have access to and sway over through its wide-cast roles.[39]

Further, the logic of crisis accountability is unmistakable – clearly, if a Member State finds itself experiencing or threatened with difficulties it must not have followed the disciplinary recommendations of the EU economic governance framework. It is the core rationale behind the legislative overdrive that ensued in the summer of 2010, with the EU attempting to reduce environmental danger by rationalising for itself a connection between crises and regulated conduct. The sanitary minimum of reforms included in ES procedures,

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[37]Reg (EU) 472/2013, Art 3.1. (emphasis added). At minimum, the adjustment measures expected of Member States are to include any and all recommendations addressed to them within the European Semester format to include the preventive and corrective arms of the Stability and Growth Pact (SGP), as well as the Macroeconomic Imbalance Procedure (MIP) from start to finish.

[38] The European supervisory authorities (ESAs), namely: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA).

[39] As we shall see below.

then, is yet another level of disciplinary enforcement in the Union which ups the ante on compliance with the regular Semester framework.

While identifying sources of difficulties has become one of the main occupations of the EU's economic governance framework since the crisis, the qualification and quantification of 'potential sources' remains shrouded in mystery. Its main potential is for a significant expansion of Commission competences to recommend various reform measures. The approach comes closest to the ECB's adamant – yet, unsuccessful – campaign for the introduction of 'vulnerabilities' alongside the imbalances monitored with Reg (EU) 1176/2011 on the prevention and correction of macroeconomic imbalances.[40]

In another instance of repurposing existent legislation, Art 3.2 Reg (EU) 472/2013 provides that the in-depth fiscal monitoring foreseen by Art 10(2), (3), and (6) of its fellow Two-Pack legislation, Regulation (EU) 473/2013 on draft budgetary plans and the excessive deficit procedure, will apply during enhanced surveillance. To be clear, this is an instrument originally justified into EU law as a proportionate measure to the existence of an excessive deficit within the corrective arm of the Stability and Growth Pact. The crisis governance framework with Reg (EU) 472/2013 makes use of it regardless of the existence of its *legal raison d'être* – an excessive deficit.

4.2.1. ES – Access to Information | Art 3.3. and 3.4. Reg (EU) 472/2013

Under the provisions of Articles 3.3 and 3.4, Reg (EU) 472/2013 stipulates the variety of information that the Commission may request of a Member State under ES. The extent of access depends on whether financial assistance has been drawn, albeit with little difference.[41] In either case, the Commission is empowered to demand but is not procedurally compelled to do so.

Importantly, three out of the four stipulated demands relate to matters of direct concern to the ECB, in its supervisory capacity. The Commission acts as a conduit of the Bank and the ESAs, obliging a Member State to communicate disaggregated information on

[40] See above. In a certain sense, both tracks of reform have the same driving logic, in which regard the ECB's proposals may well be considered to be successful.
[41] As far as Member States in receipt of financial aid are concerned but when they have been forced, the procedure is largely identical (Art 3.4), save for the addition of direct reporting to the Commission, a provision that disaggregated information remain confidential, and an absence of the additional assessment stipulated at the end of Art 3.3. The rationality behind the minimally diverging procedures is not made explicit, but is most likely owed to the parallel proceedings associated with financial aid under the ESM.

developments in its financial system (3.3(a)), subject itself to stress tests or sensitivity analyses pertaining to the health of its financial sector (3.3(b)), or submit its financial services supervisory framework to review (3.3(c)). Lastly, Reg (EU) 472/2013 provides information be relayed to the Commission for the purposes of monitoring macroeconomic imbalances as per Reg (EU) 1176/2011, but this hardly seems like a big ask considering the latter regulation already makes such provisions (in Art 3.3(d)).

Here again, distrustful of the Commission's commitment to discipline, the ECB attempts to diversify the institutional authority behind the procedure. The Bank proposes the Council, upon its own resolve, be able to instigate the procedure for additional information through the Commission. The proposal is rejected.

Should the above process move forward, the collected information feeds into a report on the 'potential vulnerabilities' of the Member State's financial system, to be submitted to the ECB and the Commission. The last paragraph of Art 3.3. stipulates an unspecified frequency of this reporting, up to the Commission, suggesting these powers may well be exercised on a recurring basis.

4.2.2. ES – Monitoring Missions | Art 3.5 Reg (EU) 472/2013

Enhanced surveillance includes another standard feature of crisis practice – monitoring missions. The formula is well-established – as per Art 3.5 'the Commission, in liaison with the ECB and with the relevant ESAs and, where appropriate, with the IMF' are to conduct regular review missions to Member States under enhanced surveillance for the purpose of progress verification on the semi-MAP reform measures adopted under Art 3.1. The Commission is to report on its missions to the 'competent committee of the European Parliament and to the EFC' at least every quarter, meaning it is also to undertake its trips at least that often.[42]

The primary purpose of these reports is to assess whether further measures may be required of the Member State under surveillance. When calculating the risk-management mix, the Commission also takes into consideration any in-depth reports (IDRs) or risks of spillovers as qualified under Art 5(2) of Reg (EU) 1176/2011 (Art 6) – the MIP. It is worth

[42] As missions are a standard fixture of most economic governance procedures since the crisis, in the interest of avoiding duplication, these ES *review missions* are to replace the *on-site monitoring* foreseen in the Excessive Deficit Procedure (EDP) of the corrective arm of the SGP (Reg (EC) 1467/97), should the government already be subject to that procedure upon entering ES.

noting here, that just as with the rest of the Great Reformation of EU economic governance, this is hardly an exact science with the moving goal post built into the framework.

4.2.3. ES – Ultimately Enhanced Surveillance | Art 3.7 Reg (EU) 472/2013 The Rubicon

Ultimately, the review missions become a means for stepping up procedure. They may provide evidence upon which the Commission concludes that 'further measures are needed and the financial and economic situation of the Member State concerned has significant adverse effects on the financial stability of the euro area or of its Member States.' In this case, the Commission is to propose that the Council, acting by qualified majority (QM), recommend the Member State 'adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme' (Art 3.7 final).

The provision is as convoluted as it is momentous.

Article 3.7 is fully aware of the boundaries of EU economic governance, which have seemingly designated recourse to financial aid as the Rubicon of EU law.[43] In fact, these are boundaries which the original proposal for regulation readily crossed, providing that a Council recommendation may *compel* a Member State to seek financial assistance as well as to prepare a MAP.[44] The idea seems as preposterous as it is perversely logical. While it follows a predictable path of bottom-up preventive governance escalation, it does so across legal regimes, using EU law to push Member States 'out' towards the financial assistance instruments of the ESM.[45] It is, nevertheless, also an orderly and straightforward system – the ultimate manifestation of the risk-aversion logic of crisis reforms. Unsurprisingly, the ECB was elated at the potential of the proposal, qualifying it as 'an important provision as it strongly encourages a Member State to ask for financial assistance and to avoid unnecessary delays where this could have detrimental consequences for financial stability in the euro area as a whole.'[46]

But the triumph would not last. The legislative process introduced significant changes and backtracked from forcing Member States into financial aid. Instead, it left this paramount final step towards the ESM to the 'voluntary discretion' of troubled governments in true soft

[43] Articles 123 and 125 TFEU a case in point.
[44] Proposal for regulation, (At 3.5 COM(2011) 819 final) [emphasis added]
[45] Not to mention the fact that a recommendation is thereby imbued with mandatory character/binding force, Art 288 TEU.
[46] ECB general observations from the opinion C 141/10, II, para 3

law, New-Governance fashion, not much unlike Member States submitting and signing their own MoU reform programmes during the crisis. It should also be clear that the request for financial aid following the highly path-dependent bottom-up regular economic governance procedure, hardly leaves much room for free will or choice. It is no more but a legal formality that governments walk themselves to the noose.

At any rate, the institutions found a compromise solution between proposal and final legislation by introducing yet another round of disciplinary measures before financial aid, keeping matters within the regular surveillance framework of EU law. However, it seems that in their determination to avoid crossing the Rubicon, EU legislators simply could not resist borrowing some novelty methods of exception from the opposite bank across the legal divide. As a result, while the original proposal was not without its troubles, the final version of Reg (EU) 472/2013 – as is the case with most compromise solutions in the EU – produced an even greater problem.

4.2.4. Precautionary Corrective Measures

'Precautionary corrective measures' (PCMs) is a curious choice of terminology, which is never clearly defined or, for that matter, referred to ever again either in the Regulation or ESM. Arguably, the preventive classification signifies these measures' status as a last resort 'lesser evil' before further intensification of enforcement – such that a Member State would be wise to avoid it. The fact PCMs are to be 'adopted' by virtue of the Council's mere recommendation denotes a clear hierarchy, whereby a MS under ES is to follow European fiat, even one issued through non-mandatory legal acts. This setup is not necessarily exclusive. For instance, the provisions of Art 3 Reg (EU) 472/2013 do not allow much, if any, room for manoeuvre for the concerned national government either, but the fact PCMs are designated differently and provided as an alternative to a draft MAP make all the difference with regards to their coming about.

It is the second provision of Art 3.7, regarding the preparation of MAPs, which provides the true context and full potential of PCM procedure. It is an awkward proposition for a number of reasons. MAPs, it is generally accepted, follow as a consequence of financial aid.[47] And yet, Art 3.7 stipulates a Member State may be compelled to prepare a draft MAP in

[47] This much is stipulated with Art 7 of the very same Regulation (EU) 472/2013 and Art 16.2 ESM

what appears to be the absence of financial aid. Is this MAP the ultimate level of intensification of disciplinary measures within the confines of EU law?

As shall become evident with the succeeding review of Art 7 Reg (EU) 472/2013, there is little content from the enhanced surveillance procedure that does not feed into a MAP. With the two instruments so intimately connected, MAPs indeed follow as a rather organic development in the escalation of disciplinary action.

A MAP is, however, an instrument designed to mimic the contents and procedure of the notorious crisis MoUs, predicated upon severe conditionality with highly invasive, wide-cast, *top-down* reforms. This conditionality, it shall be recalled, has only been legislated into Union law through Art 136.3 TFEU as a function of the permanent financial aid mechanism intended with the ESM. While MAPs are indeed laid out with Regulation (EU) 472/2013, their use is explicitly grounded in the request or receipt of ESM financial aid – they are exceptional measures predicated on exceptional circumstances. Moreover, in the case of a 'regular' MAP, the adoption of corrective measures is ensured through the piecemeal schedule for disbursement for financial aid in a classic *quid pro quo*. This raises further unanswered questions as to the special case that is the MAP stipulated with Art 3.7 Reg (EU) 472/2013.

What exactly follows from the Council recommendation stipulated in Art 3.7 Reg (EU) 472/2013 is not laid out. Nonetheless, and notably, should the Council decide to make this recommendation public – in what is likely to be an effort of putting public and market pressure on the troubled Member State – this opens the door to a series of New Governance-termed 'exchange of views' opportunities involving the European and national parliaments (Art 3.8). These are doubtlessly designed to imbue some sort of legitimacy to the exercise.[48] Conversely, however, should the recommendation remain undisclosed, it seems recourse to democratic processes is altogether precluded with national officials simply left to follow Council edicts on the additional corrective measures or the rather elaborate process for preparing a draft MAP. This second option only supports the view the 'exchange of views' provisions is but a charade – no need for extending legitimacy when measures are taken away from the public eye.

At any rate, MAPs – the most invasive instrument inherited from the sovereign debt crisis, now follow the two-track path of enhanced surveillance with potential for being introduced bottom-up within the European legal framework of economic governance

[48] As the ECB has admitted of these dialogue opportunities on multiple occasions.

surveillance by peer pressure in the Council, or top-down and automatically upon receipt of financial aid on a non-precautionary basis. This former approach singles yet another instance of the legal normalization of measures preconditioned upon exceptional circumstances.

4.2.5. Art 5 Reg (EU) 472/2013 – Requesting Aid

The next section of Reg (EU) 472/2013 would have followed a lot more logically had the legislators kept with the original provisions of Art 3.7 forcing governments into the arms of the ESM. From Art 5 onwards, Reg (EU) 472/2013 deals with matters from across the Rubicon, which makes for a sharp change of topic turning to the framework of the ESM.

Article 5 Reg (EU) 472/2013 establishes a pre-emptive notification regime for Member States wishing to obtain financial assistance from any known financial instrument (the EFSM, EFSF, ESM, or IMF) or other states (whether within or without the Union).[49] Should that be the case, the Commission, the ECB, and the EWG are to be immediately informed.[50] The Commission then submits an assessment of the situation to the EWG, based on which the latter entity instructs the troubled government on how to best handle the matter – either through existing Union or international financial instruments.

5. Across the Rubicon

Thereupon the EU framework for crisis management develops through a complex web of cross-boundary legal provisions, riddled by intense politicisation, ingrained conflicts of interest, and gaps in justiciability.

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[49] In practice, this is merely a formality. The ESM and Reg (EU) 472/2013 in fact enjoy an exclusive relationship. While the latter addresses *any* form of financial assistance – 'from one or several other member states or third countries, the EFSM, the ESM, the EFSF or the IMF' (Art 7) – it must, for all intents and purposes, be read primarily as a companion to the ESM Treaty. Some of the reasons have been outlined in the introduction of this chapter, concerning the legislative background and direct references between the texts. Additionally, with the ratification of the ESM, the EFSM – the only EU law legitimate financing instrument based with Art 122 TFEU – became defunct; the EFSF no longer issues new loans with its ongoing management taken over by the ESM; crisis practice has shown IMF aid is conditioned on European participation and therefore, would not act on its own; and, lastly, the provision concerning direct relations between MSs covers contingency possibilities for new *ad hoc* measures, such as the first two bilateral loan facilities for Greece, as well as the off-chance of governments trying to bypass the system. This is all to say that the following analysis will disregard superfluous provisions regarding any variance in financing instruments, distilling the Regulation and ESM into one comprehensive system.

[50] Owing to the ECB's successful intervention, this step actually constitutes a Member State obligation pursuant to the responsibilities borne of Art 121 TFEU for mutual concern over economic policies (Am 9, explanation)

Provided that financial aid come from the ESM – as it is most certain to – Art 13 ESM stipulates a formal request be made to the Chairman of the BoG, i.e. the President of the Eurogroup, to initiate procedures. With Art 13.1 ESM, the Mechanism *entrusts* the Commission and ECB to: i) assess the risks for the euro area as a whole; ii) carry out a debt sustainability analysis (DSA) of the troubled Member State, where possible in liaison with the IMF; and, lastly, iii) to ascertain actual and potential financing needs. Art 6 of Reg (EU) 472/2013 elaborates on these arrangements. The Commission and ECB carry out their tasks by repurposing the powers granted to them within European law, including, for instance, information provided to the ECB in its financial supervisory capacity or to the European Supervisory Authorities.[51] Their findings inform the final decision on financial assistance made by the ESM's BoG (Art 13.2 ESM).

The lifeline is then formalised through a Memorandum of Understanding (Art 13.3 ESM) mirrored with a Macroeconomic Adjustment Programme within EU law (Art 7 Reg (EU) 472/2013). Monitoring is highly dependent on the existent EU surveillance mechanisms (Art 7.4 Reg (EU) 472/2013) with enforcement based on conditional tranche disbursements of financial aid.[52] The significant dependence of the ESM on Regulation (EU) 472/2013 becomes most evident once aid has been disbursed in full and the Mechanism loses its teeth to exact the price of structural reforms written into the MoU/MAP contracts. Post programme surveillance is *de facto* exclusively administered by the EU (Art 14 Reg (EU) 472/2013).

The relationship between the two legal regimes remains uneasy throughout these procedures, resulting in awkward arrangements and gaps in justiciability.

For instance, the moment a government requests financial aid (Art 5 Reg (EU) 472/2013), the procedure shifts away from the frame of EU law towards the metaphysical realm of the Eurogroup and its Working Group. In fact, the Commission and ECB predominantly communicate with the ESM *via* the EWG.[53] This is a highly suspect procedure, which draws to the fore the legitimacy issues of the Eurogroup/Working Group double hat arrangements with the ESM. Neither the ESM, nor the Regulation, ever address the blatant accountability issues at play here – perhaps having deemed it unnecessary to explain the

[51] With Article 3.3, Reg (EU) 472/2013. ESAs – under the European System for Financial Supervision - the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA)
[52] This is the procedure most closely associated to loans (Art 16 ESM), but the basic premise behind it is equally applicable to other financial aid instruments depending on the individual case.
[53] Article 6 Reg (EU) 472/2013

transmission of information from one legal regime to the other through the black box that is the EG/EWG format.

Further, there is the issue of liability. Even if the Commission and the ECB negotiate – and the Commission signs – the Memoranda of Understanding, their activities under the ESM Treaty commit the ESM alone, and their involvement does not alter the legal nature of ESM acts which fall outside the EU legal order. The only protection under EU law against acts of the ESM, then, is indirect: since the ESM Treaty tasks the Commission with reviewing the terms of MoUs for consistency with EU Law, the CJEU has held that the Union's non-contractual liability could be triggered were the Commission to contribute to a sufficiently serious breach of individual rights.[54] The ESM itself, however, is fully insulated against any liability under EU law.

5.1. Politicisation & Conflicts of Interest | Art 13.2 ESM

Debt-Sustainability Analyses | Debt- Restructuring | Illusive Market Discipline | Voting

Once the Commission and ECB's analyses on risk and debt sustainability are submitted to the ESM, the BoG makes the final decision on whether to grant financial aid and, if so, under what terms and conditions. This is a highly political and obstructive process with the ESM torn between sanctioning the technical expertise and recommendations of the Commission and ECB and servicing its own interests. The crux of the matter lies in the significance of the debt sustainability analyses (DSA) carried out by the Commission and ECB.[55] DSA conclusions define the terms and conditions for ESM financial aid and the possibility for debt restructuring.

Most crudely, the logic of DSAs comes down to a balancing act between: i) a troubled government's incurred debts; ii) the size of potential financial aid – which helps settle

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[54] The Commission's obligation as Guardian of the Treaties is codified in Art 17 TEU. The Court of Justice has had multiple chances to opine on the Commission's responsibilities under the ESM. See: CJEU, Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising et al. v European Commission and ECB* [2016] ECLI:EU:C:2016:701, para 55, 58; and CJEU, Case C-370/12 *Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756, para 164. The Commission has not taken kindly to this outcome either. According to its own assessment, this parallel existence of the ESM complicated matters with 'judicial protection, respect of fundamental rights and democratic accountability.' See: European Commission, 'Proposal for a Council Regulation on the establishment of the European Monetary Fund,' COM(2017) 827 final (6 December 2017) 3.

[55] For details on debt restructuring see recital 12 ESM Treaty; on debt sustainability analysis see Art 13.1 ESM Treaty and European Parliament and Council Regulation (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L140 (17 May 2013).

immediate concerns, but ultimately adds to long term debt; iii) and the fiscal savings expected through various structural reforms outlined in the conditionality programme. The DSA is to be 'based on the most likely macroeconomic scenario or a more prudent scenario' and a significant amount of the information is to be made public.[56]

Per established IMF practice, it is not advisable to issue new loans to a government whose debt is judged unsustainable. Most obviously, it is a bad investment strategy with little promise for repayment. Further, it risks exacerbating underlying problems even further.[57] Barring sovereign default, the solutions in such a case include: i) revisiting the terms of the financial aid package – for instance, renegotiating repayment schedules to make individual payments financially bearable; ii) revising the assessment of the conditionality programme towards more optimistic conclusions; iii) demanding further austerity measures for further spending reductions; iv) or lastly – implementing debt restructuring.

As unappealing as debt restructuring might be in political and financial circles, the alternatives provide false solutions. Extending the repayment schedule only prolongs a borrower's struggle to balance its accounts and recover, while the total debt burden remains unchanged and to be shouldered by generations in an even more distant future. Overoptimistic conclusions on austerity reforms lead to unreasonable expectations for recovery and a possible repeat of the doom cycle. Demanding further fiscal tightening risks public rejection of the programme, political backlash, and stagnant growth. This much has been clearly demonstrated with the unfortunate case of Greece's third programme review in 2016.[58]

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[56] Art 6, para 2, Reg (EU) 472/2013.

[57] The International Monetary Fund (IMF) has a clearly established practice on this. For a succinct summary, see: S. Hagan, M. Obstfeld and P. M. Thomsen 'Dealing with Sovereign Debt—The IMF Perspective,' *23* February 2017, *IMFBlog*.

[58] A now infamous case in point is illustrated by the unprecedented public showdown between the IMF and the EU during the third programme review for Greece in 2016. The creditors disagreed over the sustainability of Greek debt and their assessment over the future growth scenarios of the country, specifically – budget surplus targets. Their numbers simply did not match. The IMF advocated for serious debt restructuring before it could provide additional financial support; the EU fell back on claiming protracted repayment of the loan in full as a kind of debt restructuring spread out over time. Matters deteriorated so badly that two top IMF officials published an open letter warning of the Fund's projections and against the EU's new conditions for more austerity. See: P. Thomsen (director of the IMF's European department) and M. Obstfeld (IMF chief economist) 'The IMF is Not Asking Greece for More Austerity,' 12 December 2016, *IMFBlog*. Accessed 24 Jan 2020: <https://blogs.imf.org/2016/12/12/the-imf-is-not-asking-greece-for-more-austerity/>
Also widely publicised in media: FT: 'IMF denies it is trying to force more austerity in Greece' Dec 12, 2016, Accessed 24 January 2020: https://www.ft.com/content/b0b987c6-c08a-11e6-81c2-f57d90f6741a; The Guardian, Greece 'boxed in' as EU and IMF fight over nation's debt relief plan, 13 December 2016,

Debt restructuring should be to markets what conditionality is to governments. Forced austerity, rough lending terms, and a certain loss of sovereignty are expected to discourage governments' fiscal profligacy and prevent future crises. Analogously, a realistic possibility for debt forgiveness should scare market investors into responsible lending, so that they may price risk accordingly and, in turn, help discipline government borrowing and spending.

This was the premise behind the bailout prohibitions at the core of the Maastricht compromise – the threat of sovereign default ensuring both government and market discipline. Yet, as will be recalled from Chapter 1, Alexandre Lamfalussy himself acknowledged this was but a bluff – Member States would be too closely integrated to afford taking a hit when push came to shove and markets knew it. The solution was simply to double down on fiscal discipline so as to preclude such problematic scenarios ever arising in the first place.

Two decades later, the ECB could not agree more. In a commentary from 2011 on the yet to be finalised European Stability Mechanism, the Bank imparts its wisdom on the perils of debt restructuring:

> '[I]t is important to note that resorting to debt restructuring as a form of private sector involvement would be a very costly process, not only for the country concerned but also for other euro area countries. A restructuring of sovereign debt could significantly undermine the financial sector of the country concerned and *would risk contagion to exposed banks in other euro area countries*. As a recapitalization of the exposed banks could become necessary to compensate for the losses on government bonds of the restructuring country in their portfolios, further strain could be put on the fiscal positions of the euro area governments concerned. Any debt restructuring is also likely to imply far-reaching second-round effects, in part through the increase in banks' holdings of non-performing loans extended to governments and non-financial corporations. Indirect contagion to other euro area countries via confidence effects is also possible. The high and unpredictable costs of any form of debt restructuring reinforce the need to ensure a very strict implementation of the new Stability and Growth Pact to eliminate the risk of such debt restructuring being needed in the first place.'[59]

Accessed 24 Jan 2020: https://www.theguardian.com/world/2016/dec/13/greece-eu-imf-war-of-words-debt-relief-plan-tsipras-austerity

[59] Monthly Bulletin ESM July 2011, 81-82 [emphasis added] in an article on the European Stability Mechanism

The conflict is obvious. With the ESM Board of Governors representing a significant proportion of a troubled government's private creditors, a vote on debt sustainability is tantamount to a vote on 'bailing in' a creditor's own financial institutions and – by extension – itself. Coupled with an obligation is to prevent eurozone contagion and minimize exposure in a context of deeply rooted cross-border financial exposure, the ESM simply cannot apply the IMF rulebook in good faith.[60]

In the novel EU framework for crisis management disciplining governments and disciplining markets are not equally plausible procedurally – with the latter a mere recital and measure of last resort, nor legally – as the legal premise behind the financial aid mechanism gives clear priority to the 'stability of the euro area as a whole' (Art 136.3 TFEU). What is more, not only has the ESM made sovereign defaults impossible, but its approach to debt restructuring during the crisis set up expectations that member states will always pay their debts and do so more or less in full.

As a result of the incomplete asymmetric EMU creditor governments now identify themselves with the free market because of temporarily converged interests, which happen to be a perfect match to Maastricht-ingrained economic beliefs about debt. In fact, this identity crisis has deteriorated into having Member States assume the role of the market itself, distributing some idealised notion of market discipline through the ESM. To this end, crisis management is but an exercise in financial quarantine. It is best to isolate a troubled Member State by exposing it to high doses of bitter medicine than to endure the financial and political consequences of fiscal transfers across the north-south, have-have-nots, creditor-debtor divide.

The irony cannot be ignored. On the one hand, by refusing debt restructuring Member States, ESM, and ECB go directly against the 'natural' order of the market, removing any incentive for the proper pricing of risky investments. Simultaneously, the conditionality arrangements forced on financially troubled governments are designed to synthetically mimic the wrath of that very same market discipline, which – to this day – is yet to materialise tangibly in the EU sovereign bond market spread.

Perhaps most disturbingly, two decades after Maastricht, in the face of blatant economic divergences and dire economic circumstances, the only solution provided to the

[60] These concerns are reflected into the financial aid and crisis management legal framework of the EU. There is a generous number of provisions spelling out conditionality in both the ESM and Regulation (EU) 472/2013. Debt restructuring, on the other hand, is but a mere mention in a recital constrained by multiple circumstances.

perils of asymmetric union remains avoiding those at all costs with the odds stacked against debtors.

A final note must be made here, which is most evident in the analysis of Annex 1 on ESM Treaty Reform, but whose outlines have already been sketched out in the current chapter. There is a significant and overlooked assumption ingrained in the complex relationship set up with the EU crisis management and prevention framework about the interests of the European Union as a whole, represented by the Commission and ECB as founding Union institutions, and the interests of creditor governments, represented by the ESM, aligning. The most basic example, with far reaching ramifications, comes down to the ECB and Commission's recommendations on debt sustainability, which the ESM Board of Governors is to depend on for technical expertise and, likely, rubberstamp. The question here comes down to the definition of and means for achieving the stability of the eurozone. One simply cannot assume that the ESM's mandate for stability based on the best interest of its shareholders would amount to acting in the best interest of the European Union as a whole.

5.2. ESM Voting | Procedural Control – Art 4 ESM

Once ESM members agree on the best course of action in response to a request for financial aid, they have to formalise their decision through a vote. The voting arrangements of the ESM are themselves yet another procedural hurdle with built-in politicisation. Art 4 ESM stipulates 'mutual agreement,' i.e. unanimity, for more or less any act of consequence of the ESM BoG.[61] This allows any single member to block time-sensitive processes against strictly national conditions on the adjustment programmes demanded of borrowing governments.

The emergency voting procedure of Art 4.4. ESM is not much of a fail-safe either. For one, it has a very high threshold for activation – triggered only if both the Commission and ECB decide that a delay in reaching a decision amongst the ESM members risks serious consequences to the stability of the eurozone. Further, even with the lowered requirement of 85 percent capital shares sought for approval, it still leaves three governments capable of vetoing, namely – Germany, France, and Italy.[62]

[61] This includes decisions with direct financial impact on participating ESM member states (e.g. such as capital calls and changes to lending capacity) as well as those related to granting financial support and additional disbursements.

[62] The 85 percent limit (referred to as 'reinforced qualified majority' in later documents) is not frivolous. With voting rights proportional to ESM capital stock shares allocated to each country, the big three – Germany, France, and Italy, may continue to exercise veto rights even in the hypothesis of an emergency vote. Even a regular qualified majority at 80 percent of the vote, used for far less important votes within

The introduction of an emergency voting procedure to an emergency mechanism is as ironic as it is revelatory. On the one hand, it is an admission that the standard arrangements of the ESM hardly comply with the nature of a crisis-resolution body, expected to act swiftly and decisively.[63] Like much of the Great Reformation of EU economic and crisis governance, the ESM was enabled by the state of exception for purposes unconstrained by exceptional circumstances. The Mechanism is first and foremost concerned with establishing political control over funds and protecting the private national interests of creditor member states before those of the wider Union, which seem to have been ultimately entrusted to the Commission and ECB.

6. ESM Financial Stability Instruments

In any case, should ESM BoG approve going forward with aid, it has at its disposal six instruments for financial stabilisation, which it can deploy in accordance with the principles laid out in Art 12.1 ESM – if 'indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.'

Art 14 ESM | Precautionary Assistance

Article 14 lays out the two possibilities for granting precautionary assistance in the form of a credit line with either precautionary conditions (PCCL) or enhanced conditions (ECCL). Both options are targeted at Member States whose economies have been judged sound, but differ on eligibility criteria such as respect for the rules of the Stability and Growth Pact, public debt, external position or market access on reasonable terms. The indicators are collected across the regular EU surveillance framework, fiscal and financial alike. Precautionary assistance is exactly what it advertises itself to be – preventive. It is designed to strengthen 'the credibility of [governments'] macroeconomic performance' and maintain their market access.[64]

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the ESM, still leaves a German and (barely) French veto. A simple majority requiring just over half of the present votes (with two thirds for quorum) is the only means by which Germany, in particular, would be unable to block procedure, but no procedure of consequence in the ESM provides for it.

[63] By 2017 voting procedures would become a point a contention between the ESM, member states, and the Commission and ECB on the other side. Eventually both the Commission and the ECB would turn against this approach calling for more efficient voting arrangements (COM proposals EMF See: European Commission, 'Proposal for a Council Regulation on the establishment of the European Monetary Fund,' COM(2017) 827 final (6 December 2017) 3 and ECB Opinion CON/2018/20 on a proposal for a regulation on the establishment of the European Monetary Fund, 11 April 2018.

[64] ESM Lending Toolkit, Accessed November 8, 2019: https://www.esm.europa.eu/assistance/lending-toolkit

There is no structural reform conditionality involved with PCCLs, but they are not wholly without conditions either. Courtesy of the ECB, the beneficiary government must show continuous respect for the eligibility criteria, i.e. to sustain sound finances, and open its books to monitoring by the Commission and ECB.[65] In the case of an ECCL – or as soon as a PCCL is drawn – governments are automatically placed under enhanced surveillance managed within the framework of Regulation (EU) 472/2013, which comes with its own version of reform conditionality. There is continuous monitoring and reporting, but it does not automatically trigger a review of the precautionary assistance, lest the ESM Managing Director submit a proposal to this end.

Art 15 ESM | Financial Institutions

The ESM is also directly involved with the recapitalisation of financial institutions, either directly or indirectly by funding the bank's sovereign (Art 15 ESM). The former instrument has become defunct with the full operational support of the Banking Union and Single Resolution Mechanism and only the SRB backstop remains within the legal competences of the ESM. The hope is that the work of the SRM will altogether spare sovereigns from absorbing unnecessary debt, and eventually remove the need for indirect recapitalization loans. If, however needed, the conditionality associated with indirect recapitalization is based on the understanding these are 'cases where the financial sector is primarily at the root of a crisis, rather than fiscal or structural policies.'[66] It presupposes a restructuring of the troubled financial institutions and a possible revamp of the national supervisory rulebook with compliance enforced through the European Commission, which co-monitors with the ECB and any relevant supervisory authority.

Art 16 ESM | Loans

The most notorious and literal form of financial aid must be the provision of loans as set out under Art 16 ESM. Loans concern the most dire cases of crisis management, for which reason they provide for the most far-reaching conditionality of any of the financial instruments, both instituted and monitored through the EU legal framework with Reg (EU) 472/2013, specifically - MAPs. Not unimportantly, loans were the most used lending facility of the ESM

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[65] Amendment 6, ECB opinion on Reg (EU) 472/2013.
[66] ESM Lending Toolkit, Accessed November 8, 2019: https://www.esm.europa.eu/assistance/lending-toolkit

and its EFSF/EFSM predecessors. This chapter's analysis of the EU crisis governance framework concerns specifically the legal framework of ESM loan management.

Art 17 & 18 ESM | Bond Markets

The ESM can also involve itself on the primary and secondary bond markets as a means of providing financial assistance to member states.[67] Primary market purchases (PMSFs) could be carried out as part of a loan programme under Art 16 ESM with conditionality governed by a MAP, or as a method of drawing a precautionary assistance credit line under Art 14 ESM, then governed by enhanced surveillance. The main objective of the instrument is to enable governments to 'maintain or restore their market access.'[68] The ESM can purchase no more than fifty percent of the final issued amount of sovereign securities.

ESM interventions on the secondary market 'aim to support the good functioning of the government debt markets of ESM Members in exceptional circumstances where the lack of market liquidity threatens financial stability, with a risk of pushing sovereign interest rates towards unsustainable levels and creating refinancing problems for the banking system of the ESM Member concerned.'[69] The main purpose is to ensure liquidity and encourage investors' continued exposure to the troubled government's debt – to prevent and address contagion.

SMSF could be engaged to supplement PMSF either where a MAP is already in place or without a MAP, but only in cases where the government's economic and financial situation is found to be fundamentally sound. The decision to grant assistance is based upon an ECB assessment 'recognizing the existence of exceptional financial market circumstances and risks to financial stability' (Art 18.2 ESM) and a report to confirm MoU conditionality compliance carried out by the Commission in liaison with the ECB.

Conditionality for both kinds of market intervention programmes is set out through a Financial Assistance Facility Agreement (FFA) – Memorandum of Understanding (MoU)

[67] As provided with Art 17 and 18, respectively, and detailed in the ESM Guideline for Primary market support facility https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_primary_market_support_facility.pdf and ESM Guideline for Secondary market support facility https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_secondary_market_support_facility.pdf.

[68] ESM Guideline for Primary market support facility, Accessed 8 November 2019, https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_primary_market_support_facility.pdf

[69] ESM Guideline for Secondary market support facility, Accessed 8 November 2019, https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_secondary_market_support_facility.pdf

structure (discussed below), unless already stipulated elsewhere with a MAP. In order to guarantee continued eligibility, compliance is monitored and reported by the Commission in liaison with the ECB.

7. Conditionality Arrangements| Negotiating Help

7.1. ESM – MoUs & FFAs | Reg (EU) 472/2013 - MAPs

Disbursement of financial aid is based on the standard operating procedures laid out in Art 13 ESM. There are minor divergences for each instrument, designed to make the most out of Member State troubles by instituting distinct forms of *quid pro quo* relative to the severity of the financial context. In all cases, the procedure develops along two parallel legal tracks – structural reforms conditionality and financial terms conditionality.

On the first track the ESM again outsources its operations by having the BoG *entrust* the Commission, in liaison with the ECB and whenever possible the IMF, to negotiate Memoranda of Understanding with governments, detailing the structural reforms conditionality of financial assistance. The MoU is to assimilate any existent opinions, recommendations or sanctions issued to the troubled MS within the regular EU economic governance framework (Art 13.3 ESM). This approach is an epitome of the legal cross-pollination between the EU and ESM Treaties. It draws on the legitimacy of EU law for the authorization of punitive measures and confirms the alleged causality between budgetary rule compliance and crises. And yet, as far as the CJEU is concerned, incorporating and applying recommendations borne of the EU legal framework as part and parcel of MoU conditionality does not amount to Member States 'implement[ing] EU law in the context of the ESM Treaty, so that the Charter is not addressed to them in that context.'[70]

In spite of the ESM having its own legal personality, allowing it to be party to contracts and legal proceedings (Art 32.3 ESM), the Commission signs the final MoUs on behalf of the ESM.[71] Should a financial assistance facility under Articles 16 or 18 ESM be selected (loans or

[70] *Ledra*, above n 57, para 67. There is no shortage of legal challenges to this set-up and yet, the most that the EU judiciary has been able to grant is Charter protections flowing from the Commission's responsibility to ensure the MoU and MAP are consistent with EU law. It must be noted the signature of the Commission is somewhat of an upgrade from the IMF practice the EU crisis enterprise is based on. With the IMF, governments in receipt of financial aid were to sign the final document on their own, thereby absolving any involvement or responsibility of the other party. Nonetheless, EU practice produces similar results with MS preparing their own draft MAP/MoU, only *taking into consideration* Commission and ECB *advice*, and then entering into contractual obligations supposedly out of their own volition.
[71] The one entry point of EU legal protections, such as the Charter, in the entire cross-legal edifice, resulting in balancing exercises before the Court between the shared objectives of the Union – in the

secondary market purchases), the conditions negotiated in the MoU are to be duplicated in a MAP in accordance with Art 7 Reg (EU) 472/2013.[72]

The second track of crisis management procedure configures the financial terms and conditions of the chosen lending instrument. This is done within the confines of the ESM's legal regime in a Financial Assistance Facility Agreement (FFA) drawn up by the ESM Managing Director and approved by the BoD.

These two processes are intimately connected – continued disbursement of FFA aid is subject to compliance with MoU/MAP conditionality. Securing the link between the two are the monitoring provisions of Regulation (EU) 472/2013, which give substance to Articles 13.6 and 13.7 ESM and make full use of existent EU law instruments for the surveillance of MoU compliance and the issuance of reports to that end. The latter feed back into the ESM for periodic reappraisal of the circumstances for sustained or additional aid, closing the loop on the exercise of conditionality across legal boundaries.

7.2. MAPs – Art 7 Reg (EU) 472/2013

MAPs truly are one of the most exceptional crisis acquisitions of EU law. As the Commission itself acknowledges: '[MAPs] are very broad in scope and *go well beyond* strict fiscal issues and multilateral surveillance. In practice, the Member State concerned is asked to do *whatever* is identified as needed to improve its near, medium, and long-term economic and financial situation.'[73] Regulation (EU) 472/2013 incorporates a soft-law spin on procedure, which leaves the justiciability of MAPs closer in kind to the legal limbo of MoUs than an instrument under the supervision of EU law. Art 7 Reg (EU) 472/2013 is a comprehensive legal mechanism, which includes its own monitoring regime, possibility for reinforcing corrective measures, and a significant clause on administrative capacities. These are discussed below.

For any MS arriving at a MAP through enhanced surveillance (the bottom up approach culminating with Art 3.7 Reg (EU) 472/2013), the procedure will feel familiar in terms of

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context of crisis governance – stability, and private Charter rights with the former greater good unsurprisingly prevailing. See the Judgment in *Ledra*, above n 57.

[72] Art 16.2 ESM states this much explicitly. Articles 18 on the secondary market operations detail their relation to MAPs in the ESM Guideline on Secondary Market Support Facility, Accessed 24 Jan 2020: https://www.esm.europa.eu/sites/default/files/esm_guideline_on_the_secondary_market_support_facility.pdf

[73] 'Two-Pack' enters into force, completing budgetary surveillance cycle and further improving economic governance for the euro area' Brussels, 27 May 2013, EU Commission, MEMO/13/457, [emphasis added] Accessed 8 Oct 2019: https://europa.eu/rapid/press-release_MEMO-13-457_en.htm?locale=en

structure, yet subject to a number of refinements in terms of severity. For those having requested financial aid, MAPs follow the procedure of the MoU. That is, Member States negotiate over reform measures with the *troika* in its original iteration; the measures are formalized into a draft MAP under the exclusive ownership of the Member States, pending Council approval; the contents of the MAP become part of the ESM MoU, negotiated in parallel between the same actors; complemented by a highly invasive amount of monitoring during and after the critical period.

The MAP is to be based on the debt sustainability analysis (DSA) previously carried out by the Commission and ECB. It is designed as a collection of all the recommendations ever issued to the troubled Member State under Articles 121, 126, 136 or 148 TFEU. The associated policy measures are, in turn, expected to be 'broadened, strengthened and deepened' by the troubled government in an effort to attest commitment to compliance and address risk.[74] Should measures under Art 9 Reg (EU) 473/2013 *on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area* already be in place, the MAP is to replace and build upon the existing economic partnership programme (EPP).[75]

The aim of a MAP – and presumably its measure of success – is 'rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets.'[76] We shall come back to this point shortly in the discussion on post programme surveillance.

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[74] (Art 7.1 paras 1, 3)
[75] Here again we see a repurposing of existing EU instruments, which bears witness to their true intensity and potential visible only as part of the whole framework of EU post-crisis economic and crisis governance. this interplay often manifests in stark contrast to the instruments' original justification and legal base for existence, such as is the case with the EPP (See Ch. 5 National Fiscal Frameworks). Further on the consistency and duplication with the regular economic governance framework: The preventive arm of the SGP and Semester surveillance are logically suspended for the duration of a MAP (See Ch.3 Supranational Budgetary Surveillance); If a MS is under the corrective arm EDP, reporting requirements and corrective monitoring are replaced by those of the MAP to avoid duplication, but the annual budgetary targets and required measures from the MAP feed back into the EDP; During a MAP, the Macroeconomic Imbalance Procedures with Reg (EU) 1176/2011 is suspended as well, except for the use of MIP scoreboard indicators, which are foreseen as an integral part of the MAP (See Ch.4 Competitiveness Framework); And lastly, with Art 13 Reg (EU) 472/2013 the MAP replaces the provisions of Reg (EU) 473/2013 on draft budgetary plans, except for the use of enhanced monitoring of common budgetary timelines, the use of independent fiscal bodies, and the submission of draft budgetary plans.
[76] Reg 472/2013 Art 7.1 para 2.

7.3. Social Rights and Protections

It is worth noting that the final version of Reg (EU) 472/2013 carves out a space for social and labour protections and fundamental rights observance for any institution applying the regulation. Art 7.1 explicitly provides that the contents of the MAP is to 'fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union' – just as the Commission, the Council and the Member States are expected to do with Art 1(4) Reg. Briefly, the Charter refers to labour union rights in negotiating wages and taking collective action, while the Treaty article deals with the more general 'recognition and promotion' of the role of social partners in Member States.[77] The regulation lukewarmly limits any budgetary consolidation efforts, i.e. austerity, foreseen in the MAP to 'ensur[ing] sufficient means for fundamental policies, such as education and health care.'[78] Furthermore, Art 8 instructs the troubled Member State to consult with 'social partners as well as relevant civil society organizations' in drafting its MAP for the explicit purpose of 'building consensus' over the foreseen measures.

There is much to be said of this approach. First, it follows as a trend in EU economic governance reform, especially the macroeconomic competitiveness framework with Regulations (EU) 1176/2011 and (EU) 1174/2011, as well as Reg (EU) 473/2013. Such provisions, it has already been pointed out, function as a red flag in drawing our attention to the potential scope of the regulations of concern, where too often it turns out that the most unassuming measures hide far-reaching intent and capabilities beyond what is discernible on the surface.

The efficacy of these built-in protections in balancing out the supranational reach into Member State social – and highly political – business is suspect. For one, they duplicate the general understanding (and Court-established convention[79]) that the provisions of the Charter cover all conduct and acts of European institutions. Therefore, it seems the explicit addition of these social dialogue measures has no more but an informative character. Moreover, early dialogue with social partners could provide greater social ownership of

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[77] Art 152 TFEU: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy. The Tripartite Social Summit for Growth and Employment shall contribute to social dialogue.' Art 28 Charter: 'Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.'
[78] Art 7.7, para 2.
[79] Upheld in *Ledra*, above n 57.

reforms in an effort to legitimate them, as well as a means of precluding future social dissent. These articles are a pre-emptive address of the debate on austerity in handling crises and the social protection lacunae left in the process of managing financial aid outside EU law. They are, as such, an implicit admission that European economic governance reform is a formalization of austerity, treading too close for comfort to the national social space.[80]

7.4. Monitoring Art 7.4

Once a MAP is in place, a two way monitoring regime ensues through both the Regulation and ESM. The setup mimics the rationalities behind each regime in the familiar bottom-up/top-down approach, respectively.

The EU system uses its own *troika light* configuration – the Commission *in liaison with* the ECB, to monitor progress on the implementation of MAP/MoU agreed conditionality.[81] The official purpose is securing the goals of the MAP – financial stability and risk containment within the context of Union economic governance with Art 121 TFEU.[82]

Member States are expected to fully cooperate with and provide any information the Commission or ECB deem necessary in accordance with the financial aid track Enhanced Surveillance procedure per Art 3.4 Reg (EU) 472/2013. In its legislative opinion on the proposal for Regulation (EU) 472/2013 the ECB foresaw and unsuccessfully sought to pre-emptively address any potential 'uncooperative' behaviour by introducing a 'threat of publicity' in the hopes it 'may provide inventive to the [government] to take further action.'[83] It is yet another candid instance, where virtue-signalling transparency provisions are primarily utilised for the disciplining purposes of the system, before anything else.

The Commission reports on observed progress to the Economic and Financial Committee (EFC) every three months,[84] as well as to the European Parliament, though only

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[80] See generally F. Costamagna, 'National social spaces as adjustment variables in the EMU: A critical legal appraisal', (2018) 24 *European Law Journal* 163.
[81] As EU law cannot place duties on the IMF, although the regulation refers to the crisis troika – Commission, ECB and IMF 'wherever appropriate', these tasks are carried out by the Commission *in liaison with* the ECB under the EU law configuration of crisis management. It is, in practice, more of a *dvoika* than a *troika*.
[82] With Art 7.1. Reg (EU) 472/2013, elaborated with Art 7.4, 7.5 Reg, mirrored Art 13.7 ESM, Art 4 ESM Loan Guidelines.
[83] ECB Opinion on Reg 472/2013, Explanation of Amendment11, para 3. (rejected))
[84] The involvement of the EFC is a curious decision, seeing as Reg (EU) 472/2013 pertains to the eurozone only and up until that point the legislation's primary choice had been the Eurogroup or EWG. It is nevertheless warranted by the fact that non-eurozone MS may in fact participate in the ESM on a voluntary basis. Be that as it may, the distinction with the Eurogroup remains a formality.

orally to the latter. Furthermore, these findings go to the ESM BoG so that the latter may decide on the continued disbursement of financial aid.[85]

Monitoring comes with consequences. Each report becomes the basis for tweaks and 'updates' to the MAP, which are then *renegotiated* between the *troika* and the government concerned. The Council has to approve the changes on proposal from the Commission by qualified majority. Should the review, however, lead to conclusions of *significant deviations* between a Member State's conduct and the promises made in the MAP, the procedure again splits down two tracks feeding the EU and ESM regimes in parallel. On the one hand, the Commission is to propose that the Council (by QM) formally decide there has been non-compliance. Here, in a notable divergence from the original legislative proposal, the final version of Art 7.7 Reg (EU) 472/2013 allows room for flexibility and the extraneous circumstances that one may expect in such a context. The Commission is required to make an explicit assessment of whether the compliance issues may be due to factors outside the control of the Member State. Should non-compliance nevertheless be formalized, another round of negotiations ensues between the Member State and the *troika* with a view to – specifically and distinctly here – 'take measures aimed at stabilising markets and preserving the good functioning of its financial sector' (Art 7.7 last para).

The Commission also sends the proposal on non-compliance to the ESM BoG, which may decide to temporarily withhold financial assistance until a further unspecified time, presumably – upon the Member State taking the required corrective measures.[86]

Meanwhile, in parallel, the ESM runs its own surveillance mechanism – the Early Warning System (EWS) focused on the borrowing country's ability to repay its loans in a timely manner (Art 13.6 ESM). This process is chiefly concerned with protecting creditors' interests through the assessment of risk and provisions for imposing further corrective actions. A Member State is under the same information requirement obligations with the EWS as with the EU setup – whatever the EWS deems necessary for its financial due diligence.[87] The EWS assessment 'takes into account and complements' the work of the EU *troika* in reaching its conclusions for the purposes of further aid disbursements stipulated with the FFAs.[88]

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[85] (Art 16.5 ESM stipulates reporting to the BoG, Art 2.5 Guidelines on Loans specifies BoD) Accessed 25 Jan 2020: https://www.esm.europa.eu/sites/default/files/esm_guideline_on_loans.pdf
[86] Art 4.3 ESM Loans Guidelines.
[87] Art 4.2 ESM Loans Guidelines.
[88] European Stability Mechanism, 'What is the Early Warning System?,' Accessed 24 Jan 2020: https://www.esm.europa.eu/content/what-early-warning-system-ews

7.5. Administrative Capacity

Generally, Regulation (EU) 472/2013 does not lack in audacity, but no provision comes close to the potential of Art 7.8, paragraph 1, courtesy of the ECB.[89] The text is worth citing in full:

> 'A [MS] subject to a macroeconomic adjustment programme experiencing insufficient administrative capacity or significant problems in the implementation of the programme shall seek technical assistance from the Commission, *which may constitute, for that purpose, groups of experts composed of members from other [MS] and other Union institutions or from relevant international institutions. The objectives and the means of the technical assistance shall be explicitly outlined in the updated versions of the [MAP] and focus on the area where major needs are identified. Technical assistance may include the establishment of a resident representative and supporting staff to advise authorities on the implementation of the programme*.'

While the possibility of resident technocrats had been entertained elsewhere,[90] it is the competences and procedural intent behind this specific provision, which makes the content stand out in blatant disregard, perhaps even usurpation, of sovereignty.

First is the question of how the procedure even comes about – whether establishing the existence of whatever 'insufficient administrative capacity or significant problems' with implementation might be, is a function of the voluntary and conscious will of the Member State concerned. That somehow seems an unlikely possibility, especially when we consider these arrangements are made in the context of a MAP. The Regulation gives no further details on Article 7.8, but the context speaks loudly enough. For sheer lack of logical alternative, the cycle is most likely instigated with the mission reports prepared by the *troika*, which establish the requisite conditions for technical assistance. Even though it is governments themselves which have to request technical assistance, they likely come under a mandatory obligation for doing so, not unlike the requests for financial aid itself (Art 5 Reg (EU) 472/2013).

There is also a question as to the objectivity of the threshold categories. One may easily assume *significant problems* is a reference to the previously-discussed and proceduralized *significant deviations*, meaning that a Council decision on non-compliance under Art 7.7 Reg (EU) 472/2013 is to automatically bring about one of the most invasive courses of action in European economic governance – technical assistance. But that is not necessarily the case and the legal nature of these 'problems' remains highly suspect.

[89] The content added by the ECB is in italics.
[90] The monitoring missions as set out by Regs (EU) 1176/2011 & 1174/2011, discussed above in Chapter 4.

The alternative condition that brings about EU assistance – *insufficient administrative capacity,* also remains unclarified. It does, however, have the potential of a catch-all provision capable of applying in cases where either *i)* a Member State uses technical difficulties as justification to slow progress, or *ii)* where the *troika* is unsatisfied with progress, but MAP deviations are not 'significant' enough for the Council to come to a decision on non-compliance.

Establishing either state of affairs, so as to initiate the technical assistance procedure, however, remains obscure at best and a function of inequitable negotiations at worst (and most likely). It is hard to imagine the imprecision in terminology is unintentional, especially since the ECB always takes great care of pointing out such details in reviewing legislative proposals. In this context, ambiguity makes the provision all the more comprehensive, not unlike the expansive review potential of the 'vulnerabilities' amendment with the macroeconomic imbalances framework, or keeping the definition of 'serious financial problems' leading to enhanced surveillance loose.

Indeed, Art 7.8 Reg (EU) 472/2013 is a small coup for the Bank – a vocal supporter of surveillance missions and regular auditing throughout the process of EU governance reform. The ECB's proposal (in italics) was adopted verbatim in the final version, significantly enhancing the original intent of the measures. It is also worth mentioning the provision for technical assistance comes the closest to materializing the punitive loss of fiscal sovereignty that the ECB had entertained as retribution since the start of the sovereign debt crisis.

Which brings us to the question of who exactly is to provide technical assistance and exercise sovereignty on behalf of the troubled and evidently incompetent government. Always candid, by way of explanation to Amendment 11.6 of its Opinion, the Bank admits to entertaining the participation of a variety of unspecified institutions *and* Member States 'with relevant expertise' to carry out these missions alongside the Commission. The prospect is highly troubling on a number of normative and legal fronts. It is exemplary of the distorted power dynamics between EU Member States, split into creditors and debtors, where the former might come to exercise direct administrative control – albeit through 'advice' – over the latter with the provisions of Art 7.8 Reg (EU) 472/2013. This, in effect, results in a perverse hierarchisation of an otherwise legally heterarchical relationship between EU peers within EU law and the quantification of sovereignty through economic prowess. The use of permanent resident staff, the Bank claims, is considered to 'increase significantly the probability of adequate programme implementation.' How that triumph is to come about

remains open to speculation, but it should be noted that the troubled government may well find itself under the governance of any unspecified – and at the time of legislating, still non-existent – EU or international organisation. One particular EU endeavour to this end stands out.

7.6. Structural Reform Support | Technical Assistance with a Life of Its Own

To elaborate on the latter, we must fast forward EU legislative reform. In 2017 the EU inaugurated the Structural Reform Support Programme (SRSP), based with DG REFORM.[91] The SRSP absorbed the *quid pro quo* relationship established between the disbursement of Cohesion Funds and economic rulebook compliance, combined it with the technical assistance framework envisioned by the ECB with Art 7.8 Reg (EU) 472/2013, and set up a support system for i) own initiative reforms; ii) such demanded by economic adjustment programmes; iii) and growth-oriented reforms borne of regular Semester surveillance.[92] In other words – stand-by technical expertise for voluntary and mandatory top-down and bottom-up reforms.

The setup is predicated on incentivising reforms by leveraging Union funds. Just as with Art 7.8 Reg (EU) 472/2013, the SRSP is proud to provide Member States with a 'unique combination of expertise' – including 'experts from national administrations, international organisations, private firms and consultancies, [and] individual experts from the private sector,' alongside Commission personnel.[93]

This structure had apparently proven so successful that the Commission issued a proposal for regulation to formalise it for posterity as part of the Reform Support Programme (RSP) – the key convergence instrument of the 2021-2027 Multiannual Financial Framework. The 2020 health pandemic may have altered these plans with the Commission withdrawing

[91] Reg (EU) 2017/825 establishing SRSP

[92] In fact, the Greek government has been an early 'beneficiary' of the SRSP, with it applying directly to the reform policy conditions of its MAP, as well as foreseen in its post-MAP governing future. See: Eurogroup statement on Greece of 22 June 2018, PRESS RELEASE, 390/18, 22/06/2018, Accessed 8 Oct 2019: https://www.consilium.europa.eu/en/press/press-releases/2018/06/22/eurogroup-statement-on-greece-22-june-2018/pdf; European Commission, C(2018) 4495 final, Commission Implementing Decision of 11.7.2018 on the activation of enhanced surveillance for Greece – Para 16. Accessed 8 Oct 2019: https://ec.europa.eu/info/sites/info/files/economy-finance/2_en_act_part1_v7_adopted.pdf

[93] Structural Reform Support Programme, DG Reform, European Commission, Accessed 27 Jan 2020: https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/structural-reform-support-programme-srsp_en

the RSP in favour of the Recovery and Resilience Facility, but the Technical Support Instrument will nevertheless remain an integral part of the future setup.[94]

8. ~~Art 14 – Post- programme Surveillance~~ | Exiting Programme Surveillance

Article 14 Reg (EU) 472/2013 carries on with provisions for the post-programme surveillance (PPS) of Member States that have benefited from financial aid. For all the details divulged therein, however, there is a serious problem with this scheme – rummaging through the entire document, nowhere is it clearly stipulated what a successful completion of a MAP actually entails, so that a Member State may be successfully graduated out of it and enter PPS.[95] Therefore, before addressing the substance of Article 14, we must first try to establish the criteria for MAP success stories. Clues lie in the general aim of the programmes, some informed guess-work, and a brief overview of practice.

The most basic parameters of a MAP are laid down with its purpose in Art 7.1, para 2, Reg (EU) 472/2013, namely: to address the risk of contagion for the euro area, to 'rapidly re-establishing a sound and sustainable economic and financial situation and restore[e] the Member State's capacity to finance itself fully on the financial markets.'[96] Further, as we have seen, MAPs are premised on financial aid on a disbursement schedule in order to guarantee compliance with conditionality arrangements.

Fulfilling these criteria, presumably by submitting to the terms of the MAP, and receiving the entirety of negotiated aid ought to negate the very existence of a programme, therefore signalling a natural conclusion to the undertaking.[97]

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[94] COM(2018) 391 final Proposal for est Ref Sup Programme, p.4, <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:391:FIN>
On the latest developments: EU Parliament, Legislative Train, on Technical Support Reform Programme, Last accessed 8 Mar 2021 < https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/new-boost-for-jobs-growth-and-investment/file/mff-reform-support-programme>
Technical Support Facility <https://ec.europa.eu/info/funding-tenders/funding-opportunities/funding-programmes/overview-funding-programmes/technical-support-instrument-tsi_en>

[95] Furthermore, it is unclear whether a MAP conditioned on the provisions of Art 3.7 of the Regulation, that is – without financial aid, would be subject to the same regime.

[96] Reg (EU) 472/2013 Art 7.1 paras 2).

[97] It must be pointed out, beneficiary countries may – apparently – decide not to take on the entire debt burden of financial aid, as Portugal did with the last tranche pending in June 2014. What the particular negotiating details behind this publicly unilateral decisions are, remains unclear. European Commission, Information on Portugal's economic adjustment programme, post-programme surveillance and an overview of disbursements, Accessed 17 Jan 2020: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-portugal_en

For quality assurance, we must turn to examples in practice, specifically the last MAP reports before the first PPS reports on Ireland and Portugal.[98] With Ireland, the Commission, in no uncertain terms, conditions the 'successful completion' of a programme upon a '*vast majority* of policy conditions under the programme *substantially met* and investor confidence restored for the sovereign and the banks.'[99] With Portugal, the Commission points out the 'implementation of an ambitious reform agenda [which] contributed to regaining economic growth and restoring investor confidence.'[100] In both cases, the reports single out outstanding issues for the beneficiary state to address as it moves forward, signalling the significant amount of discretion left to the monitoring institutions in announcing success stories and designating the blurry threshold between *post*- and *in*- programme surveillance.

At any rate, it seems we can conclude PPS is reserved for Member States, which have i) ceased receiving financial aid, ii) implemented a satisfactory number of mandated reforms, and iii) which have achieved – or are well on the way to achieving – the general objectives of MAPs as outlined under Art 7.1 Reg (EU) 472/2013 and further specified in their particular programme, subject to the significant discretion of the monitoring institutions.

9. Post-Programme Surveillance – Art 14

Once these conditions are met, Article 14.1 Reg (EU) 472/2013 stipulates PPS lasting as long as a minimum of 75 percent of the financial aid has not been repaid, provided the Commission does not raise objections for extension 'in the event of a persistent risk to the financial stability or fiscal sustainability of the Member State concerned.' Should that be the case, the Commission's recommendation is deemed adopted by the Council by RQMV.

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[98] European Commission, Post Programme Surveillance for Portugal, Summary for non-specialists, Autumn 2014 Report, Occasional Papers No. 208/December 2014, Accessed 27 Jan 2020: https://ec.europa.eu/economy_finance/publications/occasional_paper/2014/pdf/ocp208_summary_en.pdf

[99] In December 2013, Ireland successfully completed the EU-IMF financial assistance programme, with the vast majority of policy conditions under the programme substantially met and investor confidence restored for the sovereign and the banks [emphasis added]
European Commission, Information on Ireland's economic adjustment programme, post-programme surveillance and an overview of disbursements, Accessed 9 Oct 2019: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-ireland_en

[100] European Commission, Information on Portugal's economic adjustment programme, post-programme surveillance and an overview of disbursements, Accessed 17 Jan 2020: https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-portugal_en

Under PPS, governments return to the general framework of the European Semester with modified surveillance conditions and selected exemptions on certain reporting and monitoring requirements, so as to avoid duplication of the administrative effort. PPS is highly reminiscent of enhanced surveillance (ES). It could, in fact, be viewed as a lighter version of it. Regular review missions remain standard procedure to be conducted solely by the Commission, in liaison with the ECB with their frequency moderated down to a semi-annual basis, as is the associated reporting to the European and national parliaments.[101] The missions are meant to assess continued compliance with MAP conditionality through the Member State's 'economic, fiscal and financial situation,' as well as *to continually examine its 'capacity to repay its outstanding loans*.'[102]

The latter provision is an important modification of the surveillance regime past MAPs, formally grounded in EU law. Here, we are reminded of the dual legal basis behind EU crisis management and prevention. The conditionality on loan repayment risks is courtesy of the ESM's Early Warning System (EWS) – primarily focused on financial issues and devoid of its own leverage on policy conditionality once disbursement of aid has ceased. It is at this juncture that the Commission, in liaison with the ECB, begin to exercise compliance enforcement for *both the EU and ESM* through the provisions of the regular economic governance framework.

During PPS the EU and EWS surveillance mechanisms operate in parallel, utilising separate competences, taking into account each other's considerations, but exercising effective control solely through the EU framework. In other words – when alarm bells go off on in the EWS, these concerns can only be addressed by the regulatory leverage of the EU Semester.

The issue here lays with the implicit balancing exercise the Commission has to carry out between the normative priorities of two separate legal regimes, at least one of them exclusively beholden to creditor interests. How such decisions are carried out remains unclear and while the shift is never explicitly stipulated, it is circumstantially evident. For instance, with the Greek case of PPS (to be discussed immediately after) the Commission confirms it

[101] The Commission reports published for Ireland and Portugal thus far seem to point to the same schedule. By contrast, enhanced surveillance calls for monitoring missions to include ESAs and the IMF and to be carried on a minimum quarterly basis.
[102] As per the Commission's own admissions: main webpage on PPS for Portugal/IRE [emphasis added]

'intends to closely collaborate with the European Stability Mechanism, in the context of its Early Warning System, in implementing the enhanced surveillance.'[103]

Based on these fluid arrangements, the Commission can propose that new corrective measures be imposed, with RQMV in Council making the action a lot more likely to succeed (Art 14.1 Reg (EU) 472/2013). Clearly, PPS is another mechanism for conditionality compliance with the potential for amplifying enforcement should the need arise. The invasiveness of the procedure is directly proportional to a government's continued commitment to MAP reform policies.

In its legislative opinion on Reg (EU) 472/2013, the ESM comes out the unlikely champion of an economic dialogue doctrine, introducing two new –successful – amendments on parliamentary participation.[104] The European Parliament may invite the concerned government 'to participate in an exchange of views on the progress made' under PPS (adopted under Art 14.3). Further, the national parliament of the MS under surveillance may invite the Commission for an exchange of views on these matters (adopted under Art 14.5).

In no way do these ameliorate the legal and practical impotence of parliamentary bodies throughout the procedures outlined with Reg (EU) 472/2013 or the ESM. In fact, as the ECB volunteers with its explanation to the amendment, the concern for superficial democratic powers is an effort to amplify public pressure 'to add to the incentives of the Member State concerned to pursue adequate policies.' As we have seen, the Bank extends this approach to wherever such provisions appear elsewhere in the Regulation, with ES and MAPs for instance.

As a whole, not much changes for a Member State once under PPS. Although constituting a lighter form of surveillance, the procedure – and much fanfare surrounding it[105] – is more of a political message of trust designed to boost the political capital of national governments and the investment commitments of capital markets, than a real breath of fresh air away from the smothering embrace of financial aid programmes.

[103] C(2018) 4495 final, Commission Implementing Decision of 11.7.2018 on the activation of enhanced surveillance for Greece – Par1 17. Accessed 8 Oct 2019: https://ec.europa.eu/info/sites/info/files/economy-finance/2_en_act_part1_v7_adopted.pdf

[104] Amendment 12, ECB Opinion Reg 472/2013 CON/2012/18 of 7 March 2012 Drafting proposals regarding the proposed regulation on strengthening surveillance procedures

[105] Note the news coverage and self-congratulating mood at Greece's 'graduation' from the financial aid programme, especially.

9.1. Alternative Arrangements

It turns out, also, that graduating out of a MAP could have more than one outcome, solely based with the discretion of the monitoring bodies and irrespective of the provisions of Reg (EU) 472/2013. A decade after the initial shock of the sovereign debt crisis, the Greek case continues to prove itself the exception to the rule.

Having fulfilled the more objective and easily quantifiable criteria of MAPs – absorbing all financial aid and instituting the structural reform policies negotiated in exchange, Greece was not found to have normalised its financial situation sufficiently, thus failing to fulfil the ultimate purpose of its MAP. In other words – all measures deemed necessary had been adopted to unsatisfying effect. Thereby, upon the final MAP compliance review, the Commission recommended Greece be subjected to *enhanced surveillance* 'in order to address residual risks and monitor the fulfilment of the commitments geared thereto,' in accordance with the provisions of Art 2.1 Reg (EU) 472/2013.[106] The press release on the measure provides another audacious snippet of candour, justifying ES as a means of 'facilitat[ing] Greece's return to a normal situation in which it sets its own policy objectives.'[107] In effect, this assertion openly admits that the measures under Reg (EU) 472/2013 amount to a certain degree of sovereignty suspension as early as enhanced surveillance (ES), a mechanism borne exclusively within the EU economic governance legal framework.

At any rate, as a middle ground between MAPs and PPS, the enhanced surveillance procedure acts as high risk investment insurance.[108] It is a particularly curious case, not only because it demonstrates the Commission's hypothetical powers, but also because it puts the crisis establishment in a somewhat embarrassing position. A MAP fulfilled without a crisis alleviated is the ultimate manifest of a candid confession made in the context of legislating the macroeconomic imbalances procedure (MIP), which admitted the troubled causality between problem resolution and suggested measures throughout the EU economic

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[106] C(2018) 4495 final, Commission Implementing Decision of 11.7.2018 on the activation of enhanced surveillance for Greece – Par1 14. Accessed 8 Oct 2019: https://ec.europa.eu/info/sites/info/files/economy-finance/2_en_act_part1_v7_adopted.pdf

[107] Commission Press Release, Commission supports normalisation in Greece through activation of post-programme framework, Brussels, 11 July 2018, Accessed 8 Oct 2019: https://europa.eu/rapid/press-release_IP-18-4381_en.htm

[108] While it is still referred to as a form of post-programme surveillance, that is the case only with regards to its temporal relationship with the MAP in so far as it is a surveillance mechanism activated *after* the completion of a MAP, but not in the sense of limited monitoring requirements of PPS as laid out by Art 14 of Reg 472/2013. (see, especially, Eurogroup statement on Greece of 22 June 2018, PRESS RELEASE, 390/18, 22/06/2018, Accessed 8 Oct 2019: https://www.consilium.europa.eu/en/press/press-releases/2018/06/22/eurogroup-statement-on-greece-22-june-2018/pdf)

governance framework.[109] Again – all measures deemed necessary had been adopted to an unsatisfying effect.

9.2. Life After a MAP?

Life after a MAP is not that much different than life under it, revolving around the considerably extensive shelf life of reform commitments.

Even though under PPS or ES conditionality is wielded by the Commission and through the instruments of the EU economic governance framework, governments also sign formalised agreements of mutual understanding with the Eurogroup. These include additional specific commitments to carry on with the reform trajectory set by the ESM.[110] These arrangements are closely reminiscent of MoUs for both their language – focused on self-commitment, and the fact that the Eurogroup's communications are not legal acts of the EU, both features absolving European liability for any further reforms. It is also perhaps fitting that once the crisis has subsided, the ESM Board of Governors – the eurozone ministers for economics and finance – revert to their metaphysical EU existence under the banner of the Eurogroup.

It is worth reiterating here that ES, MAPs, and PPS – these rather extraordinary crisis-borne measures on budgetary and economic surveillance created with Reg (EU) 472/2013, are moving targets. The policy conditions negotiated therein are subject to ongoing revision should the monitoring institutions, on behalf of the creditors, deem it necessary. As far as financial aid in the EU is concerned, once drawn – it is not over until the creditors decide it is over and the European legal framework provides every lever in that regard.

10. Conclusion

The ECB had ample opportunity to express its stance on the EU crisis management and prevention framework – both the ESM and Reg (EU) 472/2013. The formal legislative process offered the Bank unbridled access with legislative opinions issued on the proposal for

[109] See the discussion on MIPs above in Chapter 4.

[110] See, especially: Annex to Eurogroup statement of 22 June 2018 on the *Specific commitments [undertaken by Greece] to ensure the continuity and completion of reforms adopted under the ESM programme*, Accessed 8 Oct 2019: <https://www.consilium.europa.eu/media/35749/z-councils-council-configurations-ecofin-eurogroup-2018-180621-specific-commitments-to-ensure-the-continuity-and-completion-of-reforms-adopted-under-the-esm-programme_2.pdf> Incidentally, upon exiting its ESM programme, Greece also signed a 'Cooperation and Support Plan' with the European Commission's Structural Reform Support Services, 'which provides the continued provision of technical assistance to support reform implementation in the coming years.'

Regulation (EU) 472/2013 and on the draft European Council Decision amending Article 136 TFEU, which laid the constitutional foundations of the ESM. These were complemented by the ECB's exhaustive commentary in corresponding Monthly Bulletins.[111]

In evaluating the ECB's influence in the EU crisis management and prevention framework we must also note that since the ESM and Reg (EU) 472/2013 construct a unitary disciplinary system, interventions in one of the legal instruments related directly to and amplified the other. Further, since the Great Reformation of EU economic governance came together as a methodical hierarchical framework – a full circle, which began with a crisis, was driven by crisis rationality, and then legally peaked with crisis instruments – there is not a single reform intervention of the ECB on any other instruments of EU economic governance, which does not somehow feed into the ultimate exercise of crisis with the ESM and Reg (EU) 472/2013. Conversely, because of their status at the apex of the economic governance framework and later adoption, the ESM and Reg (EU) 472/2013 became a legislative recipient for leftover reform ambitions from preceding crisis legislation, fulfilling unfulfilled intent and retroactively expanding the competences laid down in preceding regulations.

While the Bank's notable interventions on crisis governance have been pointed out throughout this section, their cumulative effect is worth a brief summary in the interest of demonstrating just how complementary these far reaching reforms were to the Bank's general vision for the reformation of EMU.

ESM financial aid came to focus on minimizing moral hazard through intense conditionality throughout a procedure borne of EU law (MAPs), stipulating the involvement of the IMF in regular (albeit corrective) governance.[112] Sanctions and monitoring are proportional to a Member State's financial afflictions, intensifying on a gradient with a distinctly expansive approach – starting earlier on in procedures as well as pertaining to a wider set of circumstances than originally intended with any of the regulatory proposals. There is a seamless connection between preventive and corrective economic governance in the EU, rationalised by the threat of crisis. Therein, existing instruments and legal acts, i.e. recommendations under the SGP or MIP, can be repurposed to serve the higher cause of securing the financial stability of EMU by pre-empting crises. In the absence of a real crisis

[111] Monthly Bulletin April 2013, Editorial – Economic and Monetary Developments, The Two-Pack regulations to strengthen economic governance in the euro area, pp. 53-55; and Monthly Bulletin July 2011 – Articles, The European Stability Mechanism, pp.71-84.
[112] ECB Opinion *on a draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro* (CON/2011/24) 17 March 2011, para 7.

necessitating the disbursement of financial aid, conditionality arrangements threaten with the stick of EU law.

As intended with the Blueprint, the Eurogroup is almost formally granted guardianship of EU fiscal responsibility – already ensured with national fiscal frameworks through the TSCG and Reg (EU) 473/2013 through regular economic governance; now guaranteed even in the absence of crisis with the EG and EWG's early oversight in the enhanced surveillance procedures of Reg (EU) 472/2013; and with crisis – under their ESM configuration.

Conveniently for the ECB, it itself featured prominently in both of these forums. In the Eurogroup, '[b]esides the ministers and their advisors, only a few other institutions are present in the room, notably the ECB President, the European Commissioner Economic and Financial Affairs (responsible for DG ECFIN) as well as the Vice President for the Euro or their deputies... By contrast, more than 100 people participate in meetings of the Ecofin Council.'[113]

Another feat for the Bank's early ideas is the combination of adjustment programme policies and technical assistance resident representatives – highly reminiscent of the advocated enforcement officer and general loss of fiscal sovereignty. Lastly, we cannot ignore the Bank's success in utilising transparency practices for the purposes of pressuring governments into compliance through public shaming.

There are, however, two noteworthy arguments which the ECB 'lost' when it comes to EU crisis management and prevention.

10.1. Commission Discretion

Reducing the discretion of the EU Commission was a leitmotif of amendment attempts throughout Reg (EU) 472/2013. The Bank had always viewed discretion as opposite to its desire to make the economic governance framework more automatic, for instance with the introduction of indicators and compulsory intensification of procedures, which it largely succeeded at. Curiously, in its involvement with crisis governance legislation, instead of offering automatic procedural alternatives, the Bank sought to empower the Council in place of the Commission. This was doubtlessly in hopes Member States would be more willing to

[113] B Braun and M Hübner, 'Vanishing Act: the Eurogroup's accountability,' Transparency International (2019) 11, Available at < https://transparency.eu/wp-content/uploads/2019/02/TI-EU-Eurogroup-report.pdf> Accessed 5 April 2021

act against a peer, fearful of spillover effects across borders. Arguably, this was a case of aligned interests, where the ECB had more faith in masochistic tendencies of creditor governments than in the potential magnanimity of the Commission. It is a curious instance, especially considering the ECB's other great loss on the reforms of EU crisis governance – on the ESM's intergovernmentalism.[114]

10.2. ESM & EU Law

In its opinion on the Art 136 TFEU Amendment legitimating the institutionalisation of a permanent crisis mechanism with EU law, the ECB clearly declared itself against the intergovernmental approach. The ESM, it opined, ought to be a Union mechanism, if not immediately then at some point in the future. In order to retain the connection with the EU until then, the Bank 'encouraged' that 'regarding the assessment of circumstances leading to the activation of the ESM and regarding conditions on financial assistance, *Union institutions are granted a prominent role given their expertise and their focus on the collective Union interest*.'[115]

This is a curious intervention and an instance when the otherwise shared interests of the creditor Member States and ECB ideological stance seem to diverge. It is all the more so, because in CON/2011/24 the ECB attempts to speak for both itself and Commission, arguing the exercise of their competences and experience to be to the benefit of the *collective Union interest* and implying quite the opposite of the ESM's intergovernmental iteration.[116] This is also an assertion greatly at odds with the Banks' general line of legislative interventions, whereby it actively attempted to empower the Council at the expense of the Commission.

The issue will come to a head during the subsequent attempts at ESM Treaty Reform undertaken by the Commission only to be frustrated by and carried over the finish line by Member States. These events are analysed at length in Annex I, but should also be interpreted within the context of the Great Reformation.

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[114] This topic is discussed at length in Annex I – on ESM Treaty Reform.

[115] ECB Opinion *on a draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro* (CON/2011/24) 17 March 2011, para 8.

[116] The particular topic of Union and ESM (intergovernmental) interests will come to fore in the discussions surrounding the failed attempt to incorporate the ESM into EU law, beginning in 2017, and subsequent ESM Treaty reforms undertaken under public international law. Furthermore, the latest development with the ESM have seen the mechanism develop its own analytical capacities, 'liberating' itself from the expert technical dependence on the Commission and ECB. See: Annex I, The ESM Reform Treaty.

10.3. Calling the Shots | Dependence on Technical Expertise

Clearly, one part of the Bank's argument comes down to diverging interests between the ESM and the Union, the latter represented by the ECB and Commission. That is not a far stretch. As has already been noted in this chapter and will be demonstrated more clearly still in Annex I on ESM Treaty Reform, the ESM's interest in the stability of the eurozone is conditional upon the interests of its shareholders – the eurozone Member States. Without oversimplifying, said interest can be easily reduced to ensuring debt repayment. The priorities of the ESM and ECB did align over the management of the European sovereign debt crisis – fiscal discipline, structural reforms, tough lessons on budgetary prudence, etc., but it is not a foregone conclusion they shall do so in the future. And yet, whatever the potential for policy discord, the ECB knows well that since the ESM is almost exclusively beholden on the technical expertise of Union bodies – due to its own limited capacities as well as legal concerns over exclusive Treaty competences – it cannot stray very far from Union priorities.[117]

This context shines a different light on the ECB's influence in the EU crisis management and prevention framework. The ESM's troublesome outsourcing to Union bodies and the information loop between the two legal regimes can also be interpreted as a means of controlling the Mechanism within the parameters of Union interests.

10.4. LLR Through Proxy

Further, we must consider the ECB's relationship with the ESM in the context of the ESM's role as lender of last resort (LLR) against the Bank's monetary sovereignty.[118] An autonomous ESM taking independent make-or-break decisions with immediate relevance to the ECB's mandate would be yet another centre of gravity for the Bank to balance out in addition to the

[117] The significance of this issue became plainly evident with the Commission unsuccessful push for ESM reform at the end of 2017 and Member States' successful commandeering of the venture with the ESM Reform Treaty, completed in 2021. One of the most meaningful reforms adopted with the latest Treaty is the ESM's own analytical capacity and functions parallel to the Union bodies in setting out financial aid programmes (See Annex I).

[118] Consider, for instance, the potential for conflict with the ECB's quantitative easing bond purchasing programmes in direct competition with the ESM's primary and secondary market bond purchase financing facilities. The two institutions more or less engaging in the same conduct (even if the ECB is formally precluded from exclusively targeted operations), yet one is connected to the economic rationality of the crisis – with attached conditionality programmes, while the other just happens to grease the wheels of the monetary transmission mechanism. It is not a far stretch to understand certain governments' outright opposition to ECB QE as deeply rooted in the loss of control over fund transfers in direct opposition to the tenets – and post-crisis reaffirmed vows – of Maastricht.

disaggregated fiscal union. This is, however, potentially a two-way street. Does the EU crisis management framework provide the ESM outsource responsibilities to the Union or vice versa?

It is obvious how the provisions of the crisis management and prevention framework allow Member States to finance troubled peers in the face of Art 125 TFEU, balancing out the compromise through forced conditionality.[119] What has perhaps remained obscured, is that the ESM provides the same kind of 'firewall' for the ECB to exercise competences otherwise prohibited with Art 123 TFEU. In its opinion on Art 136.3 TFEU the Bank defines Art 123 TFEU as 'one of the basic pillars of the legal architecture of EMU both for reasons of fiscal discipline of the Member States and in order to preserve the integrity of the single monetary policy as well as the independence of the ECB and the Eurosystem.'[120] As a guarantee of fiscal discipline and monetary independence, Article 123 TFEU is then a guarantee of the synthetic boundary erected in the middle of economic rationality with Maastricht – a fundamental guarantee of the asymmetric architecture of EMU.[121]

Incidentally, the ESM provides the ECB with analogous safeguards. On the one hand, the Mechanism's strict conditionality ensures that the incentives for fiscal discipline are not diluted (in fact, quite the opposite). On the other, we have the ESM's dependence on ECB technical expertise (both directly and through Reg (EU) 472/2013 in evaluations and recommendations concerning the disbursement of funds, negotiating and monitoring compliance with conditionality arrangements). The ECB is in a position to dictate the terms of ESM programmes without taking on liability for the ultimately political decision of aid disbursement.[122] The Bank has no direct financial interactions with troubled sovereigns, remaining at arm's length and on the right side of Art 123 TFEU.[123]

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[119] See Chapter 1 for the Treaty fundamentals of the Great Reformation of EU economic and crisis governance.

[120] ECB Opinion *on a draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro* (CON/2011/24) 17 March 2011, para 9.

[121] The ECB will again reiterate these points in its Monthly Bulletin publication on the ESM from July 2011, reading Art 123 TFEU as a declaration of independence (see: 'The European Stability Mechanism,' *Monthly Bulletin* (July 2011)). By 2015, the CJEU would fully concur with this reading in *Gauweiler* - directly associated with the Delors Report's original intent for Maastricht than the simplified reading of a monetary financing prohibition.

[122] 'The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating an MoU (Article 13(3)) and monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).' *Pringle* para 157

[123] Pringle, para 161.

It is not hard to imagine externalising LLR functions would have been a welcome development for the ECB, in a position to influence the conditions for the successful fulfilment of its own mandate absent couplings between troubled national fiscal spaces and monetary policy. In a certain sense, this arrangement was indeed a superior development than the ECB itself being imbued with the LLR competences of classic central banking.[124]

[124] The Bank's defense in the OMT and PSPP cases echoes these sentiments in trying to identify its actions within the strict remit of monetary policy – even if non-standard – so as to avoid the same kind of couplings and hindrance to its independence that classic monetary financing would otherwise open the legal doors to. Moreover, the latest consideration of the FCC's *Weiss* decision brings up the exact troubles that LLR capabilities would signal for the ECB.

CONCLUSION

THE BEST LAID PLANS

'But Mouse, you are not alone,
In proving foresight may be vain:
The best-laid schemes of mice and men
Go oft awry,
And leave us nothing but grief and pain,
For promised joy!'[1]

When the Delors Committee got together in 1988 they had to contend with the political conditions circumscribing the political enthusiasm for a European economic and monetary union. The line in the sand, the 'crisis threshold,' was the unwarranted transfer union. Maastricht – a treaty, constitution, compromise and contract – came together as a regulatory framework for the mitigation of economic risks emanating from the national budgetary and macroeconomic space to the peril of the shared monetary realm. Therefore, EMU was always premised on a precarious trade-off between national sovereignty and the stability of the project, compensating possible disadvantages while maximise consensus in areas of shared activity. Member States gave up only as much as was absolutely necessary to make the framework functional, to make the asymmetric EMU stable, and to make the Maastricht compromise sustainable.

The price to pay for national sovereignty in fiscal matters was a fiercely independent European Central Bank. The price to pay for the radical separation of fragmented 'economic policy' and centralised 'monetary policy' in the Treaty was the inevitable dominance of the monetary sphere in times of crisis.

The original boundary of this compromise was settled through the Maastricht definition of budgetary discipline, designating specific debt and deficit levels as indicators of potential systemic risk, threatening to spill over the costs of government debt across national borders.

[1] Robert Byrnes, *To a Mouse, on Turning Her Up in Her Nest With the Plough* (1785).

But this balance and the inherent risk calculation it was based on were always conditioned upon the level of economic and financial integration across the Union. This much is clearly evidenced by the distinct and progressively intensifying stages of EMU development planned at the beginning of the project: the more integration – the more risk of unwarranted fiscal transfers and danger to price stability – the more need for regulation.

The pressures of the financial and sovereign debt crises in the context of the inextricably integrated economic and monetary union would upend the original trade-off between sovereignty and EMU and force the EU establishment to acknowledge the higher purpose behind budgetary discipline – securing EMU stability or, simply put, preventing crises – in the interest of solving the crisis through law. The legal dimensions of the political narrative weaved with the onset of the sovereign debt crisis seemed undisputable – the Maastricht contract had been breached, in more ways than originally anticipated, as a result of which the injured parties had cause for action to further regulate national budgetary space, incentivise compliance and re-establish a stable equilibrium.

The fact that the underlying economic conditions behind the crisis had been in play since well before the global financial meltdown and subsequent Greek debacle, or that Member States had all long evaded the progressive restrictions on their national economic space as intended by the Treaties, only heightened the stakes. The sovereign debt crisis thus became an auspicious moment for EMU reform – an opportunity to be exploited in justifying long-awaiting and far-reaching policies at minimal political cost.[2]

It is in this context that the interests of the 'injured parties' aligned and developed into a symbiotic legislative relationship.

Creditor Member States sought to re-establish effective control over debtors' hazardous fiscal behaviour in an attempt to preclude the need for unregulated fiscal transfers and associated costs. Thereby ensued the legislative overdrive referred to by this study as the Great Reformation of EU economic governance. Creditors invested their entirely contextual crisis authority into reforming EU law attempting to regulate any miniscule detail attributed

[2] Niklas Luhmann refers to this concept as 'the propitious moment' and gives a fitting list of similarly historical 'opportunities:' 'The propitious moment for a political decision on the abolition of nuclear power stations lay in the days following Chernobyl - neither before not after. The propitious moment for advancing German reunification lay immediately after the opening of the borders, and only at this point in time was it possible to disregard the economic risks involved. The propitious moment for the Austrian ultimatum to Serbia in 1914 was in the days following the assassination of the Austrian heir apparent in Sarajevo. Only at this moment could one assess the risks of war.' Niklas Luhmann *Risk, A Sociological Theory* (Rhodes Barrett tr, De Gruyter 1993) 150-1.

to having precipitated or contributed to the crisis. This calculus was entirely predicated on economic risk projections based on causal attributions to past decisions, or lack thereof, in the framework of EU – national and supranational – budgetary and macroeconomic governance.

Creditor governments were more than happy to benefit from the mystical ways of the free market, but only in the absence of risk. They would see to altogether preclude the possibility of losses by intervening both with the management of debt (by directly instructing eurozone governments on fiscal prudence through the European Semester) and the management of liability (by taking over the 'free market' process in the case of adverse financial events through the European Stability Mechanism).

These intergovernmental dynamics opened the door to the involvement of the European Central Bank in renegotiating the boundaries of EMU. The ECB had no specific interest in the formulation of the Maastricht compromise – whether the fiscal union were to be supranational-political, national-synthetic, or entirely independent, was no concern of the Bank for as long as it could secure its mandate unperturbed by budgetary whims. The Bank's disagreements with its political allies over reform policies shine a light on these details, with the former having pushed a heavy agenda for the complete emancipation of the economic union from political interests on both the national (with independent fiscal councils) and supranational (with an independent fiscal agency) levels.

Be that as it may, the legal overhaul of the framework presented the monetary authority with an unparalleled opportunity to extend its policy space and regulate the risk emanating from the national budgetary realm. The constitutional dimension of, and ECB interest in, the Great Reformation had always been about getting the economic union up to speed with the functional demands of price stability in a highly integrated EMU. In fact, since the Bank had been designed act as an anchor of the original terms of the Maastricht compromise, the further economic reality moved from economic theory enshrined in the Treaties, the more cause the ECB had to intervene and the tougher the advocated reform measures became.

It is easily imaginable that the extent of eventual economic governance reforms in terms of both substance and intensity would have been unachievable outside the context of the raging EU sovereign debt crisis, which was time and again recalled in one after another legislative preamble as grounds for action. The rationale and boundaries of the mandate for reform recommendations presented by the ECB, Commission and Task Force by the fall of

2010 were founded in the European experience with the global financial crisis, and yet – the resultant recommendations could neither ignore or forego utilising the context of contemporaneous events.[3]

Establishing a connection between the crisis and legislative reforms, however, exploited the context of events in order to incentivise support. This happened as a function of both political and legal decisions.

By identifying the crisis as a product of budgetary profligacy – a subject of existent oversight competences – the EU political establishment secured control over fast-developing events. Most immediately, designating the guilty party within the context of existent legal obligations gave creditor Member States moral superiority and the authority to manage the terms of crisis resolution. But subduing the powerful forces at play within the EU legal framework also secured the opportunity to make causal attributions on past decisions in the interest of regulating all future risk and overhauling EU economic governance.

When it came to the CJEU, the treatment of crisis was rather more complicated. The European sovereign debt crisis was, for our purposes, most importantly a legal crisis. While the economics of the events were a certain cause for alarm, they mattered all the more – if not exclusively – because the Union was precluded from action at great cost to all involved. In other words, EU law could not sustain its normativity in the face of very clearly failed expectations and dissonance with economic and political reality. To that end, the CJEU in its reading in *Pringle* 'simply' changed the understanding of what was meant by the Treaty norms in question, emasculating the 'no bail-out' rule as but an expression of the discovered new higher norm of 'stability.' Further amplified by the harsh context of the sovereign debt crisis, these developments would present the legal opportunity and justification for a grandiose expansion of European oversight into previously unregulated competence areas on the mere conjecture they represent a risk to the stability of EMU.

Therefore, when the President's Task Force began its informal negotiations on reforming EU economic governance in the summer of 2010, it was clear that regulating budgetary discipline would no longer suffice. In securing EMU stability, the framework would have to insure all contingencies, which the experience of the sovereign debt crisis had designated as potential risks. These efforts would result in a highly integrated framework of crisis prevention through the regular cycle of EU economic governance and ESM financial

[3] For instance - As MoUs and conditionality were for the first time unravelling, they were shortly thereafter introduced into EU reform documents. Same was the situation with the ESM.

aid, straddled across and vandalising the boundaries of disparate legal regimes. Legalised financial aid would become an organic extension of the regular EU economic governance framework, taking on the rationale and exceptional reach of provisions mandated by the crisis and transposing them into a permanent governance structure. The punitive implementation of budgetary discipline throughout this comprehensive setup assumed the inherent causality between financial assistance – the crisis threshold of the EMU – and fiscal profligacy.

This was the legal manifest of the new era of European disciplinary constitutionalism – a revival of the economic ideologies imbued with the Maastricht compromise recalibrated in proportion to the risks of contemporary economic integration. Disciplinary constitutionalism is a construct which amounts to more than the sum of its parts and its parts, in turn, have much further scope in the context of the whole. It is an edifice built on escalation with the *threat* of financial aid institutionalized at the top. On the one hand, with its very existence, the threat of ESM financial 'aid' and associated punitive measures conditions compliance with the legislation beneath it. On the other, the fact that the entire framework is premised upon identical understandings of normative hierarchy in the union, ensures that the ESM is the ultimate and logical final step to ensuring compliance with disciplinary budgetary governance.

The Reforms

The overwhelming majority of the Great Reformation of EU economic governance developed through existing Treaty provisions and thereby did not formally introduce new powers into the competence mix of EMU. It did, however, significantly intensify existent ones, skewing the balanced of the established equilibrium.

Within the preventive iteration of EU crisis prevention, the newfound approach severely intensified both the scope and enforcement of regular surveillance procedures under the SGP, as well as expand supranational oversight into previously unregulated areas for macroeconomic and competitiveness surveillance in an attempt to subdue the possibility of any dangers into a regulated risk. This was accomplished in large part by operationalising dormant Treaty provisions for regulating risk (Art 126(3) para 2 and Art 121(4) TFEU).

Introducing the highly speculative calculation of risk into the known entity that is the rule of law greatly expanded the range of potential violations, associated oversight, and pre-emptive corrective measures, but only at the cost of legal uncertainty. The approach obscured the legally stipulated procedural boundaries between digression and penalty and created a

remarkable amount of discretion to the benefit of EU bodies into the vertical relationship governing the exercise of Member State rights and responsibilities covered by Articles 121 and 126 TFEU.

The Great Reformation moved the goal post of budgetary prudence on a technicality, instituting much further reaching pre-emptive mechanisms and demanding a much tighter fiscal stance from eurozone members based on the criminalisation of financial vulnerability. The newly instituted fiscal room for manoeuvre (a revival of excessive deficit safety margins) became the epitome of crisis rationality, whereby fiscal prudence would no longer be exercised for the sake of fiscal prudence, but in the interest of remaining on the right side of the budgetary boundaries if a crisis should ever occur.

The turn to crisis prevention and risk regulation had even further reaching implications when it came to the newly developed competences for macroeconomic and competitiveness oversight. Simply put, the subject of surveillance – and potential correction – was defined by attributing risk to various national economic or social policies (from education to health) as potentially jeopardising the proper functioning of EMU. This highly enterprising approach has greatly expanded supranational oversight and enforcement into national policy areas previously undisturbed by EU interests by obscuring the boundaries of Treaty law.

Making the macroeconomic imbalances and competitiveness framework operational across the fault lines of national and supranational competences required an unconventional – and troubling – solution, whereby soft law measures came to benefit from formally disengaged procedural sanctions, teetering at the brink between governing and governance. Complemented by intentional language ambiguity, this turn in EU governance gravely obscured the boundaries between Union and national competences with the former extending to the near limits, and in certain instances – beyond, their original Treaty configuration.

Should this assemblage of risk prevention fail, the ESM would regulate the ultimate danger of budgetary indiscipline – shared liability. Its very existence would also fundamentally redefine the consequences for insubordination within the formal boundaries of the EU regulatory framework. Whereas before the crisis Member States were mutually imperilled by each other's spending proclivities, the new framework ensured that the liability of debt be firmly secured with the transgressors. What is more, the latter would be severely punished for indiscipline, even if no longer capable of causing others harm since under obligation to retain their debts. At the boundaries of EMU stability, Member States would

also arrive at the boundaries of EU law with the only instrument capable of keeping them within to be found without. Any government that had lost – or was at risk of losing – market access would be automatically expelled beyond the confines of EU law and onto the ESM. Once in the custody of the ESM, a Member State would leave behind all rights taking only with it the consequence of its failed budgetary responsibilities. It was a perversely fitting resolution to the problem posed and boundaries erected by Article 125 (and 123) TFEU.

The ESM's own embrace of risk more accurately identifies it as the ultimate intensification of EU budgetary discipline, rather than a crisis management mechanism. Its numerous preventive aid facilities blur the boundary between crisis and norm, between EU and international law, between being in the markets and outside the markets. In truth, and in spite of its own legal base, it is not just activated as an *ultima ratio* to critical circumstances, but gets to itself define where those lie.

This study has also established that the legal structure underpinning EU crisis prevention has the capacity to operate as a two-way bottom-up/top-down apparatus alternating between regulatory and corrective measures and repurposing its legal competences accordingly. It is a most disturbing feature of EU economic governance, whereby an overwhelming amount of economic governance legislation can be repurposed into a top-down supervisory mechanism with pre-existing surveillance on government performance now enforced through the much harsher conditionality instruments of the ESM. This relationship, it must be pointed out, is not of equal opportunity – it is hierarchical, with the ESM – an alien legal regime imbued with crisis rationality – continuously informing the operations of EU macroeconomic and budgetary governance. This detail is highly obscured by the fact that both systems are conditioned upon the same value system – the morality of debt.

The Bank

Crises do indeed present great opportunities. In the EU, nobody knows this better than the European Central Bank. It had been there all along – advising, counselling, opining – acting as an agent of its own founding ideology and mandate by virtue of its competences under Articles 127(4), 282(5) and 126(14) TFEU.

As the institutional embodiment of the monetary union, the Bank was constitutionally predisposed to supporting the specific economic flavour of reform policies advocated by spiteful and risk-averse creditor Member States. In the context of the global economic and

monetary consensus relevant at the time, price stability could indeed make use of more fiscal discipline and synthetic convergence, i.e. austerity politics.

With its immediate and most pressing concerns clearly aligned with the creditors, the Bank's policy agenda was largely fulfilled through the Great Reformation of EU economic governance starting with the preliminary negotiations of the Blueprint period and carrying over to the Commission's legislative proposals for more contentious leftover matters.

In the process, the ECB would secure the regulatory toolbox to secure an economic counterpart to its monetary domain – one up to the required standards of a highly integrated single currency union. During this 'fast forwarding' of yet another round of economic integration, the Bank would also significantly expand its own competences into matters otherwise extracurricular to its mandate.

Apart from the menagerie of novel compliance incentivising measures added throughout the economic and budgetary governance framework, the Bank was also responsible for another significant – if subtle – turn in policy on the status of the national fiscal space vis-à-vis EMU.

But three particular reforms stood out setting into motion what can only be described as the governance of governing – the introduction of Draft Budgetary Plans and associated surveillance throughout the European Semester cycle, the institution of independent national fiscal bodies to oversee the exercise of democratic discretion over national budgetary policy, and last but not least – in the same vein as the independent fiscal councils – on-site missions to Member States. Combined, these represented a move towards the EU micromanagement of national budgetary space – extending supranational oversight in the absence of budgetary transgressions, and an attempt at altogether decoupling national political and democratic processes from budgetary policy.

Paradoxes of Crisis Law

The normalised and legalised 'emergency measures' have, of course, very little to do with solving crisis. Instead, the Great Reformation should be seen as an attempt to legislate what, from the vantage point of monetary dominance, the trade-offs of the original Maastricht compromise were supposed to be. The only way to escape a transfer union – made impossible by mutual mistrust and fears of loss of 'sovereignty' – was to install and legalize hyper-charged budgetary surveillance. What this kind of disciplinary constitutionalism actually

achieves is lost on no honest observer: proceduralised mistrust and 'sovereignty' as a luxury good only accessible to the virtuous.

The lasting irony of the Bank's involvement in the legislative restoration of the worldview of Maastricht is that, in its executive monetary role, it has itself done much to fundamentally alter the context in which 'disciplinary constitutionalism' 'makes much economic sense. Acting on its mandate to maintain (price) stability – the same mandate legitimising its legislative role – it has found itself pumping trillions of Euros in the European economy in an attempt to stimulate demand and fight deflation. If there is a risk of crisis now, fiscal profligacy is not part of the equation.

Perhaps the ultimate paradox of the Great Reformation is to be found in the current health and economic crisis related to the pandemic: what is now an 'emergency measure' is exactly the suspension of the 'emergency measures' of the previous crisis normalised and legalised in the rulebook of European economic governance.

ANNEX I

ANNEX I

INCORPORATING THE ESM INTO EU LAW

This Annex will turn the reader's attention to the latest developments with the crisis management and prevention framework of the EU, borne of the attempt for and critical reaction to the incorporation of the ESM into EU law.

1. The Commission Tries to Make Amends | Third Wave of Reforms

The dissertation has demonstrated that the nature of the ESM Treaty is a manifestation of the legal institutionalisation of creditor interests during the crisis. At first glance, this intergovernmental approach to the ESM could have been superficially excused by 'the pressure of events at the time.'[1] However, the developments surrounding the Commission's subsequent push to complete EMU and incorporate the ESM into the Treaties tell a rather different story. Apart from the obvious legal reasons – namely, Art 125 TFEU – keeping the competences of the ESM outside the bounds of EU has become a matter of conscious political choice and exercise of sovereign control.

On December 2017 the Juncker Commission proposed a legislative package of measures committed to completing the Economic and Monetary Union (EMU) and to incorporating the ESM into the EU Treaties under Art 352 TFEU.[2] The proposals sought to address the multiple governance, legal and legitimacy issues inherited from the eurozone crisis. It was a forward-looking endeavour, which significantly miscalculated the political climate of the time.

Proposed measures included the already reviewed revisit of TSCG leftovers;[3] new budgetary instruments for a stable euro area within the Union framework, such as expanded capabilities for structural reform assistance, a future stabilisation function, a backstop to the

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[1] Although this context was reminiscent of the events surrounding the TSCG, nowhere in the ESM Treaty did Member States ever stipulate bringing its substance within the framework of EU law à la Article 16 TSCG. Moreover, there had never been any legal proscriptions to adopting an instrument such as the ESM under the Treaties, rather the opposite – with Art 352 TFEU. See: Commission proposal for a Council Regulation on the Establishment of a European Monetary Fund, COM (2017) 827 final, 5.

[2] The package consists of (COM(2017) 821-827 final. This 'December package' has also apparently been labelled the 'St Nicholas Package' by the 'Brussels bubble'. Dermine, Paul, The Commission's December Package 18 Months Later (December 9, 2019). Available at SSRN: https://ssrn.com/abstract=3500755 or http://dx.doi.org/10.2139/ssrn.3500755.

[3] Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, COM(2017) 824 final

Banking Union, and dedicated convergence instruments for ERM II member states;[4] a European minister for Economy and Finance who would also assume the role of Eurogroup President;[5] further financial capabilities and adaption of the general objective of the Structural Report Support Programme of Reg (EU) 2017/825;[6] an amendment of existing ESI Funds governance towards actively supporting structural reforms in Member States ;[7] and finally, a proposal for the incorporation of the ESM into EU law under the title of a European Monetary Fund with a Regulation under Art 352 TFEU.[8]

In presenting its plans for the future of the ESM, the Commission made a number of important observations – the existence of the ESM in parallel to the European legal framework has rather complicated matters with 'judicial protection, respect of fundamental rights and democratic accountability… fragmented and unevenly implemented' as a result.[9] Moreover, the very operations of the instrument had proved 'it is difficult and cumbersome to articulate a collective action of the Member States with the competences of economic policy coordination conferred on the Union.'[10] The Commission also rightly observed the decision-making procedures of the ESM hardly comply with the expected standards of a crisis-resolution body required to act swiftly and decisively. Not only was the intergovernmental structure under public international law detrimental to the legal coherence and protections of the Union, but it was also inefficient, thereby foregoing its very purpose for existence in that very state. The Commission concluded that financial support mechanisms are therefore 'best placed in the Union framework and in the hands of a Union body created for such purpose.'[11]

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[4] Communication on New Budgetary Instruments for a Stable Euro Area within the Union Framework, COM (2017) 822 final

[5] Communication, A European Minister of Economy and Finance, COM(2017) 823 final.

[6] Proposal for a Regulation amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective, COM (2017) 825 final.

[7] Proposal for a Regulation amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 as regards support to structural reforms in Member States, COM (2017) 826 final.

[8] COM (2017) 827, above n 1.

[9] Ibid., 3.

[10] Ibid..

[11] Ibid..

Here follows a brief discussion of the most important aspects of the Commission's vision for the future ESM. Apart from the superficial renaming of the ESM into a European Monetary Fund (EMF), the Commission entertained six significant amendments.

First, the future ESM was to include a common backstop to the Banking Union's Single Resolution Fund, providing emergency liquidity assistance whenever the existent banking insurance framework is unable to cope alone.

The second reform concerned ESM voting procedures, noted as inhibitive of resolute decision making. The Commission planned to do away with the unanimity requirement for the majority of important decisions, instead lowering the regular threshold for successful votes to that of the emergency procedure – at eighty five percent.[12]

The Commission's proposal also stipulated that the EMF may 'develop new financial instruments,' which it expressly foresaw as playing a role in a 'stabilisation function' for the EU economy in the future. Of itself, the idea was in no way a novelty, but the audacity to present it had not been demonstrated in EU circles since 1989.[13] The stabilisation mechanism was envisioned as a true crisis balancing mechanism involving the cross-border EU-wide redistribution of funds, seemingly absent conditionality arrangements, and predicated solely upon external economic shocks – a genuine break with the crisis rationality analysed in this study.[14]

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[12] This concerned 'specific decisions on stability support, disbursements and the deployment of the backstop,' defaulting to reinforced qualified majority voting (RQMV). Unanimity voting was to be retained for 'all major decisions with financial impact [such as capital calls].' The proposal could have potentially disenfranchised any ESM member holding out their vote with the exception of Germany, France and Italy. Ibid., 6.

[13] The Stabilisation function was actually found within the scope of the original proposal for an European Monetary Fund/ European Reserve Fund with the Delors Report: J. de Larosièrre, 'First stages towards the creation of a European Bank, The creation of a European Reserve Fund,' in *Report on economic and monetary union in the European Community- Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989), 177.

[14] In fact, the plans for the mechanism closely mirror the 2020 ESM Pandemic Crisis Support facility, the 'stabilisation function [was] defined by the possibility to rapidly activate resources in an automatic way, subject to eligibility criteria defined in advance.'

'A stabilisation function is defined by the possibility to rapidly activate resources in an automatic way, subject to eligibility criteria defined in advance. The objective would be to use these resources to attenuate the effects of large asymmetric shocks. In case of a downturn, Member States would first use their automatic stabilisers and discretionary fiscal policy in compliance with the Stability and Growth Pact (SGP). The SGP provides for additional buffers and the necessity for a smaller fiscal effort to be undertaken during difficult economic conditions. Only if these buffers and stabilisers are not sufficient in the case of large asymmetric shocks, the stabilisation function would be triggered. The EMF could support the implementation of such a function by means of organising and making available any necessary market financing associated with the triggering of the function.' COM(2017) 827,above n1, 11

The fourth proposal allowed for the direct involvement of the ESM into the management of financial assistance programmes – from negotiating and co-signing Memoranda of Understanding (MoU) to compliance surveillance. This should have streamlined the legal accountability of the instrument over its most controversial operations involving conditionality. But mostly, seeing as the future ESM was to become part of EU law, the justiciability of the ESM's expanded powers could be safely presumed.

European law presupposed European oversight. Under the Commission's scheme the ESM would have been exposed to heightened democratic accountability with access granted to both European and national parliaments. The Mechanism's operations would have become subject to the oversight powers of European Anti-Fraud Office (OLAF), as well as the European Court of Auditors.[15] European regulations on transparency would have ensured public access to ESM documents.[16] All acts of the ESM and therein associated bodies would have been obliged to fully observe the provisions of the Charter of Fundamental Rights of the European Union.[17] Last but not least, the direct exposure to the full effects of European law – both its obligations and protections – would have secured the justiciability of EU crisis governance and removed the immense legal burden placed on the Commission to act as a legal bridge between the EU and ESM Treaties.[18]

Apart from these amendments, the ESM was to retain much of its structure and operations scheme, except that the President of the Eurogroup would become the only possible candidate to chair the ESM Board of Governors (BoG).[19]

The importance of this seemingly unremarkable proposal only made sense in the context of the complementary communication on a Minister for Economy and Finance, where the Commission entertained merging 'the function of Commission Vice-President in charge of the Economic and Monetary Union with that of President of the Eurogroup.'[20] This future

[15] Ibid., Annex, Art 45.
[16] Specifically subject to European Parliament and Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 (31 May 2001), as per proposals in COM (2017) 827 final, above n 1, Annex, Art 46.
[17] Specifically Art 28 of The Charter of Fundamental Rights of the European Union and Art 152 TFEU, as per the proposals I COM(2017) 827 final, above n 1 Annex, Art 12.
[18] CJEU, *Ledra Advertising et al. v European Commission and ECB* (2016) Joined Cases C-8/15 P to C-10/15 P [para 58, 67] and CJEU, *Pringle v Government of Ireland* (2012) C-370/12 [para 164]
[19] Currently, members can opt for an alternative choice of representative in a vote amongst themselves.
[20] Also highlighting that this could already be achieved under the existing Union Treaties. COM(2017) 823 final, above n 8, 2.

EU Minister of Finance 'would exercise a neutral role, taking into account the interests of the shareholders of the European Monetary Fund *in a balanced manner*.'[21]

The reform carries serious implications. Most obviously, it would have significantly expanded the Commission's competences.[22] Also, it would have done away with the pretence of a Chinese wall between the ESM and the Eurogroup in terms of information flow, decision-making authority, and liability. The effective 'takeover' of the Eurogroup could have subjected the body to the same scrutiny as any formal EU body or institution – formalising its workings and lifting the veil of secrecy from this remarkably powerful and regrettably unaccountable entity.

But perhaps the most curious consequence of the Commission's proposal has to do with the future Minister's role to act in a 'neutral and balanced manner.'[23] The mere mention of balance is an obvious acknowledgement of multiple and distinct interests at play in securing the stability of the eurozone during financial crises – EU interests and ESM interests. With this slight turn of phrase the Commission opened the door – if ever so slightly – to a new approach to EU crisis management, which could endanger the ESM's fiduciary responsibility to its shareholders, the focus on debt-sharing risk-aversion and possibly even the for-profit business model of the institution.

Indeed, the Juncker Commission's December 2017 reform package was an audacious proposal. Bringing the ESM into EU law was part of a grander scheme, which sought to consolidate the coordination and cooperation of economic affairs and crisis management within a single legal framework capable of speaking with one voice and acting decisively as the need arises.

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[21] Ibid., 7 [emphasis added]

[22] A correct reading of the scenario with odd conclusions was provided by the European Parliament Report on the proposals of the December Package, which state that 'if the wishes of the Commission were to come true, such as that of a Commissioner also being elected at the helm of the Eurogroup, then the its role within the EMF might be substantial, to the expense of the national ministers of economy and finance and possibly also of national parliaments.' One would think the Parliament would embrace moving the operations of the Eurogroup and ESM out of the shadows, even if that happened 'at the cost' of empowering the Commission. Especially considering that Parliament oversight would have a much better chance of succeeding when the operations of an EU institution-proper are involved. See: European Parliament Legislative Train, Accessed 13 January 2020: <http://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/economic-and-monetary-affairs-econ/file/integration-of-the-esm-into-eu-law-by-creating-an-emf> European Parliament, Legislative Train, 'Integration of the ESM into EU Law by Way of Creating a European Monetary Fund (EMF).'

[23] COM(2017) 823, above n 8, 7. [emphasis added]

2. ECB Opinion EMF

The Commission's December Package initiated the regular legislative process in the Union and with it – the learned Opinion of the European Central Bank. CON/2018/20 of 11 April 2018 is, by far, one of the most amiable opinions the ECB had issued since the start of the eurocrisis.[24] It is also a rather short one, which does not indulge in the usual Amendment proposals annex or provide much detail, but enough insight to warrant our attention.

The ECB was adamant in its support to bring the ESM under EU law. It had said as much in its opinion on the proposal for amendment of Art 136 TFEU, when the ESM was first introduced, and confirmed its stance with the EMF proposal.[25] Keeping with its usual approach, the ECB suggested the Commission's proposal could serve as a basis for reform, warranting some additional work in the near future. The Bank argued for a general review of EMF financial instruments and zeroed in on the precautionary financial assistance facility, reiterating its interest in the introduction of 'adequate conditionality' therein. In fact, this was an idea which had previously failed to register with the establishment in spite of the ECB's best attempts with its opinion on Reg (EU) 472/2013. The Bank also suggested more streamlined – and likely automated – governance procedures in the interest of 'swift and credible decision-making, based on high quality independent technical advice.'[26] As the executive body behind the Single Resolution Board, the Bank also reconfirmed its support to 'establish additional backstop arrangements that could be activated in exceptional circumstances' and for those to apply on the widest range of possible support facilities operated by the SRB.[27]

The opinion also takes special interest in two particular issues related to language. Unsurprisingly, the Bank was rather sensitive about the mere suggestion of anything having to do with 'monetary' competences and registered its protestations against the potential renaming of the European Stability Mechanism into a European Monetary Fund. Such a

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[24] And judging by the Bank's opinionated commentary on the ESM during the amendment procedure for Art 136 TFEU and through various Monthly Bulletins on the topic, should the Bank have disagreed with any of the Commissions' proposals from December 2017, it certainly would have had ample opportunity and no issue sharing its concerns.

[25] 'The ECB supports the European Commission's initiative to bring the European Stability Mechanism (ESM) into the Union legal framework.' CON/2018/20 on EMF, 1. general observations; 'the ECB supports recourse to the Union method and wold welcome that, with the benefit of the expertise gained, the ESM would become a Union mechanism at an appropriate point in time.' Para 8 CON/2011/24 on Art 136 Amendment, 17 March 2011

[26] CON/2018/20, 2, general observations. On this latter matter, the ECB agreed with the Commission on the proposal for procedural reform on ESM drawdowns (CON/2018/20, para 2.6)

[27] CON/2018/20, Para 2.2., p4

move, it was argued, would at the very least be misleading in terms of the competences of the body.[28]

Curiously, the ECB seemed interested in parting with its legal invisibility cloak – the '*in liaison with'* formulation under which it performs a wide array of tasks for the ESM, exercising significant influence within the crisis management and prevention framework of the EU. Notably, this is the same phraseology, which had proven itself a winning formula for safeguarding these arrangements from judicial scrutiny, removing the actions of the Bank within the ESM framework beyond liability.[29] Yet, the ECB noted, that situation had been borne of crisis and proceeded to recommend that, 'in the light of further development and enhancement of the Union's permanent crisis management framework in a post-crisis environment, any contributory role of the ECB should be further clarified to better reflect the ECB's tasks and independence under the Treaties and the clear allocation of technical expertise and responsibilities in the future framework of the ESM.'[30] The Bank made it clear it was solely interested in dealing with 'financial sector policies and macro-critical issues, such as headline fiscal targets and sustainability and financing needs' within the bounds of its Treaty-assigned powers.[31]

The idea was not without merit. Clarity of purpose would confirm the ECB is only involved in a very specific part of financial programme negotiations, potentially sparing it from litigation over the far reaching socio-political dimension of these negotiations. This move could also be construed as protecting the ECB's independence vis-à-vis the Commission, considering the latter's push to complete EMU and subvert the informal operations of crisis governance within the hierarchy of the EU institutional and legal order represented a significant centralisation of authority.

But perhaps the most peculiar intervention of the Bank's opinion on the Commission's plans for the ESM concerned an instance of seeming clairvoyance, where it already noted the possibility of the proposal failing and a 'future discussion of the tasks… conferred on the ESM in the field of economic governance.'[32]

The ECB was mindful of the political backlash that the Commission's proposal had stirred. By the time it issued its legislative opinion, the writing was on the wall.

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[28] CON/2018/20, 3.
[29] *Pringle*, above n 22, paras 155-161.
[30] CON/2018/20, p. 3, para 1.3
[31] CON/2018/20, p. 3, para 1.3
[32] CON/2018/20, 1-2, general observations

3. The Pushback

To say that the European political establishment was generally unimpressed with the Commission's proposal is an understatement. In fact, they were rather aggravated. By April 2018 the regular legislative procedure on the regulation looking to incorporate the ESM into the Treaties had *de facto* ceased.[33]

3.1. The Hanseatic League

The first salvo came from a group of Member States which had branded itself the New Hanseatic League. It comprised of eight fiscally consolidated austerity hawks: Estonia, Finland, Ireland, Latvia, Lithuania, the non-eurozone Denmark and Sweden, all under the leadership of the Netherlands – the epitome of 'creditor Member States.'[34]

In a public statement from 6 March 2018, the League seemingly agreed on a majority of the Commission's reform proposals and also advocated for a reinforced procedure for debt restructuring, which was indeed a much needed reform.[35] But this meant little, considering the League's open hostility to any changes to the intergovernmental character of the ESM and therein-contained voting arrangements.[36] These were judged strategically connected to the commitment to conditionality at the core of the ESM.

With unanimity required in the Council for a good few of the Commission's reform proposals, the League's early disagreement made further discussions futile.[37] The result of

[33] COM(2017) 827 with the last documented action was in February of that year with nothing to be added until the current time of writing in 2020.(website eur lex) < https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2017:827:FIN>

[34] At the time of writing the status of the League is somewhat questionable with different configurations emerging in accordance with various political issues.

[35] Particularly, they agreed on the ESM's involvement in development and monitoring of financial assistance programmes, some kind of a Banking Union backstop, and a re-christening of the ESM as an EMF for no apparent purpose. See: Statement of the Hanseatic League, 6 March 2018.
Hanseatic League statement, March 6 2018; Dutch Government Website Accessed 11 January 2020: <https://www.rijksoverheid.nl/documenten/publicaties/2018/03/06/position-emu>

[36] The proposed reforms to voting procedure would have exclusively impacted the rights of this particular group of member states, holding insufficient shares to veto and making them wholly dependent on mostly German consent in such matters, as their principal ally on fiscal prudence.

[37] Observers have pointed out this collective clout could rebalance power arrangements in the Council and, by extension, the ESM BoG itself. With the SWP: 'The new alliance, which is becoming increasingly formalised, could take effect at Council level, not only attempting to block proposals from other euro states, but also working towards curbing Franco-German dominance. In June 2018, the Netherlands, an informal spokesman for the group, protested against the Franco-German proposal to set up a separate euro-zone budget.' P. Tokarski, and S. Funk, 'Non-euro Countries in the EU after Brexit, Between Fear of Losing of Political Influence and Euro Accession,' Comment 2019/C 03, January 2019, *Stiftung Wissenschaft und Politik (SWP)* 4. <https://www.swp-berlin.org/10.18449/2019C03/> Accessed on 21 January 2020

this intervention was likely as intended – the suspension of the latest wave of EMU reforms, specifically in the version imagined by the Commission.[38]

3.2. Klaus Regling

A month later, the ESM itself tuned into the debate with a speech by its Managing Director Klaus Regling.[39] In it, he also outlined a very different vision for the institution's future than the one proposed by the Commission, making two significant interventions.

Firstly, Mr Regling outright rejected the ESM's incorporation into EU law under a somewhat unconvincing pretext. He claimed that the legal basis chosen by the Commission – the 'flexibility clause' Article 352 TFEU, would somehow obstruct the ESM's efficacy and independence.

The argument for efficacy was unclear; the one for independence confounding. Never had the work of the ESM been directly connected to the discourse and practicalities of political independence, such as the operations of central banking for instance. The ESM's voting arrangements and constitution as a body representative of eurozone governments' financial interests simply did not qualify it for entertaining such considerations. That unfortunately left the Commission and the European Central Bank as the only suspects which this independence was sought from.

Mr Regling's intervention therefore confirmed the divergence of institutional interests with regard to EU economic and crisis governance. Unsurprisingly, then, the ESM suggested that the ESM remain its own institution akin to the European Investment Bank, specifically noting the Mechanism's ability to protect accountability to its shareholders in this format.

An even more significant proposal of the speech advanced that the ESM be allowed to 'regularly monitor the economic situation in all euro area countries, and not just the current or former programme countries' for the purposes of swift action in the case of a crisis.

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[38] The European Parliament definitely made this connection: '[O]n 6 March 2018 the schedule for modernising EMU was *de facto* put into question after eight - mostly North-European - countries known as New Hanseatic League openly cautioned against a far-reaching development of EMU.' See: European Parliament, Legislative Train, 'Integration of the ESM into EU Law by Way of Creating a European Monetary Fund (EMF).' <http://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/economic-and-monetary-affairs-econ/file/integration-of-the-esm-into-eu-law-by-creating-an-emf> Accessed on 21 January 2020

[39] Klaus Regling, "A European Monetary Fund: for what purpose?" speech, Euro 50 Group conference, Brussels, 10 April 2018, Accessed 20 Dec 2020: <https://www.esm.europa.eu/speeches-and-presentations/european-monetary-fund-what-purpose-speech-klaus-regling>

To be clear, the ESM's entire existence has been conditioned on the existence of crisis – the exceptional circumstances where a member state's financial troubles might run so deep as to risk the safety of the entire eurozone. Its original Treaty functions reflect this arrangement – the ESM has no effective purpose outside of financing programmes and no access to member states who have never borrowed from it.[40]

In other words, Mr Regling's proposal would provide the ESM with a full time occupation stretching its original mandate far beyond crises.

3.3. Meseberg

By June 2018, the Franco-German Meseberg Declaration on future steps to complete the EMU sealed the fate of the Commission's proposals, acquiescing to all dissenting opinions.[41] The Declaration also entertained the ESM should have its own analytical capacity – and presumed associated access to information – to 'assess the overall economic situation in the Member States' during normal times.[42] This was somehow envisioned to take place without duplication or breach of existing Community instruments and within the crisis-specific competences of the ESM Treaty. The incorporation of the ESM into EU law was mentioned as a formality for some unspecified time in the future, provided its 'key governance features' – meaning member state control – remain intact.[43]

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[40] For instance, the ESM's surveillance mechanism, the Early Warning System (EWS), only monitors *programme countries'* debt repayment capacity, cannot act on EWS information independently and has to rely on the Commission to take action through the enhanced surveillance procedure of EU economic governance.

[41] The ESM would remain an intergovernmental instrument founded on the 'underlying principle' of conditionality, managing the future common backstop for the Banking Union; directly participating in the design and monitoring of macroeconomic adjustment programmes, and allowing for the introduction of single-limb collective action clauses (CaCs) as a means of smoothing the debt-restructuring operations; it would receive its own analytical capability and access to information to 'assess the overall economic situation in the Member States' during normal times. See Germany and France, Meseberg Declaration, 'Renewing Europe's promises of security and prosperity,' 19 June 2018. <https://archiv.bundesregierung.de/archiv-de/meta/startseite/meseberg-declaration-1140806> Accessed 22 Dec 2020

[42] In a related follow up, the Hanseatic League elucidated this highly intrusive access to information is warranted by the need 'to be properly prepared to assess risks to a country's repayment capacity' when a crisis actually hits. In a rather novel take on the competences and mandate of the ESM, they argued for 'early identification of risks and vulnerabilities and contingency planning to ensure timeliness of actions,' thus bringing Klaus Regling's proposal full circle. Hanseatic League Statement 2 Nov 2018 (Accessed 11 January 2020) <https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/02/hanseatic-statement-on-the-esm>

[43] Apart from ESM reforms, France and Germany allowed space for one other of the Commission's December Package proposals, most notably – considerations for a future Euro budget focused on competitiveness, convergence, and stabilisation. Meseberg Declaration, Renewing Europe's promises of

3.4. The Eurogroup Legislates the ESM | The ESM Modifies the ESM Treaty

Following the informal political agreement at Meseberg, on 3 December 2018 the Eurogroup proposed their version of reforms much in line with the opposition to the Commission's package. This approach was wholeheartedly endorsed at the Euro Summit of 14 December, where the Eurogroup was tasked to prepare a new draft treaty on the ESM.[44] This created the curious situation in which the ESM – in its Eurogroup iteration – reformed its own treaty. The conflict of interest with this set up created harsh optics, but the Eurogroup was protected by the very accountability gap which the Commission's reforms had sought to repair.

The drafting process was completed in June 2019 and the revised treaty signed on 27 January 2021, due to undergo national ratification procedures by ESM member governments.[45]

Telling Developments

The history of the political and institutional wrangling behind the Reform Treaty on the European Stability Mechanism is revealing and important. It shines a harsh light on the many divergent interests at play in the management of EU economic and crisis governance. It plainly designates winning and losing sides to an argument, which goes much deeper than the surface of the ESM – that of Economic and Monetary integration in the Union. It also makes it explicitly clear that this was no 'missed opportunity' to fix the scars left by the eurozone crisis, but a political choice and conscious rejection of the possibility for doing so.

Somehow the European heads of state considered that empowering the ESM outside of the EU Treaties and exponentially growing its responsibilities outside the frame of potential financial crises would 'pave the way for significant strengthening of the EMU.'[46] To be clear – creating a second centre of gravity to the EU project was believed to somehow

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security and prosperity, 19 June 2018, Accessed 13 January 2020: https://archiv.bundesregierung.de/archiv-de/meta/startseite/meseberg-declaration-1140806

[44] EURO 503/18, 14 December 2018, para 2, (Accessed 11 January 2020: https://www.consilium.europa.eu/media/37563/20181214-euro-summit-statement.pdf) Full text of the Reformed Draft Treaty: Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019: https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf).

[45] Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019. <https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf> Accessed 18 January 2021

[46] Statement of the Euro Summit, 14 December 2018, Accessed 20 Dec 2020: https://www.consilium.europa.eu/en/press/press-releases/2018/12/14/statement-of-the-euro-summit-14-december-2018/

strengthen the EU project. Instead of incorporating the corrective crisis mechanism into EU law – bringing the corrective mechanism together with the preventive regular surveillance, eurozone governments attempted to replicate preventive surveillance *outside* EU law.

Most extraordinarily, throughout this process, crises were alluded to for the purpose of empowering ESM operations outside of crises – to help *prevent* and manage them. In the absence of a real crisis, the memory of the previous and threat of a future such event would be used to justify the usurpation of further powers for the permanent crisis regime. The ESM Reform Treaty took the enabling potential of the state of exception – which had been thoroughly utilised throughout the first wave of the Great Reformation of EU economic governance – to a wholly metaphysical context of existence, pushing the boundaries of its sanction.

4. The ESM Reform Treaty

The following is a brief overview of the Reform Treaty on the European Stability Mechanism.[47] Not only does its content fail to remedy the ESM's longstanding systemic issues, but it actually worsens these pre-existing conditions because of the further expansion of ESM competences outside of EU law.

Therefore, the analysis of the most consequential amendments introduced with the ESM Treaty cannot be disengaged from the impact of their legal forum and its relationship with EU law. These include the Common Backstop to the Single Resolution Fund, the procedure for precautionary conditioned credit lines (PCCL), the new rulebook on debt sustainability analyses (DSAs) connected to collective action clauses (CACs), the ESM's access to European Semester information through a future cooperation agreement with the Commission and the Mechanism's enhanced analytical capabilities. These are discussed below.

4.1. Common Backstop

The most visible and publicised reform of the new ESM Treaty has been the introduction of the Common Backstop to the Banking Union's Single Resolution Fund – emergency financing

[47] Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019 (Accessed 14 January 2020: https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf).

for the swift resolution of ailing banks. It is expected to become operational in 2022, two years ahead of the original 'schedule.'

The Backstop is a significant step towards completing the European Banking Union and breaking the vicious circle between banks and sovereigns. It is a recognition that the EU is a highly integrated cross-border market for financial and banking services and that the responsibility for financial institutions of a truly European scale belongs at the European level. This could well mean the future difference between a financial crisis and a sovereign debt crisis.

However, there is one particular shortcoming with the new setup. In an effort to retain full control over Backstop funds with governments, the Eurogroup copied and pasted the highly obstructive voting procedures of the ESM to the Backstop.[48] Unanimity voting could subject future decisions on banking bailouts to the private demands of any single eurozone member and possibly so for purposes entirely unrelated to the Banking Union. Furthermore, it must be pointed out that the Banking Union is a highly technical, expertocratic framework, generally void of political influence by virtue of its subject. Introducing political considerations for its stop-gap mechanism – the Backstop, is not without concern.

4.2. Precautionary Conditioned Credit Lines | PCCL

Another much publicised reform of the new ESM Treaty is its claim for 'more effective' precautionary credit lines (PCCLs).[49] These are the most basic and non-intrusive form of financial support the ESM can disburse to troubled states, but only those who are not too troubled. Unfortunately, the Reform Treaty may have taken this approach too far for PCCLs to be of any future use.

Reflecting the low investment risk, precautionary credit lines are extended without conditionality arrangements for structural reforms – without Memoranda of Understanding.[50] In order to qualify for PCCL a country's economic and financial situation

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[48] By contrast, the Commission had proposed the ESM Managing Director be granted the competence to make those decisions singlehandedly and thus move along the process in a more expedited manner.
[49] European Stability Mechanism, ESM Reform, Available: https://www.esm.europa.eu/about-esm/esm-reform
[50] Streamlining the PCCL preliminary stage, the ESM reform stipulates the recipient country would only sign a letter of intent as opposed a Memorandum of Understanding. (See: European Stability Mechanism, 'Guideline on Precautionary Financial Assistance,' Accessed 13 January 2020: <https://www.esm.europa.eu/sites/default/files/esm_guideline_on_precautionary_financial_assistance.pdf>; and Draft revised text of the Treaty establishing the European Stability Mechanism, Annex III, Eligibility Criteria for Precautionary Financial Assistance, Accessed 13 January 2020 <https://www.consilium.europa.eu/media/39771/esmt-annexes.pdf>. Still, the PCCL is not wholly

has to be judged sound based on a number of criteria (debt, market access, financial system health), which remain without change for the reformed ESM.[51]

The novelty comes with the Reform ESM's rules on member states' standing with the European Semester for economic governance. The original Treaty allowed that governments subject to the preventive or corrective procedures of the Stability and Growth Pact (SGP) and Macroeconomic Imbalances Procedure (MIP) could still benefit from PCCL aid, provided they demonstrate ongoing compliance with Semester recommendations.

That is no longer the case under the revised Treaty. In the future, PCCL access will be conditioned on a minimum two year impeccable track record with respect to SGP criteria (deficit, debt benchmark, structural budget balance). Any contact with the Excessive Deficit Procedure – the SGP's corrective arm, becomes an automatic disqualifier. MIP criteria are also to be respected, in so far as governments should demonstrate an 'absence of excessive imbalances.'[52]

To be clear, a government whose financial standing meets the new threshold for PCCL aid is extremely unlikely to ever need a PCCL. The highly restrictive eligibility criteria severely widen the gap between ESM preventive and corrective financial aid with the overwhelming majority of member states being automatically designated in the latter category.[53]

4.3. Debt Sustainability | Restructuring | Analytical Capacities

The ESM Reform Treaty also tries to address the issue of debt restructuring through the introduction of single-limb collective action clauses (CACs) for eurozone government bonds.[54] These are designed to ensure negotiations over potential sovereign debt

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without conditions. The beneficiary government must show continuous respect for the eligibility criteria, i.e. to sustain sound finances, and open its books to monitoring by the Commission and ECB, and soon enough – the ESM's own analytical team. As soon as the credit line is drawn, governments are automatically placed under enhanced surveillance – one of the most invasive monitoring procedures in EU economic governance. (See: European Parliament and Council Regulation (EU) 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L140 (17 May 2013).)

[51] For both the original and reformed ESM, these include sustainable government debt, a sustainable external position, intact access to markets 'on reasonable terms' and a healthy bank system, clarified as the absence of 'financial sector vulnerabilities.'

[52] It remains unclear whether that includes the lower threshold excessive imbalances procedures (EIPs) – the preventive arm of the MIP.

[53] The rest of the ESM's instruments are characterised by strict conditionality and invasive interference, either through enhanced surveillance procedures (for precautionary credit lines) or full macroeconomic adjustment programmes (for loans).

[54] 'Collective action clauses are clauses in bond terms that allow changes to the terms of those bonds to be made subject to a vote by the holders of those bonds. If a majority approves the change, it becomes effective for all the bonds.' Double-limb CACs 'require two separate majorities to approve a change in

restructuring proceed in a more 'orderly and predictable' manner by reducing the risk that private creditors refuse to participate in restructuring – the so-called 'holdout problem.'[55]

CACs have indeed been shown to help in such circumstances, but before they can be triggered the dominant issue with eurozone debt restructuring remains arriving at the very possibility of it through debt sustainability analyses (DSAs).

Unfortunately, the reformed Treaty does not address the problematic ESM voting arrangements on this matter. It actually complicates DSA procedure further by introducing yet another component in the analysis.

In the future, the details of ESM financial aid programmes and debt restructuring will depend on the outcomes of a debt sustainability analysis (DSA) *and* the newly-minted repayment capacity assessment (RCA) – a procedural institutionalisation of ESM shareholder interests.[56] The analyses are supposed to be carried out in tandem by the Commission, in liaison with the ECB and the ESM, and are generally expected to arrive at the same conclusions.

However, the Reform Treaty recognises that the ESM and EU are beasts of a different nature, protecting different institutional interests.[57] Should these sometimes conflicting responsibilities result in dissenting views, the new setup provides that each institution default to a uniquely assigned responsibility – the Commission is to limit its assessment to public debt sustainability (DSA), while the ESM focuses on debt repayment (RCA).[58] These potentially conflicting reports will then inform a proposal by the ESM Managing Director to the Board of Governors (BoG) for a final decision.[59]

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bond terms: one at the level of each "series" and one at the level of all "series" combined. This means that it is more difficult to achieve a majority that would make it possible to restructure a country's sovereign debt, compared to a single-limb CAC.' European Stability mechanism, 'Explainer on ESM reform and revisions to the ESM Treaty,' Press Release, 24 June 2019. (Accessed 20 Dec 2020: https://www.esm.europa.eu/press-releases/explainer-esm-reform-and-revisions-esm-treaty).

[55] C. Fang, J. Schumacher and C. Trebesch, 'Restructuring sovereign bonds: holdouts, haircuts and the effectiveness of CACs' ECB Working Paper Series No 2366, January 2020. (Accessed 22 Dec 2020: https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2366~5317a382b3.en.pdf).

[56] Amendment to Art 13.1(b) ESM as per ESM Reform Treaty.

[57] Contrary to the Commission's mandate to safeguard the interests of the Union, the ESM is explicitly said to perform 'its analysis and assessment *from the perspective of a lender*.' Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018, Section 3 [emphasis added] Accessed 13 January: https://ec.europa.eu/info/sites/info/files/economy-finance/com-esm_cooperation.pdf).

[58] Recital 12A ESM Reform Treaty; also: European Stability Mechanism, 'ESM Treaty Reform – Explainer,' Available: https://www.esm.europa.eu/about-esm/esm-treaty-reform-explainer#ui-id-17

[59] Art 13.2 ESM Reform Treaty; Recital 12-12B ESM Reform Treaty; Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018. (Accessed 22 Dec 2020: https://ec.europa.eu/info/sites/info/files/economy-finance/com-esm_cooperation.pdf).

The division of labour between institutions cannot be overemphasised. The Reform Treaty clearly takes the view that EU institutions cannot be trusted to protect the interest of ESM shareholders.[60] That, conversely, the interests of the EU project cannot be distilled down to debt repayment.

It is not a straightforward conclusion how exactly these new provisions would impact the possibility for debt restructuring in the EU or the efficiency of the ESM. In the context of what we know about the ESM's conflicting creditor interests, it is hard to imagine how these new provisions would result in more balanced assessments leading to a more willing introduction of debt restructuring when necessary. If anything, the opposite seems true.[61] In formalising dissenting opinions, the latest reforms are certainly an exercise in institutional empowerment. This, in turn, could lead to greater institutional accountability, whenever information is made publicly available. But ultimately, the new procedure also politicises the process. When experts cannot agree to compromise on shared recommendations, the balancing exercise on these particularly technocratic matters is moved to the political arena of the ESM Board of Governors – the eurozone Ministers for Economy and Finance, with its highly restrictive voting arrangements. That cannot be a welcome development.

4.4. New Competences

With the Reformed Treaty, the ESM is set to acquire further powers. The Mechanism is set to grow exponentially with its autonomous analytical capabilities and competences. It will be involved in the negotiation, design and oversight of programme conditionality, have the possibility of joining monitoring missions to member states and conduct independent analyses of data for the appraisal of financial risk, liquidity needs, and debt sustainability.[62] The ESM is also to begin signing the conditionality programme Memoranda of Understanding alongside the Commission, although it is unclear to what legal effect – if any – since it remains outside the reach of EU law.

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[60] That the Commission or ECB may be more inclined to give a favourable debt analysis or too easily forgive a debt owed to third parties – the ESM shareholders.

[61] In fact, the new ESM Treaty introduces yet another conflict of interest by providing that the ESM itself – representing creditor interests – may be the agent to 'facilitate the dialogue between [the troubled] ESM Member and its private investors on a voluntary, informal, non-binding, temporary, and confidential basis.' Draft revised text of the treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019, recital 12.

[62] Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018. The agreement will enter into force at the same time as the amendments to the ESM Treaty. Accessed 22 Dec 2020: <https://ec.europa.eu/info/sites/info/files/economy-finance/com-esm_cooperation.pdf>

Most importantly – all these powers will remain active in economic and financial 'peace time' – outside the confines of the ESM's very reason for existence, i.e. crises.

4.4.1. Peacetime Powers

By far the most consequential reform of the new ESM Treaty is the one least talked about, least understood, most fluid and, yet, with the greatest potential for further development – the new role for the Mechanism outside financial aid programmes, outside crises.

As we have seen throughout this chapter, the ESM holds significant sway in the regular cycle of economic governance in the Union in both its bottom-up and top-down iterations. But there is more.

Article 3.1 ESM Reform Treaty presents the reformed – and significantly expanded – purpose of the ESM. Apart from providing imminent-crisis stability support, the Mechanism may also,

> 'where relevant in order to internally prepare and enable it to appropriately and in a timely manner pursue the tasks conferred on it by this Treaty... follow and assess the macroeconomic and financial situation of its Members including the sustainability of their public debt and carry out analysis of relevant information and data. To this end, the Managing Director shall collaborate with the European Commission and the ECB to ensure full consistency with the framework for economic policy coordination provided for in the TFEU.'

The new competences are slightly clarified in an agreement on *Future cooperation between the European Commission and the European Stability Mechanism*, to be annexed to the reform Treaty. It provides the ESM with access to the Commission's monitoring missions to member states in the absence of financial aid.[63] Furthermore, the two institutions have agreed on a regular exchange of information. With the text: 'Based on reciprocity, the Commission and the ESM will share data, analyses and assessments while respecting applicable Union law[64] and 'would meet informally to share assessments and analyses pertaining to their respective competences as well as to discuss and assess macro-financial risks.'[65]

[63] Ibid., Section 1, 1. Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018.
[64] Ibid., Section 7, 4. Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018.
[65] Ibid., Section 1, 1. Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018.

Surely, the most obvious and logical reason behind these peacetime powers is to give the Mechanism a full-time job beyond financial crises and the resolution of outstanding debts. These new competences also mark a significant shift in the institutional identity and role of the ESM. Just how significant, however, remains somewhat of a mystery due to the open-ended character of the legal provisions instituting the new powers. In turn, these give rise to a multitude of possibilities, leaving the future regime lacking legal clarity and judicial protection.[66]

5. Peacetime Powers and Unanswered Questions

First, it is not clear what the future ESM's macroeconomic and financial assessment functions will consist of. But also: i) What are the ESM's governance procedures on the conduct of peacetime analytical capabilities? ii) How will ESM analyses relate to and differ from those carried out by the Commission and ECB, in order to avoid a clash of competences and ensure full consistency with the EU Treaties? iii) Will and if then how would the results of ESM analyses translate into action vis-à-vis EU member states?

Second, we must address the ESM's future relationship with EU economic governance. i) What are member state budgetary and financial health indicators that trigger ESM surveillance or warrant its access to monitoring missions conducted outside of financial aid programmes? ii) Is the ESM's right of initiative and right to access automatic or assessed on a case by case basis? iii) Could triggering ESM monitoring lead to a self-fulfilling prophecy, unnerving markets and generating the circumstances for financial turmoil? iv) What is the confidentiality regime covering the ESM's concerns, analyses, or involvement in missions to governments which have not received financial aid?

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[66] This privileged access is also to include post-programme surveillance (PPS), where the procedure again develops within Reg (EU) 472/2013 while the ESM's main purpose remains safeguarding 'its balance sheets by assessing the ability of a beneficiary Member to repay.' (Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018, Section 6, p.4) Notably, PPS monitoring is a return to the regular surveillance cycle of economic governance, albeit with a few modifications. This seems like the formal fusing of monitoring mechanisms available under Union law (PPS) and the Early Warning System (EWS) of the ESM with no clarity as to the assigned competences therein. Also, it is indeed curious how the possibility of conflicting conclusions on repayment between the Commission and ESM might play out within the framework of the enabling Regulation (EU) 472/2013, seeing as the initiative for further procedural development therein remains with the Commission, and at that – through RQMV. (This problem has been previously pointed out in the particular instance of PPS monitoring, with the Commission having to consider ESM interests for internal balancing when assessing Member State compliance. See Chapter 6. Yet, it could be argued that even though these are indeed novel responsibilities for the ESM, they are still confined within the exercise of specific legal provisions on monitoring.

This brings us to the next set of unanswered questions related to issues of information sharing: What are the rights and obligations of either the Commission or ESM to request, share, or act on information under the Agreement on Future Cooperation?

Lastly, in assessing this future framework of peacetime competences and cross-legal cooperation, we must not forget that the ESM is – and shall remain – an 'international financial institution' with a principal responsibility towards its shareholders. It is shareholder interests, which determine the definition of eurozone stability and the conditions for its pursuit in the context of the ESM. And it is for the purpose of protecting said interests that the ESM conducts it analyses 'from the perspective of a lender.'

But what does a 'creditor approach' mean outside the context of financial crises, in the absence of ESM debt or financial turmoil?[67] What are shareholder interests in the absence of issued credit? In other words, how does the 'perspective of a lender' translate into the perspective of a *prospective* lender?

One conclusion seems unavoidable – ESM shareholder interests in the absence of debt are simply eurozone government interests. That is, the ESM Reform Treaty's peacetime powers are likely to create an intergovernmental centre of gravity pulling away at EU Treaty architecture. Its influence will depend on the intra-institutional dynamics of the ESM – the balance between its technocratic identity and the political priorities of its shareholders. Its existence should not be overlooked when assessing the ESM's future peacetime conduct.

5.1. Peacetime Powers | Inappropriate Liaisons

But why would any of these peacetime powers matter if the ESM seems to have no authority over governments that have not made use of its funding? In a certain manner, this future cooperation reflects the realities of EU economic and crisis governance after the eurozone crisis. As this study has demonstrated, in spite of being part of two separate legal regimes, the European Semester and ESM are in fact designed and indeed do act as a composite framework.

Not unlike disagreements over government debt sustainability during the negotiation of ESM financial aid programmes, there is potential for inter-institutional disagreements over the budgetary or economic position of a member state under regular Semester surveillance. For instance, being a crisis-focused risk-averse body, the ESM might favour harsher

[67] Recital 5(b), ESM Reform Treaty.

corrective measures than the Commission is willing to recommend within the Semester framework.

This is the point at which the ESM's potential participation in monitoring missions and the information exchange channel with the Commission could come into play.[68] These could provide an informal means for the ESM to see its concerns reflected in EU economic governance. In fact, the ESM's very interest in any particular member state – whether through missions or analytics – could trigger political alarm in the Council and expectations for a tougher response by the Commission. This dynamic would be a significant departure from the current state of affairs, potentially impacting the Commission's lead and independence in these matters. Moreover, Commission proposals to the Council on regular economic governance procedure could thus come to include the Council's 'point of view' considered *a priori*.

Furthermore, we must acknowledge the introduction of the Commission in the ESM's framework of informal liaisons also exacerbates the already complex arrangements at play with metaphysical entity that is the Eurogroup.[69] With the latter, the accountability and transparency issue of the Eurozone Ministers of Economic and Finance moonlighting as ESM Governors could be interpreted as delimiting the amount of cross-legal contamination and exposure within the same circle of people. What is more, the Eurogroup cannot itself formally produce acts of legal consequence. With the Commission as proxy, both the ESM (an institution outside EU law) and the Eurogroup (a body non-existent according to EU law) would acquire access to procedures of European economic governance with tangible legal effects.

This means the ESM peacetime capabilities could produce legal consequences outside the regime they are borne of by affecting matters of EU law. The informality of it all would

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[68] Joint Position on Future cooperation between the European Commission and the European Stability Mechanism, 14 November 2018, Section 7, 4 and Section 1, 1.

[69] As problematic as the current relationship between the ESM and the Commission is for the gaps in judicial protection, it is grounded in the ESM Treaty under the firm hypothesis of crisis management. Whatever the legal lacunae might be, they are subject to formal legal arrangements. This issue concerns the Commission's involvement in the assessment, negotiation and signing of the Memoranda of Understanding, which formalise financial aid from the ESM. The Commission's role and liability is clearly outlined in the ESM Treaty and has been thoroughly reviewed by the CJUE (if to a somewhat unsatisfactory effect). See: CJEU, *Ledra Advertising*, above n 22, para 67: '… the Commission is bound, under both Article 17(1) TEU, which confers upon it the general task of overseeing the application of EU law, and Article 13(3) and (4) of the ESM Treaty, which requires it to ensure that the memoranda of understanding concluded by the ESM are consistent with EU law (see, to that effect, judgment of 27 November 2012, *Pringle*,C-370/12, EU:C:2012:756, paragraphs 163 and 164), to ensure that such a memorandum of understanding is consistent with the fundamental rights guaranteed by the Charter."

surely obscure the legal and procedural boundaries between regular and crisis governance of the European Union and of the powers exercised within either EU or ESM Treaty framework – a prospect of highly suspect legality.

5.2. Maastricht | Ideological Economics

The bottom line to all this is, of course, ideological. The ESM's institutional logic – its preoccupation with debt repayment and conditionality-enforced good bookkeeping – goes far beyond its role as lender of last resort and fiduciary responsibility to its shareholders. Rather, it is at its core an emanation of the politico-economic ideology which laid the foundations of the Economic and Monetary Union with the Maastricht Treaty in 1992.

If the euro-crisis saw the Commission, ECB and member states agree on a collective response to reinforce the economic and monetary contract of Maastricht, that was to a large extent owed to the global economic context of the time, which still underpinned the economic logic of their approach.[70] At that point, EMU problems were indeed intra-systemic issues with enough promise of hope through commitment.

By 2017, when the Commission called for completing the EMU and integrating the ESM, conditions – both inside and outside the EU – had changed. Inflationary pressures had given way to a stubborn recession that stifled growth and interest rates nearing the zero bound eroded the logic of debt politics.[71] The forced return to fiscal prudence through austerity had proven itself an acutely defective approach to economic growth in such conditions.[72] In other words, the fundamentally altered global monetary and fiscal paradigm and increasingly divergent member state economies could no longer sustain the Maastricht scheme for an asymmetric Economic and Monetary Union.

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[70] In this regard, the ESM's intergovernmental genesis was a convenient solution to a pressing problem; where the powers of lender of last resort were found made little difference as long as everyone agreed on the pursued aims.

[71] This is also evidenced by the turn in European Central Bank policy to unconventional monetary policy and aggressive quantitative easing in an effort to stimulate the economy. See for a short and thorough explainer on the fundamental changes in global central banking, see: Adam Tooze, 'The world's central banks are starting to experiment. But what comes next?' Sept 9, 2020, The Guardian, Accessed Dec 23, 2020: https://www.theguardian.com/commentisfree/2020/sep/09/central-banks-deflation-covid-19-world-economy

[72] In the EU this caused more harm than good, only exacerbating the economic divergences between member states and extracting a heavy political price with a struggling electorate grasping at populist straws. See A. Mody, *EuroTragedy: A Drama in Nine Acts* (OUP 2018), Ch. 9: "The Final Act: A Declining and Divided Europe" on the economic and political consequences of the sovereign debt crisis.

This environment placed extreme pressures to adjust EU political economy towards greater risk sharing and solidarity in order to balance out the system on the supranational level. Simply put, economic and financial integration had proceeded far beyond what the Treaty firewalls agreed at Maastricht could sustain or austerity economics could fix.[73]

The Commission's plan for completing EMU sought to address these conditions.[74] But, as we have seen, a sufficiently influential group of member states equated the introduction of minimum standards of solidarity with exposure to unnecessary liability.[75] In their refusal to let go of the Maastricht worldview – the promise of a common market without costs and continued control over fiscal space[76] – these governments misjudged the logic of economic reality for the political sentiment of voluntary integration. Their campaign to salvage the economic order of the Maastricht compromise has resulted in the ESM Reform Treaty – a commitment a global economic and monetary paradigm on the brink.

6. Conclusion

The legislative history behind the ESM Reform Treaty indicates troubling levels of distrust between EU institutions and member states, and – as a result – between EU institutions and the ESM. These dynamics can be ascribed to a divergence of interests between the parties involved – whether based on their institutional mandate or political considerations.

The increasing economic pressures for solidarity in the collective Union format seem to have created a growing schism between governments and their own creation – the EU. To this background, ESM reform has served as an alternative arrangement for member states to avoid surrendering competences to the EU. This, in turn, has created a second centre of gravity for the governance of the Economic and Monetary Union outside the Economic and

[73] The crisis had showcased the extent of member states' exposure to each other's debts in spite of the best attempts of the system. Simply put, the markets and integrated financial framework refused to acknowledge the synthetic firewalls erected by the EU Treaties, treated the Union as fully integrated and hedged their bets on a bailout, knowing sovereign defaults would be too costly for the collective to allow.

[74] To this end the Commission's EMU reform package proposed new instruments for balancing out growing divergences and mutual insurance schemes against member states' growing exposure to risk – the common backstop to the Single Resolution Fund, the future ESM which promised to weigh shareholders' interests with those of the collective union, and a novel budgetary support facility for greater structural reform assistance with a stabilisation function across national borders. Outlined in the rest of the Commission's December 2017 package proposal (COM(2017) 821-827(final)).

[75] Statement of the Hanseatic League, March 6 2018, para 3. Accessed 22 Dec 20202: https://www.rijksoverheid.nl/documenten/publicaties/2018/03/06/position-emu

[76] Fiscal sovereignty as much as possible within the confines and premised on the condition of budgetary rule compliance – the infamous deficit and debt 3/60 criteria, as outlined with the Stability and Growth Pact framework.

Monetary Union, and especially so considering the serious potential of the ESM's novel peacetime capabilities. The framework has cemented powers exercised by eurozone ministers of economy and finance outside EU Treaties' legal and democratic protections.[77] If left unchecked, the reformed Mechanism could become an institutional avatar for intergovernmentalism in the EU with powers far surpassing what the Council is capable of accomplishing for itself within the EU legal framework.[78] The potential damage to the functionality and legitimacy of EU economic and crisis governance will be conditioned on the prudent exercise of EU Treaty protections.

It is already evident the ESM Reform Treaty itself leaves much to be desired: i) the Treaty does not resolve outstanding issues from the original ESM framework; ii) it creates new problems related to its expanded powers; and iii) it remains an extremely limited instrument to properly manage future crises.

6.1. Old Problems

First, the ESM Reform Treaty does not resolve the outstanding issues with the original ESM governance framework or its relationship to EU law, including: i) the lack of accountability in the alarming nexus between the ESM-Eurogroup formation, acting as a decision-making black box; ii) the ESM's unanimity voting procedure, ill-fitting for the demands of swift crisis resolution and riddled with conflicts of interest; iii) the lack of justiciability of ESM actions, which forces the European Commission to take on the liability of balancing the primary norms of Union law with the primary interests of the ESM; iv) the damage done to 'market discipline' by removing the risk of sovereign default and substantially decreasing the chances of debt restructuring, because ESM shareholder interests are inextricably linked to those of the market.

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[77] The Eurogroup is not an EU body. This has been firmly confirmed by the CJEU in Case C-597/18 P *Council v K. Chrysostomides & Co. and Others* [2020] ECLI:EU:C:2020:1028, paras 84-90. As far as the ESM Board of Governors format is concerned, the procedures of the original Treaty hardly provide for much justiciability in relation to the EU law.

[78] In a Report on the ESM from before the beginning of the reform process, Transparency International analysts observe analogous developments at play. See: C. Ban and L. Seabrooke, 'From Crisis to Stability: How to Make the European Stability Mechanism Transparent and Accountable' (2017) *Transparency International*, 19-22. Accessed 20 Dec 2020: https://transparency.eu/esm/

6.2. New Problems

Furthermore, the expanded powers of the Mechanism and its continued existence outside EU law: i) create a second centre of gravity in the EU constellation, obscuring the hierarchies and protections of EU law and obstructing much needed progress in the Economic and Monetary Union; ii) erode competences already under EU custody; iii) diminish EU authority and collective ability to act within the Treaties, setting a dangerous precedent for parallel legal frameworks whenever further integration looks politically unacceptable; iv) will create further procedural, governance and legal uncertainty for the future, to be acutely felt during the next episode of turbulent financial events; and v) endorse the dangerous pretence that the EMU project can be sustained without shared risk and solidarity.

6.3. Limits

But, perhaps, the most critical issue with the ESM is just how limited it is.

The ESM is not a flexible instrument. It is legally designed to imagine one scenario – that of the sovereign debt crisis, which required disciplinary conditionality in exchange for financial aid. It is by the same legal token that allows its existence in spite of the EU Treaties' bailout prohibitions, that the ESM can only provide one kind of stability support – punitive.[79]

This approach may have made sense as an *ad hoc* solution to the very specific circumstances a decade ago. However, it would be careless to insist it can resolve the multitude of difficulties that might befall the eurozone in the future, especially in the context of the fundamentally changed global economic paradigm.

The ESM's limited capacity to respond to the financial needs brought about by the global health pandemic speaks loudly to this point. Not only have governments shied away from any association with the Mechanism,[80] but the legality of the precautionary credit line facility altered to help out member states' health care spending *unconditionally* might soon become subject to legal contestation in German courts.[81]

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[79] *Pringle*, above n 22.The obvious presumption is that falling on hard times – whether caused by irresponsible banks, markets, or public spending – is the exclusive responsibility of governments, which must have somehow brought the problem onto themselves.

[80] At the time of writing, the ESM still has no official requests for its Pandemic Programme. During a recent press conference, the ESM managing director Klaus Regling claimed the facility need not be used to affect the markets' perception of the stability of the eurozone and has therefore served its purpose, even if it has also shown that member states find association with the Mechanism toxic. See: K. Regling, Eurogroup video press conference, 30 Nov 2020. Accessed: 20 Dec 2020 https://www.esm.europa.eu/press-releases/klaus-regling-eurogroup-video-press-conference-2020-11-30

[81] That is because in order for all Member States to qualify as eligible, the ESM has put on offer its enhanced conditions credit line (ECCL), which should come with conditionality arrangements for

There is also another argument against outsourcing lender of last resort (LLR) capabilities to an institution so limited and legally captive to its shareholders. It connects back to the distrust which has infiltrated the relationship between EU bodies and the ESM.

An overlooked problem of the crisis management framework is the implicit assumption that the Union and ESM would always agree on the meaning of and means for securing eurozone stability. The experience of the sovereign debt crisis is misleading in this regard.

We must remember these are institutions with widely divergent mandates and policy interests. They aligned during the eurozone crisis because the Commission, ECB, and ESM all needed governments to comply with fiscal discipline. But they did so for very different reasons.

On the one hand, the Commission pushed policies that would limit the alarming levels of economic divergence across the Union, since massive public debt was identified as a main cause of the crisis. This was in line with its mandate for fiscal and economic policy coordination. The ECB also advocated for fiscal austerity as a solution to economic divergence, but did so in the interest of its monetary policy transmission mechanism and because its single monetary policy is specifically designed to work in the context of a single (consolidated) economic policy across eurozone capitals. The ESM, on the other hand, was interested in enforcing structural reforms through conditionality arrangements, because austerity literally legalised financial aid and helped ensure that borrowing governments are capable of repaying their ESM debt. Moreover, this joint EU approach represented the dominant economic expertise of the time.

The next crisis may not be the same. In fact, the changing global economic paradigm has already altered key features of the approach. We cannot assume that the ESM's mandate to act in the best interest of its shareholders would amount to acting in the best interest of the European Union as a whole. In fact, the legal spectacle over EMU and ESM reform of the last couple of years speaks to the exact opposite.

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structural reforms and enhanced surveillance. What is more, to ensure that the aid is readily available in a timely manner, the Commission has pre-certified the financial health of all eurozone member states in order to deem them eligible. It is not clear how an actual request for ESM Pandemic Crisis Support would proceed should economic conditions for certain members change in the meanwhile. See generally: European Stability Mechanism, 'ESM Pandemic Crisis Support, Explainer, Timeline and Documents' Available: https://www.esm.europa.eu/content/europe-response-corona-crisis; On the risk of legal battles in German Courts, see general overview of the debate by D. Marsh, 'German court litigants prepare fresh skirmishes,' 12 August 2020, *OMFIF*. Accessed 23 Dec 2020: https://www.omfif.org/2020/08/german-court-litigants-prepare-fresh-skirmishes/

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