In Law We Trust

The Role of EU Constitutional Law in European Monetary Integration

Marijn van der Sluis

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 16 June 2017

European University Institute
Department of Law

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Abstract

Prior to the euro, the topics of constitutional law and monetary policy rarely overlapped. Money was regulated, on the national level, through the ordinary legislative procedures. For European monetary union, the use of constitutional law was nevertheless attractive because it meant that the MS would be in control of the negotiation process, because it enabled a very independent central bank and because it kept the MS in control over the future of the euro. The lack of trust among MS to share a currency was overcome by an abundant trust in law. As the euro was negotiated as a constitutional currency, this created specific opportunities and obstacles for the different parts of the EMU. Once the euro finally came into existence, the constitutional framework of the euro proved remarkably stable for the first decade and a half. After the excitement of Maastricht, monetary policy very quickly became boring again, in no small part due to constitutional law. Unfortunately, EMU primary law was quite successful. During the euro-crisis, EMU primary law shaped the responses to the crisis by placing fewer obstacles on some routes to change than on others. As the crisis developed, some conflicts became the topic of much legal debate and even judicial decisions, whilst other parts of euro-crisis law met with few objections, despite some legally problematic aspects. The possibilities for further reform of the Eurozone without treaty change are then largely the result of the process of reform until now.

List of Abbreviations

BIS	Bank of International Settlements
CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
CoG	Committee of Governors
EC	European Community
ECB	European Central Bank
ECU	European Currency Unit
EDP	Excessive Deficit Procedure
EEC	European Economic Community
EFSF	European Financial Stability Facility
EFSM	European Financial Stabilization Mechanism
ELA	Emergency Liquidity Assistance
EMCF	European Monetary Cooperation Fund
EMS	European Monetary System
EMU	Economic and Monetary Union
EP	European Parliament
ERM	Exchange Rate Mechanism
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EU	European Union
GLF	Greek Loan Facility
IMF	International Monetary Fund
LTRO	Long Term Refinancing Operation
MAP	Macroeconomic Adjustment Program
MC	Monetary Committee
MS	Member States
NCB	National Central Bank
OMT	Outright Monetary Transactions
PSPP	Public Sector Purchases Program
QMV	Qualified Majority Voting
R-QMV	Reverse-Qualified Majority Voting
SEA	Single European Act
SGP	Stability and Growth Pact
SMP	Securities Markets Program
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

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Introduction

In European integration, the city of Maastricht has become synonymous with the treaty that brought to life the common currency that is now used by over 300 million people. Phrases like 'the Maastricht rules', 'the Road to Maastricht' or the 'Maastricht compromise' refer to the historic international treaty that was signed in the provincial capital of Limburg. The reasons that the treaty was signed there were that the Netherlands presided over of the final stages of the negotiations of the Treaty and that Maastricht could symbolize the heart of (Western-)Europe, due to its proximity to Belgium and Germany.

It is significant that the treaty was not signed in Brussels, where most of the politics of the European Union (EU) takes place. Negotiating EU treaties is largely a matter of the Member States (MS), with the Union institutions mainly playing a supportive role. This strengthens the idea that the MS are in charge of the project of the European integration.[1] Hence, most of the bigger treaties on the EU are named after the city where they were signed: the Rome Treaty (1957), the Treaty of Amsterdam (1997), Treaty of Nice (2001) and lastly, the Lisbon Treaty (2009).

In Maastricht, the political leaders of the MS not only agreed that there would be a common currency, the *ecu* as it was supposed to be called, but also what its main characteristics would be. The new European Central Bank (ECB) would independently set monetary policy for those MS that would participate in the euro, with the objective of maintaining price stability. The MS would coordinate their economic policies and avoid excessive deficits, but would keep the main responsibility for their economic policies. Economic and Monetary Union (EMU) would be a bit lopsided. Much intellectual energy has been spent reflecting on the choices of Maastricht: whether the ECB can be both independent *and* democratically accountable,

[1] Two minor issues that haunt all works on the legal history of European integration are those of terminology of the European (Economic) Community/Union and the re-numbering of the articles of the Treaties. A balance has to be found between correctness and readability. On terminology, preference is given to the use of *European Union*, unless where the use of *Community* is necessary for the argument at hand or obvious from a historical perspective. Also, references to what used be known as the European Court of Justice, are to the Court of Justice of the European Union (CJEU) On the numbering of the Treaties, the first chapter uses the Treaty of Rome and article references to the EEC, the next three chapters use the Maastricht Treaty and EC, even where the Nice Treaty re-numbered most provisions. Chapter 5 then uses the Lisbon Treaty and the indications of TEU and TFEU. For convenience, the relevant chapter of the Maastricht Treaty on EMU is included in an appendix.

whether the restrictions on MS fiscal policies can be effective, whether the no bailout clause was credible and so forth. These are reflections on the political choices about the individual policies that were to form the euro and whether those individual policies could form a coherent whole.

Rather than pondering the choices *of* Maastricht, the focus of this thesis is the choice *for* Maastricht, that is, the choice to organize monetary union through an extensive EU treaty. Although it seems self-evident now that European monetary union would be based on an EU Treaty that would regulate all of the important aspects of the currency, this choice for Maastricht was also a political choice. The context in which this choice was made, such as the alternatives that were available and the reasons for their elimination, is instructive for how we perceive the project of European monetary integration. Instead of taking the Maastricht Treaty as the starting point of the legal analysis of the euro, it must be asked why monetary union was agreed in Maastricht.

The euro is not just a unique experiment because it is a shared currency managed by supranational institutions, but also because of its legal basis. There have been monetary unions based on international law before, but the qualities of the legal framework of the EU make the euro unique nonetheless. It is these special qualities of the legal framework of the EU that have led many to consider the EU Treaties as the Constitution of the EU. By using the Maastricht Treaty to insert all of the main rules of EMU into the EU Treaty, the euro became a constitutional currency, managed by a constitutional central bank.

After the fireworks of Maastricht, the euro quickly became part of the day-to-day life of EU law and politics. This included a skirmish between the ECB and the Commission that landed before the CJEU; France and Germany strong-arming their way out of a recommendation over their government deficits; and the Ministers of Finance of the Eurozone meeting together in an informal forum called the Eurogroup. In other words, few people besides the experts cared. Yet it is here where the magic of law happened. A decade and a half after signing a piece of paper, the euro was functioning almost exactly as expected. The ECB was a well-respected independent central bank, the euro a trusted currency.

Then the crisis happened. The founding pillars of EMU were suddenly proven defective and in need of reform. Through a long and painstaking process, politicians, bureaucrats, economists,

political scientists and legal scholars have in small steps re-thought and re-built the rules on the euro. Voters and courts begrudgingly accepted this restructuring process, although it is by no means certain that the euro-crisis is now over. Questions abound over future reforms of the euro and the possibilities under EU law to implement those reforms. Courts and voters might not be so acquiescent during a second wave of reforms.

For each phase of monetary integration, EU primary law appears in the story of monetary integration in a different way, leading to the central question of this thesis: what is the role of EU constitutional law in European monetary integration?

The central question of this thesis is about the *role of law*, not the *rule of law*. Normative analysis takes a back seat in this thesis. This is not because I believe it is not relevant for the euro or for European integration. Constitutional law is intimately connected to big questions about the organisation of European integration, democracy and the rule of law. The euro undoubtedly touches upon these issues, but the main aim of this thesis is to explain, rather than to evaluate. Excellent analyses on the impact of the euro on democracy and the rule of law have moreover already appeared elsewhere.[2] I will sketch some normative implications of the findings of this thesis in the Conclusion. Nor is this thesis concerned with testing general propositions about the roles of constitutional law. Instead, this thesis favours the inductive approach. The goal is to identify instances where EU constitutional law can be seen to have influenced how the euro came to be, what its foundational pillars are and how they developed. The emphasis is on the rules of EMU within their constitutional context.[3] What would you miss in the story of the euro, if you left out EU constitutional law?

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[2] Crum, B. (2013), 'Saving the Euro at the Cost of Democracy?', 51 *Journal of Common Market Studies*; Kilpatrick, C. (2015), 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies*.

[3] Over the years, numerous authors have questioned the wisdom of embedding or keeping embedded the rules of EMU in EU primary law, although usually as passing remark. See for example Snyder, F. (1994), *EMU - Metaphor for European Union? Institutions, Rules and Types of Regulation*, in: Europe after Maastricht: An Ever Closer Union? (R. Dehousse ed.), 99; Smits, R. (2003), *The European Central Bank in the European Constitutional Order*, Eleven International Publishing, 38; Kapteyn, P.J.G. (2005), 'EMU and Central Bank: Chances Missed', 1 *European Constitutional Law Review*, 129. More detailed are Everson, M. (1999), *The Constitutional Law of the Euro? Disciplining European Governance*, in: Legal Framework of the Single European Currency (P.R. Beaumont & N. Walker eds.); Goebel, R.J. (1998), 'European Economic and Monetary Union: Will the EMU Ever Fly?', *Columbia Journal of European Law*, 286-288. In the run-up to the Nice Treaty, there were serious proposals to de-constitutionalize many aspects of EU law, this is discussed in Chapter 4. Recently, Scharpf argued in favour of de-constitutionalization. Scharpf, F.W. (2015), 'After the Crash: A Perspective on Multilevel European Democracy', 21 *European Law Journal*. A

In his book *The Passage to Europe*, Van Middelaar described the creation of an intermediate sphere of European politics.[4] The outer-sphere is where states act according to the principles and traditions of diplomacy, preserving the national interest: the Concert of Europe with its ever-shifting coalitions and pacts. In the inner-sphere, the European institutions reign, with the purpose of creating and protecting the European interest. In between these spheres is the intermediate sphere, where the MS of the EU act *collectively*. Cooperation is organized here along the lines of the relative strength of the MS, but, crucially, also on the basis of the coercive power of membership.[5] In the intermediate sphere the states are condemned to cooperate. Whereas the inner sphere continuously acts through its supranational bodies, but has difficulty representing the European public, it is the opposite for the intermediate sphere. When the MS act collectively there is a strong claim of representation and the act of Treaty-making is the strongest expression of the collective of MS. It is how they exert their control over the form of European integration.[6] The actors of the inner-sphere, the EU institutions, listen because they are bound by the rule of law and because they are themselves dependent on law in their exercise of power.

The creation of the euro through the Maastricht Treaty was therefore not simply a surrender of monetary sovereignty to the institutions of the EU, as these institutions were not at liberty to decide on the future of the euro. They were both empowered and restricted by the rules in the Treaty. Instead, in Maastricht the twelve MS put themselves collectively in charge over the future of the euro.

It is within this political context that the constitutional law of the euro operates. EMU primary law delineates spheres of influences between the Union and the MS, empowers and restricts the institutions of the Union and, lastly, creates the procedures for reform. To a large degree, this is how ordinary EU constitutional law works in most policy areas. The language of law is, at the least, a helpful tool in understanding the nuances in the exercise of power. But in some cases, law can even be understood, not as the object, but also as the agent of integration.[7] The question then is what constitutional law is for EMU. Is EMU primary law different from other

[4] Van Middelaar, L. (2009), *De passage naar Europa: geschiedenis van een begin*, Historische Uitgeverij.
[5] Van Middelaar (2009), 42-43.
[6] Van Middelaar (2009), 47.
[7] Dehousse, R. & J.H.H. Weiler (1990), *The legal dimension*, in: The Dynamics of European Integration (W. Wallace ed.), 243.

areas of EU constitutional law for example because of the specific policy areas[8], because of the particular choices of Maastricht[9] or simply because of the bad luck of the euro-crisis?

Of relatively little importance for this thesis is the ongoing debate whether EU primary law is constitutional law proper.[10] More important are the undisputed characteristics of EU primary law that are, or are not, widely associated with constitutions. The terms EU constitutional law, the EU Treaties and EU primary law are therefore used as synonyms. For example, one broadly shared characteristics of constitutions is that they are rigid, at least relative to ordinary laws, meaning that the institutional hurdles for the adoption of constitutional amendments are higher than for the adoption of ordinary legislation.[11] Within the EU this is undoubtedly the case, as the amendment of the Treaties involves many more veto-players than the adoption of secondary legislation. Especially the requirement that amendments must be ratified by all MS (currently 28) is a significant obstacle. Provisions on EMU were thus embedded within a rigid legal regime. Even in Germany, with its famously independent Bundesbank, the rules on monetary policy were laid down in federal law and therefore subject to the ordinary democratic pressures as resulting from the legislative process. That constitutional law is rigid has the effect that when circumstances change, the text of the constitution cannot be easily updated to take account of the new situation. Constitutional practice might nevertheless evolve, even though the text of the constitution remains unaltered. This means that the political need for flexibility can be accommodated through alternative means than formal amendment, although the requirements for this process are difficult to define in advance. Whereas the lack of rigidity does not necessarily mean that ordinary laws are changed often – with the Bundesbank again being a good example – but neither does rigidity mean inflexibility.

Rigidity is one reason why constitutions, and here the EU Treaties, are a special branch of law, supremacy another.[12] Supremacy means here that constitutions stand above all other legal rules

[8] Tuori and Tuori distinguish the macro-economic constitution of the EU from the micro-economic constitution. Tuori, K. & K. Tuori (2014), *The Eurozone crisis: a constitutional analysis* Cambridge University Press. Also see Everson (1999), 121.
[9] Joerges, C. (2014), '"Brother, can you paradigm?"', 12 *International Journal of Constitutional Law*.
[10] Kumm, M. (2006), 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe has a Constitution Properly So Called', 54 *The American Journal of Comparative Law*.
[11] Brentford, P. (1998), 'Constitutional Aspects of the Independence of the European Central Bank', 47 *International and Comparative Law Quarterly*, 76.
[12] Baquero Cruz, J. (2002), *Between competition and free movement : the economic constitutional law of the European Community*, Hart, 12.

and that those lower norms must be in conformity with the constitution.[13] As supreme rules, constitutions can construct the basic pillars of government by creating institutions and by attributing and limiting competences. For the EU, the principle of supremacy is disputed, but this mainly concerns the question where EU law ends and national (constitutional) law begins. What is relatively undisputed is the supremacy of EU primary law within the domain of EU law. EU institutions must respect the limits of their competences as laid down in the EU Treaties. Competences not transferred to the Union remain with the MS.[14] Any provision transferring a competence to the Union must therefore also be read as a restriction upon the competences of the Union. The Maastricht Treaty not only meant integration, but also limits to integration. This also means that the success of the Maastricht Treaty can be viewed in light of whether it was able to prevent integration.

One aspect in which EU constitutional law can be seen to differ from the constitutions of federally organized states is that an amendment requires the consent of all MS. As the euro was introduced on the basis of EU primary law, this meant that MS wanting to stay out of the euro could demand a special status and even block the coming into force of the Maastricht Treaty. This affected not only the membership of the Eurozone, but also the control over the legal framework of the euro. Insofar future reforms of the legal framework of the euro necessitate amendments to EU primary law, also the MS not participating in the euro have a veto.

That constitutional law is a special form of law is also noticeable in the interpretation of the constitutional provisions. As supreme law of the land, constitutional provisions often relate to the core purpose of the state, which then also shapes their interpretation.[15] Moreover, as rigid rules are not subject to the ordinary democratic process, constitutional provisions are often interpreted in light of a specific theory justifying their rigidity. Textually similar provisions can be interpreted differently, depending on where they are found, with (EU) constitutional law being a rather peculiar place. Does it matter for the no bailout clause that it is part of EU constitutional law?

The most visible appearance of constitutional law is when constitutional questions are answered by courts, especially by highest courts or constitutional courts. Although legal

[13] This does not take into account the relationship between other aspects of international law and EU law.
[14] Art 4 TEU.
[15] Graber, M.A. (2014), *A new introduction to American constitutionalism*, Oxford University Press, ch 4.

academics are often a little too fixated on the courts, it is undeniably the case that constitutional adjudication has become an indispensable part of modern governance. Few policy areas remain outside the scope of constitutional adjudication, but monetary policy was always a little different in this regard. Core questions about monetary policy rarely came up in court, let alone as part of a constitutional dispute. However, first in 2003 and then again in 2015, the Court of Justice of the European Union (hereafter referred to as CJEU or Court) had to settle constitutional disputes on the independence and mandate of the ECB. What caused this involvement of the judiciary in monetary matters and is it here to stay? Examining the role of EU constitutional law for EMU means considering the possibility that it was the constitutionalization of EMU that was the primary cause behind the judicialization. By making the rules on monetary policy rigid and supreme, the usual mechanisms to resolve conflicts over monetary policy disappeared, thus making the judicialization of conflicts inevitable. I suggest to study this hypothesis in light of four other possible causes of the judicialization of EMU.[16] Firstly, it could be argued that monetary policy was bound to become entangled in constitutional disputes anyway, regardless of the euro. This assumes that the lack of judicial involvement until the euro was not due to any structural features. Secondly, the cause of the judicialization might be the European Unionization of monetary policy. In the EU, judicial/constitutional adjudication is common in many policy areas and the CJEU has played an active role in promoting integration. Thirdly, it could be argued that the particular shape of EMU lies behind the judicialization, for example due to an incoherent vertical division of powers or the flawed logic of the no bailout clause. Lastly, the judicialization could perhaps be seen to have been caused by the euro-crisis. The argument then is that the cases from the early 2000's actually set the course for judicial dis-involvement, and that this path was only disrupted during the crisis. Drawing boundaries between these five causes is no easy task. In light of the inductive approach of this thesis, there will be no attempt to test the different hypotheses individually. Instead of keeping these five different explanations apart, the goal is to see how they are connected. For example, did the constitutionalization of EMU have an effect on individual provisions of EMU in light of any possible role of the CJEU? Or was the strong constitutional role of the CJEU in the EU one of the reasons why EMU had to be embedded in EU primary law?

[16] See for an overview of the different causes of the judicialization of politics, Hirschl, R. (2008), *The Judicialization of Politics*, in: The Oxford Handbook of Law and Politics (G.A. Caldeira, et al. eds.).

This brings to the fore another methodological aspect of this thesis, namely that the question of the role of constitutional law for European monetary integration is answered by taking into account a relatively long period of time. One of the positive effects of looking at EMU primary law over a longer period of time is the way constitutional conflicts (with or without the involvement of the Court) can be analysed without getting caught in the heat of battle. There is no need to declare sides anymore. This allows the intellectual focus to shift to the constitutional context in which the conflicts arose. Moreover, it brings to light shifts in the interpretation or application of law that are difficult to detect at a single moment. The aim is then to see the role of EMU constitutional law in the different phases of monetary integration, from the moment of the first attempts at monetary union in the 1960's up to and including the euro-crisis.

The inspiration for the historical approach of this thesis comes from *A New Introduction to American Constitutionalism* by Graber, which takes a historical-institutionalist approach to constitutional law.[17] Central to his approach are the claims that "constitutional meaning would often be forged through ordinary politics" and that the "politics of constitutional meaning (…) nevertheless is structured by processes designed by constitutional text and constitutional precedent".[18] The separation between law and politics might thus not be as sharp as it sometimes appears. The appeal of this approach is that it neither assumes law to be all-powerful, nor completely powerless. Judges and politicians do not always follow the law just because it is law. In many cases, other considerations than those of a purely legal nature do come into play. But neither are judges and politicians completely free to do as they like. The point is then to consider the development of a constitutional system over time.[19] For example, whereas a judicial decision can be heavily disputed at a specific moment in time (with the obligatory accusations that the Court is substituting law with politics), at another moment, the precedent set by the court might be widely accepted *as law*, quietly forming the legal context

[17] Graber (2014). Also see Smith, R.M. (2008), *Historical Institutionalism and the Study of Law*, in: The Oxford Handbook of Law and Politics (G.A. Caldeira, et al. eds.).
[18] Graber (2014), 214.
[19] For European integration studies, historical-institutionalism has proved beneficial, so far mainly in the field of political science, starting with Pierson, P. (1998), *The Path to Integration: A Historical-Institutionalist Analysis*, in: European Integration and Supranational Governance (W. Sandholtz & A.S. Sweet eds.). For its use to study the euro, see Verdun, A. (2007), *A Historical Institutionalist Analysis of the road to Economic and Monetary Union: A Journey With Many Crossroads*, in: Making history: European integration and institutional change at fifty (S. Meunier & K.R. McNamara eds.); Gocaj, L. & S. Meunier (2013), 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis', 35 *European Integration*.

in which another constitutional rule is challenged. Hence, in a particular constitutional conflict, law is not only the rule that is being violated, interpreted or amended, law is also the set of rules that determine which political actors get to be involved in the conflict, how a conflict lands before the court and what the possibilities are to overrule a court.[20]

For the euro, this means first and foremost questioning the legal environment in which the rules of the euro would be embedded. It does not suffice to note that the choice for Maastricht was a 'political choice'. Even though there was no legal rule that required that the euro be created through an EU Treaty (at least not until the Single European Act), this does not mean law did not play a role in shaping how that decision was made. Just as beliefs concerning economics and politics played a role in the Maastricht, so did considerations about law. In turn, when the decision for the legal basis of the euro was made, this affected how specific rules were negotiated, based on the requirements or possibilities that EU constitutional law offers. For the analysis of the euro-crisis it is important to note the crucial role of non-judicial actors in (re-)interpreting EMU law. Also in the assessment of the actions of these political actors it is important to realize that (constitutional) law neither fully restrict nor leaves completely open the scope of action that can be undertaken. Some rules are easier to break than others; some actors invoke a legal rule only at a specific moment in time.

Graber dispels the notion that politics dominates law, mainly by showing how law already shapes the arena in which politics plays out. For EMU, there is another factor to consider, namely the omnipresence of economics in the analysis of the euro(-crisis). It is certainly tempting to view the rules of Maastricht mainly from an economics perspective. Is the Maastricht Treaty the embodiment of a neo-liberal or ordo-liberal economic order? The problem with *starting* the analysis with this question is that it does not take seriously the legal nature of the Maastricht Treaty. The negotiations of Maastricht were not about which economics textbook to use, but about finding appropriate legal language that might, or might not, allow for different economic interpretations. Parliaments ratified a treaty, not a set of economic beliefs. Hence, law must be the starting point for the analysis of the Maastricht Treaty. This is not a plea to disregard economics, but rather to take law seriously.[21]

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[20] See for a good overview of the use of law by political scientists and economists Hodson, D. (2015), 'Law and the Euro Crisis: A View from Political Economy', 2015/16 *EUI Working Paper LAW*.
[21] Joerges, C. (1996), 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration', 2 *European Law Journal*.

Absent in this thesis is a critical analysis of the role of the Bundesverfassungsgericht, or of multi-level constitutionalism in general in the euro. The Bundesverfassungericht plays a minor role in this thesis, only appearing on stage in chapter 5, on the euro-crisis. The main reason it does not make an appearance earlier is timing: the radical Maastricht *Urteil* came only after the negotiations of the Maastricht Treaty had been concluded. As such, it had no influence on the Treaty itself. For the further development of the euro before the euro-crisis, the influence of the Bundesverfassungsgericht appears marginal or indirect, through its effects on EU constitutional law as a whole.

This thesis will proceed as follows: the first chapter examines the use of constitutional law in the regulation of monetary policy prior to the euro on the national, European and international level. On the international level, few clear legal rules exist on how states should conduct their (external) monetary affairs since the collapse of the Bretton Woods regime in the 1970's. On the European level, monetary integration took off after the collapse of the Bretton Woods regime, but with a peculiar relationship with the Community legal order. Although in many key aspects European monetary integration was embedded in the European Communities, the important (legal) rules were often kept outside the Community legal order. On the level of the MS, the independence of central banks was not a topic regulated by constitutional law. On all three levels, monetary affairs were rarely a topic of constitutional concern. If it had been up to the Werner Committee of 1970, this would have most likely also been the case for the euro.

The second chapter analyses the choice for the Maastricht Treaty as the basis for the euro by comparing it with alternative legal bases. Chapter 1 concludes that constitutional law and monetary affairs were mostly unrelated topics. Chapter 2 is then about how a constitutional euro was almost inevitable. To understand this shift, the legal bases are examined on three main topics: who is authorized to make the decision, what special characteristics does the legal basis offer and who is made responsible for the policy area over the long term. A possible legal basis for the euro was the infamous flexibility clause of the EEC Treaty. This was possible considering that the main argument for the euro was that it strengthened the internal market. The euro would then be introduced without ratification by the MS. Another possibility was to introduce the euro through a broad enabling clause into the Treaty, giving the EU secondary legislator the responsibility for the single currency by way of express authorization of the MS. This was the route for monetary union suggested by Spinelli's Draft Treaty establishing the

European Union. Both options were effectively rejected by the Single European Act. The Delors Report then made the substantive argument that the rules of EMU must be embedded in the Treaty. This had the political benefit of keeping the MS collectively in control over the euro. A last option would have been to introduce monetary union, or another form of deep monetary cooperation, through an international treaty or as fourth pillar of what would be the EU. The assumption was that it would be difficult to create an independent central bank through this route.

The third chapter asks how EU constitutional law can be seen to have influenced the rules of EMU as they were laid down in the Maastricht Treaty. How does the constitutionality of the rules of EMU affect their interpretation or the way they were negotiated? For the rules on the membership of the Eurozone, it was relevant that all MS who ratified the Maastricht Treaty signalled their willingness to join EMU. The obligation to join EMU therefore did not require an enforcement mechanism. For the rules on ECB independence it is firstly important to consider what EU constitutional law would not offer, in comparison to national constitutions, namely a government responsible for economic policy. This had the effect of emphasizing legal rules as the main instrument of regulating the institutional relations of the ECB. The constitutional effect on the rules of economic governance is mainly that the process through which decisions are made on the EU level is geared towards protecting the discretion of MS. Lastly, the theoretical background and negotiating history of the no bailout clause are discussed. The question here is whether the constitutional nature of the clause can help explain the ambiguity and the name of the clause.

In the fourth chapter, we see the constitutional rules of EMU in action during the period from the ratification of the Maastricht Treaty until the start of the euro-crisis in 2009. The question is whether during this period the allocation of constitutional authority remained intact. In short, did the constitutional rules of Maastricht function as expected? In this light, the transformation of the German proposal for a strict stability pact into two unambitious regulations (the Stability and Growth Pact) must be seen as an important success of the Maastricht Treaty. The CJEU subsequently had little problems applying a plain reading of the rules on economic governance, thus confirming the allocation of responsibilities under the Treaty. In another case before the CJEU, the question was what the exact constitutional status of the ECB was within the Union. This question was first raised in an academic setting and was only settled by the entry into force of the Lisbon Treaty. However, the transformation of the ECB into an institution of the

Union hardly affected its institutional relations. It turned out that due to the detailed description of the rules on monetary policy in the Treaty, the question on the status of the ECB was of secondary importance.

The euro-crisis is covered in the last chapter. Whereas Chapter 4 showed the politics involved in maintaining the stability of the legal framework of the euro, Chapter 5 shows to what extent euro-crisis law was given shape by the application of constitutional law. The point is not to doubt the political character of the many decisions of the euro-crisis, but to show that these decisions were made in a context that was shaped by EMU primary law. Euro-crisis law was not written on a blank slate, but responded to the opportunities, weaknesses and ambiguities already present in the Treaties. For the bailouts, this meant that a comprehensive narrative that justified the bailouts in light of the no bailout clause slowly emerged after the first set of measures. The CJEU then sanctioned the political consensus on the new interpretation of the no bailout clause. For the ECB, two parts of the crisis are discussed, sovereign bond purchases and emergency liquidity assistance. The former made the headlines and led to the first preliminary reference from the Bundesverfassungsgericht, the latter was a much less known issue about the division of labour between the ECB and the national central banks. The point of discussing the second aspect is to show that beyond the well-known disputes, legal ambiguities are settled simply by an institution taking a position. The last section is on the discretion of the secondary legislator in economic governance.

Lastly, a note on the title of this thesis. At its core, money is a social construction which is connected to the foundations of society, and in modern times, the state.[22] This explains, at least in part, the use of the phrase "in God we trust" on US banknotes. God is seen as the protector of American society and the bedrock upon which solid money is built. Whether God actually protects the value of the US dollar is of secondary importance. The decision not to include a question mark in the title of this thesis follows the same line of reasoning.[23]

[22] Ingham, G. (2004), *The Nature of Money*, Polity Press.
[23] The title of this thesis is moreover inspired by the doctoral thesis of Miguel Maduro. Maduro, M.P. (1998), *We the court: the European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty*, Hart.

Chapter 1
Monetary policy and constitutional law before the euro

Introduction

This first chapter sets the background against which, in the next chapter, the decision to create the euro by way of extensive EU treaty is viewed. It does so by taking a constitutional perspective on developments in three areas: international monetary cooperation, European monetary integration and national monetary policy. In other words, this chapter surveys how 'things were done' before the euro. For each of the three areas, the central question is whether, over time, elements of constitutionalization can be seen. In each of the three fields the terms 'constitutional' and 'constitutionalization' have different meanings, or at least different connotations. This does not undercut the relevance of the exercise performed here, as the legal framework of the euro incorporates aspects of each of these three fields. It does require that the central question is approached differently in each of the fields. In the international arena, the question is firstly to what extent monetary affairs have become subject to legal rules. Secondly, it is whether these international rules display characteristics commonly associated with constitutional law. In the European arena, where the EEC as a legal regime became slowly constitutionalized over time, the question is to what extent the attempts at European monetary integration depended on the EEC legal regime. The question is perhaps most straightforward in the national arena, namely to what extent national constitutional law regulated monetary affairs, including the position of the central bank.

The purpose of this chapter is not to catalogue or discuss all the legal rules in place on the three different levels. Nor is it to analyze the potential of law in organizing monetary affairs. On that, there are numerous writings. Baltensperger and Cottier have analyzed the marginal role of law on the international level on monetary affairs compared to international trade law.[24] A normative approach on the failure of international monetary law to secure public goods is

[24] Baltensperger, E. & T. Cottier (2010), 'The Role of International Law in Monetary Affairs', 13 *Journal of International Economic Law*, 911.

provided by Petersmann.[25] On the European level, the work of Snyder stands out in that it has provided both a long term approach to European monetary integration and an analysis of the forms of law being used.[26] Critical commentary on the twists and turns of European monetary integration has been provided by Louis.[27] On the national level, constitutional scholarship on monetary affairs is scarce and primarily focused on the exegesis of individual provisions.[28] There is of course a lively strand of literature engaging with the intricate relationship between states and money, with the state-theory of money claiming that money is the offspring of the legal system of a state.[29] The focus in this literature is on the interjection of the state into private relations and less on the opportunities for constitutional law to regulate the behavior of the state.

At issue are legal rules concerning internal and external monetary policy. In international cooperation, such rules are often accompanied by arrangements on current account convertibility and/or short term support mechanisms. Where relevant, these arrangements are discussed briefly. Not discussed here are the developments concerning free movement of capital. Although (the lack of) free movement of capital is a crucial factor for the functioning of exchange rate regimes, its legal rules are often not directly connected to the exchange rate regime.[30]

1.1 International Monetary Cooperation

[25] Petersmann, E.-U. (2014), *Framework of analysis: towards multilayered governance in monetary affairs*, in: The Rule of Law in Monetary Affairs (T. Cottier, et al. eds.).
[26] Snyder (1994); Snyder, F. (1998), 'EMU Revisited: Are we Making a Constitution? What Constitution are we Making?', 98 *EUI Working Paper Law*. Also see the work by Lastra, discussing both international cooperation and European integration. Lastra, R.M. (2006), *Legal foundations of international monetary stability*, Oxford University Press.
[27] Louis, J.-V. (1979), 'Het Europees Monetair Stelsel', 27 *Sociaal Economisch Weekblad*, 441.
[28] What is especially lacking in this regard is a comparative constitutional analysis of constitutional provisions on monetary affairs.
[29] For an overview of these debates, see Ingham (2004). On the relation between these debates and the euro, see Otero-Iglesias, M. (2014), 'Stateless Euro: The Euro Crisis and the Revenge of the Chartalist Theory of Money', *Journal of Common Market Studies*; Goodhart, C.A.E. (1998), 'The two concepts of money: implications for the analysis of optimal currency areas', 14 *European Journal of Political Economy*.
[30] McNamara, K.R. (1998), *The currency of ideas: monetary politics in the European Union*, Cornell University Press. For a legal perspective see Smits, R. (1983), 'Some Aspects of the Monetary Law of the European Communities', 10 *Legal Issues of Economic Integration*, 39.

1.1.1 The Gold Standard

Money has a long and fascinating history.[31] The history of international monetary cooperation goes a little less far back, with books on the topic usually taking the organic development of the gold standard in the nineteenth century as a starting point.[32] By organic, it is meant that the gold standard developed over time (and with numerous exceptions) as countries unilaterally decided to adopt it. Hence, the gold standard was not founded upon international law. Although several international conferences were convened to improve the gold standard, these did not lead to a centralized regime of coordination based on binding international agreements.[33] As Lowenfeld put it: *"*prior to the end of World War II no international legal regime governed the conduct of states with respect to monetary affairs."[34] This lack of an international legal regime corresponded to a wide discretion for countries to determine their monetary laws and policies under international law: "a State is free to manipulate the value of its currency without thereby engaging international responsibility".[35] The relative success of the gold standard (at least prior to the First World War) therefore cannot be explained by reference to international law or legal enforcement-mechanisms. Countries chose to abide by the gold standard because of the (perceived) benefits it brought to specific groups. One of these benefits was exchange rate stability.

The gold standard meant that the convertibility of currencies to gold in specified ratios was guaranteed, often on the basis of national laws.[36] The exchange rates between currencies thereby became fixed. Under the gold standard, national monetary authorities had to behave in accordance with the 'rules of the game', meaning to raise/lower interest rates in order to correct a deficit/surplus on the balance of payments.[37] After the First World War, when it became clear that the rules of the game, and the economic costs they imposed, were becoming less acceptable

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[31] Ingham (2004).
[32] Lastra (2006); Eichengreen, B.J. (2008), *Globalizing capital: a history of the international monetary system*, Princeton University Press.
[33] An example is the Tripartite Agreement between the US, France and the U.K. in 1936. See Steil, B. (2013), *The battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the making of a new world order*, Princeton University Press, 32-33.
[34] Lowenfeld, A.F. (2010), 'The International Monetary System: A Look Back Over Seven Decades', 13 *Journal of International Economic Law*, 576.
[35] See Shuster, M.R. (1973), *The public international law of money*, Clarendon Press. The quote reflects the pre-IMF period. An authoritative decision by the Permanent Court of International Justice in 1929 stated similarly: "it is indeed a generally accepted principle that a state is entitled to regulate its own currency". PCIJ, judgment of 12 July 1929, *Serbian Loans,* PCIJ Series A no 20.
[36] A good introduction is found in Eichengreen (2008), ch. 2.
[37] Wilsher, D. (2014), 'Law and the Financial Crisis: Searching for Europe's New Gold Standard', 20 *European Law Journal*.

electorally, the gold standard dissolved.[38] There were no international legal rules that aimed to prevent this turn of events and the national rules upon which the gold standard was based were easily suspended or amended.

The absence of an international legal regime did not mean international monetary affairs occurred in a legal vacuum. Aside from the national rules, mentioned above, countries made bilateral agreements that related to exchange rates and exchange restrictions.[39] Most notable is the Latin Monetary Union, based on a treaty between France, Italy, Belgium and Switzerland.[40] Moreover, central banks were willing to support each other by means of extending loans in times of crises.[41] Nevertheless, these arrangements were limited in scope and ambition, and did not attempt to regulate the gold standard as such.[42]

As will be discussed more extensively in the next section, central banks have been important players in European monetary integration. It is important to point out here that central banks in the eighteenth, nineteenth and the first half of the twentieth century were different from the institutions we know today. In most cases, central banks were private banks that had been chartered by the (central) government to act as the bank to the government, instead of today, predominantly as bank of the banks.[43] This not only meant that the relation between the government and central bank was less predicated on the issue of control/independence over monetary policy, but also that central banks played a different and less pronounced role internationally. In 1930, the Bank for International Settlements (BIS) was established to facilitate German reparations payments, thereby institutionalizing for the first-time international central bank cooperation.[44] The BIS found a new purpose after the Second World

[38] James, H. (2012), *Making the European monetary union: the role of the Committee of Central Bank Governors and the origins of the European Central Bank*, Harvard University Press, ch 3.
[39] Shuster (1973), ch V.
[40] Flandreau, M. (2000), 'The economics and politics of monetary unions: a reassessment of the Latin Monetary Union, 1865–71', 7 *Financial History Review*.
[41] Wilsher (2014).
[42] Flandreau (2000), 42-43.
[43] Goodhart, C.A.E. (1988), *The evolution of central banks*, MIT Press; Uittenbogaard, R. (2015), *Evolution of Central Banking? De Nederlandsche Bank 1814 - 1852*, Springer, 27-45 & 62-63.
[44] Fittingly, the BIS was of a mixed legal nature. In January 1930, the governments of Germany, France, Belgium, the U.K., Italy, Japan and Switzerland signed a Convention whereby Switzerland undertook to grant the BIS its Constituent Charter, the text of which was annexed to the Convention. The BIS was then chartered under Swiss law, with the central banks of the abovementioned countries as shareholders. Hudson, M.O. (1930), 'The Bank for International Settlements', 24 *The American Journal of International Law*. Also see Steil (2013), 226-228.

War as 'bank of the central banks' and as talking shop for most of the world's central banks, for example, hosting the influential Basel Committee on Banking Supervision.

1.1.2 Bretton Woods and the IMF

Towards the end of the Second World War, Allied countries began to contemplate the post-war organization of the international arena. International cooperation was to be institutionalized in order to "win the peace".[45] It was evident to the negotiators of the Bretton Woods Conference in 1944, attended by 44 countries, that the competitive devaluations during the Great Depression had contributed to the breakdown of international trade and thus to the economic malaise which led to war.[46] Despite this broadly shared analysis, the driving countries behind the Bretton Woods Conference, the US and the UK, had divergent economic and geo-political interests, for example with regard to trade in the British Empire. [47]

The Bretton Woods conference resulted in two treaties, which established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (later named the World Bank). Of main importance here is the IMF.[48] Article IV of the IMF's Articles of Agreement expressed the core of the Bretton Woods regime: "The par value of the currency of each member shall be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944." Countries could apply for a change in the par value of its currency, but only in order to "correct a fundamental disequilibrium". Concurrence of the Fund was required, but the discretion to object was circumscribed. The Bretton Woods regime was thus a gold-dollar standard with fixed, but adjustable, exchange rates. Other currencies were expressed in terms of dollars and the dollar was expressed in gold, thus establishing the dominance of the dollar in global monetary affairs.[49]

In order for the par value regime to function in combination with a (limited) liberalization of trade, it was paramount that countries allowed for current-account convertibility of their

[45] Lastra (2006), ch 12.
[46] See Myrus, R. (1994), 'From Bretton Woods to Brussels: A Legal Analysis of the Exchange-Rate Arrangements of the International Monetary Fund and the European Community', 62 *Fordham Law Review*, fn 13.
[47] Steil (2013), ch 5.
[48] See for the development of the IMF, Gold, J. (1984), 'Public International Law in the International Monetary System', 38 *Southwestern Law Journal*.
[49] Art IV Sec. 4(b) Articles of Agreement. Eichengreen, B. (2011), *Exorbitant Privilege: The Rise and Fall of the Dollar*, Oxford University Press, 3-4.

currencies (not to be confused with free movement of capital).[50] As European countries kept their dollar reserves under strict control during reconstruction, they limited current-account convertibility with the dollar until the end of the 1950's, as was allowed under the transitional provisions of the Articles of Agreements.[51]

The exchange rate regime was managed by the IMF. Another task of the IMF is the provision of monetary assistance during (currency) crises in the form of loans.[52] The maximum amount of assistance is determined by the quota for a country, which also determines voting strength and the amount of gold that has to be deposited at the fund. The procedure by which assistance would be dispensed was – of course – a contentious topic, with likely debtors arguing in favor of automaticity. Although the Articles of Agreement did not fully resolve the issue[53], policy conditionality has become a standard (but much disputed) aspect of IMF assistance.[54]

The par value system collapsed in the beginning of the 1970's.[55] After instability first manifested itself in strong pressure on the German Deutschmark, which temporarily floated, the US unilaterally suspended dollar-gold convertibility in August 1971. The second amendment to the Articles of Agreement (1978) eventually scrapped the obligatory par value regime and officially allowed countries to float their currencies: "the fundamental rule was replaced by a non-rule".[56] Some legal obligations remained in place, and the IMF adapted as an international body to its main role as lender of last resort to financially troubled countries.[57]

The Bretton Woods monetary regime had no precedent and no successor. For the first and only time, a set of international legal rules limited the discretion of a large group of countries to set

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[50] Art VIII Articles of Agreement. Simmons, B.A. (2000), 'The Legalization of International Monetary Affairs', 54 *International Organization*, 580.
[51] Art XIV Section 2 Articles of Agreement. Lastra notes that the move towards full convertibility occurred *de facto* in 1958, but *de jure* only in 1961. Lastra (2006), 177.
[52] Art V Articles of Agreement. Such 'loans' were in fact possibilities for a country to buy dollars with its own currency, with the obligation to buy back its own currency later.
[53] Lowenfeld (2010), 579.
[54] Lastra, R.M. (2000), 'The International Monetary Fund in Historical Perspective', 3 *Journal of International Economic Law*
[55] James (2012), 38; Eichengreen (2008), 114-115; Steil (2013), 333-335; McNamara (1998), 93-96.
[56] Lowenfeld (2010), 582. For a description of the amendment, see Gold (1984), 817-823.
[57] Baltensperger & Cottier (2010), 927. Although the new art IV(3) of the Articles of Agreement prohibits the manipulation of exchange rates in order to gain an unfair competitive advantage, Baltensperger and Cottier point to the lack of procedural avenues for the implementation of these measures. Baltensperger & Cottier (2010), 927; Cottier, T., et al. (2014), *Introduction and Overview*, in: The Rule of Law in Monetary Affairs (T. Cottier, et al. eds.); Petersmann (2014), 436; Lastra (2006).

the exchange rate of their currency. Participation in the Bretton Woods regime grew to over 100 countries. The regime was more than just legal rules, as the IMF became a renowned international institution. Overall, this suggests a very weak form of constitutionalization. According to De Wet, the constitutionalization of international law "could be summarized as an attempt to exercise legal control over politics within the international legal order itself".[58] In this light, the legal regime of Bretton Woods showed few signs that it had been able to constrain politics over a longer period. This is perhaps best illustrated by the response to the decisions of the US that ended the Bretton Woods regime. The general response to the unilateral decision of the US was not to dwell over the breach of the obligations. Instead, intellectual attention was diverted to the question how to adjust the legal framework to the new situation.[59] The fact that the US had violated its international *legal* obligations was not relevant for the debate.[60] Especially compared to the euro-crisis, this silence is remarkable. It suggests that there never was a realistic expectation that the core of the legal regime of Bretton Woods would be applied against its main benefactor.

1.2 European Monetary Integration

Books about European monetary integration often invoke the image of a road to show that the process of monetary integration involved many different steps.[61] It was a *long* road. One of the key characteristics of this road was that it ran parallel to the EEC, what we might call the highway of European integration. This section explores the legal connections between the highway of European integration and the parallel dirt road of European monetary integration.[62]

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[58] De Wet, E. (2012), *The Constitutionalization of Public International Law*, in: The Oxford Handbook of Comparative Constitutional Law (M. Rosenfeld & A. Sajó eds.), 1213.
[59] Lowenfeld (2010), 582.
[60] The unilateral decision to suspend gold convertibility was not contrary to the Articles of Agreement. Severing the tie with gold had the effect of activating the obligation upon the US to intervene in the exchange markets to stabilize the dollar vis-à-vis the other currencies. It was this obligation that was subsequently violated by the US See Myrus (1994), 2105; Gold (1984), 817.
[61] Dyson, K.H.F. & K. Featherstone (1999), *The road to Maastricht: negotiating Economic and Monetary Union*, Oxford University Press; Szász, A. (1999), *The road to European Monetary Union: a political and economic history*, Macmillan; Van Riel, B. & A. Metten (2000), *De keuzes van Maastricht: De hobbelige weg naarde EMU*, Van Gorcum.
[62] Art 288 TFEU currently defines as legal acts of the union also recommendations and opinion, even though these have no binding force. For the purpose of this chapter, non-binding acts are not considered to be of a legal nature. For example, Council resolutions are therefore not considered here to rely on the legal framework of the EEC, even though the Council is itself a construction of the EEC Treaty.

As is well known, the EEC started to display constitutional characteristics soon after its inception.[63] Eventually, the CJEU even referred to the Treaty as a "constitutional charter".[64] References to the EEC Treaty as a form of constitutional law could refer to two aspects. Firstly, the EEC Treaty can simply be seen as the founding document that creates the institutions and attributes powers to these institutions. Secondly, seeing the EEC Treaty as a form of constitution can relate to the specific qualities of the EEC legal order in relation to the national legal orders. In this context, constitutionalization refers to the process whereby the EEC distinguishes itself from (ordinary) international law.[65] The constitutionality of the EEC Treaty is both relevant in the context of the relations with the national legal orders and for the division of powers of the institutions. The question about extent to which the road to monetary integration relied on the constitutional characteristics of the EEC Treaty must take account of both aspects.

1.2.1 The EEC Treaty

When the EEC came into existence in 1957, it did not arrive on an internationally "empty stage".[66] Most relevant here is, of course, the Bretton Woods regime, as described above.[67] But many other initiatives had been taken post World War II to stimulate monetary cooperation and/or international trade. For example, the Netherlands, Belgium and Luxembourg had been developing their own economic union. When the Benelux-agreement was finalized in February 1958, the three countries agreed that exchange rate changes of either of their currencies (in the context of the Bretton Woods regime) required common accord.[68] Trade was furthermore stimulated by improving current account convertibility through the European Payments Union (replaced in 1958 by the European Monetary Agreement). The European Payments Union replaced bilateral agreements in Western-Europe with a multilateral settlement and credit mechanism to regulate cross-border payments, based on a working capital of 300 million

[63] Weiler, J.H.H. (1991), 'The Transformation of Europe', 100 *Yale Law Yournal*, 2413.
[64] CJEU, Case 294/83, *Les Verts*, EU:C:1986:166.
[65] Weiler (1991), 2413.
[66] Patel, K.K. (2013), 'Provincialising European union: Co-operation and Integration in Europe in a Historical Perspective', 22 *Contemporary European History*, 651. This was also perceived as such at the time. Both the Bretton Woods agreement and the EPU are for example mentioned in the Dutch explanatory memorandum for ratification of the Treaty of Rome. Parliamentary Documents of the Second Chamber of Parliament of the Netherlands, 1956-1957, 4725, No. 3, 28-29, available at www.statengeneraaldigitaal.nl.
[67] Smits, R. (1997), *The European Central Bank: institutional aspects*, Kluwer Law International, 11.
[68] Art 12 Benelux-Agreement.

dollar.[69] Prior to the EEC Treaty, the ECSC Treaty from 1950 had also included a limited form of free movement of payments.[70]

The EEC Treaty was of course influenced by this international and European context. Most importantly, the EEC Treaty did not have to regulate exchange rate policies directly. Hence, it merely required in article 107 that "[e]ach Member State shall treat its policy with regard to exchange rates as a matter of common interest."[71] Other provisions also complemented the Bretton Woods regime, for example on balance of payments support and economic policy coordination.

Articles 104 and 105 EEC described that the MS had to pursue the objective of external economic equilibrium and to that effect should coordinate their (monetary) policies. Cooperation was institutionalized on the basis article 105(2) EEC, which created the Monetary Committee (MC), consisting of two members from every MS (from their Ministry of Finance and the central bank) and the Commission.[72] The main task of the MC was to prepare meetings of the Council. In addition, in 1964, a Council Decision, also based on article 105 EEC, created a platform specifically for central bank cooperation, the Committee of Governors of the Central Banks of the European Economic Community (CoG).[73] As European monetary integration progressed, the CoG became the central hub for the central bankers of the EEC, although not necessarily for the adoption of legal agreements. For example, in 1969, the central banks of the MS decided on a system of Short Term Monetary Support.[74] The decision was adopted outside

[69] Ungerer, H. (1997), *A concise history of European monetary integration: from EPU to EMU*, Quorum Books, 27. Explanatory memorandum to the bill ratifying the EMA for the Netherlands. Parliamentary Documents of the Second Chamber of Parliament of the Netherlands, 1956, 4450, 1.
[70] Art 52 ECSC Treaty.
[71] CJEU, Joined Cases 9 and 11/71, *Compagnie d'approvisionnement* v. *Commission,* EU:C:1972:52: 'It is clear from Article 107 that it is for each Member State to decide upon any alteration in the rate of exchange of its currency under the conditions laid down by that provision.' Also see CJEU, Cases 9 & 10/73, *Schlüter* v. *Hautpzollamt Lörrach*, EU:C:1973:110, para 39: "One of the cardinal aims of the Treaty is to create a single economic region, free from internal restrictions … This requires the parities between the currencies of the various Member States to remain fixed; as soon as this requirements ceases to be met, the process of integration envisaged by the Treaty will be retarded or prejudiced".
[72] Council Decision of 18 March 1958 drawing up the Rules governing the Monetary Committee, OJ 390/58. Official documents relating to monetary policy in the early years of the EEC can be found in the Compendium of Community Monetary Texts 1974 found at: http://aei.pitt.edu/5886/. Amtenbrink, F. (2012), *Denationalizing Monetary Policy: Reflections on 60 Years of European Monetary Integration*, in: From Single Market to Economic Union: Essays in Memory of John A. Usher (N.N. Shuibhne & L.W. Gormley eds.), 17-18.
[73] Ryan, M.H. (1978), 'The Treaty of Rome and Monetary Policy in the European Community', 10 *Ottawa Law Review*, 539. Also see James (2012), 43-52.
[74] Agreement Setting Up a System of Short-Term Monetary Support Among the Central Banks of the Member States of the European Economic Community, Compendium of Community Monetary Texts 1974, 56.

the EEC legal order as an informal agreement (foreshadowing later arrangements by the central bankers).

Simultaneously with the creation of the CoG, the MS made an informal declaration promising to consult each other and the Commission through the MC in case of exchange rate change.[75] A Council Decision furthermore provided that consultations should take place in the MC "in respect of any important decision or position taken by Member States in the field of international monetary relations".[76] Both the informal declaration and the binding Council decision are directed towards actions by the MS in the IMF. That two instruments were needed (the famous 'switching of hats') shows the delicate balance that was struck between the desire for deeper coordination and the preferred discretion retained to unilaterally act towards the IMF. This delicate balance was subsequently ignored when France devalued the franc and Germany briefly floated the Deutschmark in 1969, both doing so without prior EEC consultation.[77]

Coordination of economic policies was not limited to balance of payments and currency issues. Article 103 EEC provided a more general option for coordination of "policy relating to economic trends", i.e. conjunctural policy. On this basis, the Council adopted a decision in 1960, creating an Conjunctural Policy Committee and obliging the MS to keep "the Commission informed of the broad lines of any project which may affect the conjunctural situation of the Member States."[78]

In addition to the provisions on coordination and exchange rates, the EEC Treaty also provided for the possibility of the provision of emergency assistance in case of balance of payments problems (article 108 EEC) and the adoption of emergency measures by a MS in balance of payments crisis (article 109 EEC).[79] These emergency measures would still be subject to restrictions, as France found out in 1968 after it set a preferential discount rate for exports in

[75] Declaration of 8 May 1964 of the Representatives of the Governments of the Member States of the European Economic Community met in the Council, Compendium of Community Monetary Texts 1974.
[76] Council Decision (64/301/EEC) of 8 May 1964 on cooperation between Member States in the field of international monetary relations, OJ 1207/64.
[77] Norton, J.J. & C.E. Hansen (1976), 'Reflections Upon Economic and Monetary Union in the European Community', 11 *Texas International Law Journal* 263.
[78] Council Decision of 9 March 1960 on coordination of the conjunctural policies of the Member States, OJ 31.
[79] Maas, H.H. (1972), 'The Powers of the European Community and the Achievement of the Economic and Monetary Union', 9 *Common Market Law Review*, 7; Ryan (1978), 550.

order to stimulate the economy. The Commission decided that a preferential discount for exports of maximum 1,5% was allowed, but France ignored this limit after the turmoil of November 1968. Before the CJEU, France argued that its "decision was taken in a sphere which belongs exclusively to the jurisdiction of the Member State".[80] The Court rejected this argument: emergency measures still had to comply with the rules of the Treaty, in this case the decision of the Commission. Monetary policy – whilst hardly at the core of European integration at this stage – was not fully out of reach of EEC law.

The destabilization of the Bretton Woods regime in the late 1960's not only led to increased coordination and cooperation amongst the MS of the Community, it also affected the Community policies directly, most notably the Common Agricultural Policy (CAP). The CAP was predicated on a system of fixed and uniform agricultural prices throughout the Community and the ability to freely trade agricultural products. When the CAP was introduced in 1962, the Bretton Woods regime provided for stable exchange rates that enabled the setting of a single price across country-borders.[81] So, as exchange rates began to shift, a system of levies and subsidies (based on amongst others on article 103 EEC) was introduced to shield the CAP from exchange rate fluctuations, in effect running a parallel exchange rate regime for agricultural products.[82]

So, in this first phase of European monetary integration, the Community and the MS adopted a multitude of measures aimed at coping with the instability arising from the demise of the Bretton Woods regime. The measures were largely based on the legal bases provided by the EEC Treaty and thus mainly involved cooperation and coordination. Hard restrictions on the actions of MS were rare, but not fully absent.

1.2.2 The Werner Report

The first proposals for deeper monetary integration within the EEC arrived in the 1960's but lacked political momentum. This changed for the Werner Report of 1970, which followed a breakthrough meeting in The Hague in 1969 between EEC Heads of State or Government (not

[80] CJEU, Joined Cases 6 & 9/69, *France* v. *Commission*, EU:C:1969:68.
[81] The unit of account was set at exactly the same value in gold as the dollar. McNamara (1998), 101; Ungerer (1997), 64.
[82] The monetary compensatory accounts were sanctioned by the Court in CJEU, Joined Cases 9 & 10/73, *Schlüter* v. *Hautpzollamt Lörrach*, EU:C:1973:110.

yet called the European Council).[83] The Werner Report is the first to give a comprehensive plan of (the stages towards) European monetary union.[84] Political support for monetary integration declined after the publication of the Report as a result of the monetary instabilities of the 1970's. Nevertheless, the Werner Report was an important stepping stone because of the clarity of the requirements it formulated for monetary union. It set the target for further integration. The following paragraphs will first give a short description of the proposal, before turning to the question about the role of (primary) law in the envisioned monetary union.

After outlining the benefits that economic and monetary union would accrue, the Werner Report defines monetary union as comprising: firstly, total and irreversible convertibility of currencies, secondly, irrevocable fixing of parity rates and, thirdly, complete liberation of movement of capital.[85] From these elements, it followed that the "principal decisions in the matter of monetary policy should be centralized" and that the Community has "at its disposal a complete range of necessary instruments".[86] Economic union as such was not defined; instead, several elements of it are described which appear to be its foundational pillars. One of these is budgetary policy. National policy in this area would fall under "harmonized management", meaning that the variations in the volume of the budgets, the size of the balance and the method of financing deficits would be decided at the Community level. [87]

With regards to institutional reform, the Werner Report foresaw the creation of two new organs: a Community system for central banks (system of central banks) and a center of decision for economic policy. The latter would be independent and have a decisive influence over the economic policy of the Community. However, it appears that the independence was rather limited and mainly defined in relation to the MS, as the center for economic policy would be politically responsible to a (directly elected) European Parliament. The system of central banks would set monetary policy within the Community and would grant loans to both the public and private sector. External monetary policy would be divided between the center of

[83] Council Decision (70/192/EE) of 6 March 1970 regarding the procedure in the matter of economic and monetary union, OJ L 59/44.
[84] Report to the Council and the Commission on the realisation by stages of Economic and Monetary Union in the Community, "Werner Report", Supplement to Bulletin 11-1970 of the European Communities.
[85] Werner Report, 10. See Gros, D. (1989), 'Paradigms for the Monetary Union of Europe', 27 *Journal of Common Market Studies*; Ungerer (1997), 84-106.
[86] Werner Report, 10. Everling, U. (1971), 'Institutional Aspects of a European Economic and Monetary Union', 8 *Common Market Law Review*.
[87] Werner Report, 11.

economic policy and the system of central banks. The two institutions would have to work together, but each would remain responsible for its own field. They would have to set shared objectives through coordination.

What exactly would be the objectives of EMU is not spelled out in the Werner Report. Early in the Werner Report, when the benefits of EMU are outlined, it is stated that: "by the combined effect of the market forces and … the authorities responsible there may be achieved simultaneously satisfactory growth, a high level of employment and stability. Moreover, "the Community policy should tend to reduce the regional and social disparities and ensure the protection of the environment."[88] Later references are to a similar array of objectives. The exact relation between them, in the form of quantitative objectives at medium term, would be revised periodically, although it is unclear by whom.

To analyze the ideas of the Werner Report on the role of (EU primary) law in EMU, a good starting point is the statement on the necessity of treaty change: "a modification of the treaties will be necessary eventually to make possible a more advanced development of transfers of responsibility and the progressive establishment of the final institutions".[89] Two elements are noteworthy, namely the creation of the necessary institutions and the transfer of competences. It is relevant that both elements are framed in positive terms: there is no talk of restricting the actions or discretion of the new institutions. It could be argued that such restrictions are inherent to the act of creating a new institution and transferring a competence. What matters here is the emphasis, which lies on the act of the transfer and the act of creation. The purpose of the legal act of treaty amendment is not found in the economic functioning of EMU, but in its creation.

As mentioned above, the institutional relations of the two new bodies are not spelled out in the Report.[90] The Report does suggest that the two bodies develop a mutually beneficial relationship, a suggestion that seems difficult to capture in (primary) law, except for its most basic characteristics.[91] There is the further complication that the Werner Report spells out that

[88] Werner Report, 9.
[89] Werner Report, 13-14.
[90] Tuori & Tuori (2014), 22-23. They argue that the Werner group considered that spelling out the institutional details was outside its mandate.
[91] Werner Report, 26, Conclusion D: 'These institutions, while safeguarding their own responsibilities, must be furnished with effective powers of decision and must work together for the realization of the same objectives.'

the center for economic policy should be independent – but politically accountable to the European Parliament – and is silent on the independence of the system of central bank. In fact, no further details at all are provided on the institutional relations of the system of central banks. These considerations taken together seem to suggest that primary law would not be used to regulate in detail the relations between the institutions. At least, the Report does not provide functional reasons why it should.

In any case, the Werner Report does not propose to set other limits to the competences of these institutions, that is, other than those implied in the transfer itself and those resulting from institutional competition.[92] Considerations of subsidiarity do play a role in the Report, albeit under a different name, but these considerations appear to be of little consequence, given the broad transfer of competences to the Union.[93] It is furthermore hard to see how a subsidiarity test would work, as (the relations between) the objectives of EMU are left unspecified. Lastly, the Werner Report omitted prohibitions based on a specific economic rationale, such as the prohibition in the Maastricht Treaty on monetary financing.

The lack of predetermined goals for EMU is also relevant for the level of discretion for national budgetary policy.[94] The restrictions on national budgetary discretion as envisioned by the Report would have functioned different from the budgetary restrictions that ended up in the Maastricht Treaty. National budgetary policy would be subordinate to the ever-changing goals of Union policy.[95] The term "harmonized management" gives expression to this new function of national budgets in the attainment of not-yet-determined European goals.[96] The role of law in this setup would not be to set in stone a procedure on the attainment of a specific economic goal, but to create and maintain a hierarchical relationship between the European and national decision-making authorities.

To conclude, the economic benefits of EMU described in the Werner Report did not depend on specific prohibitions or instructions as laid down in primary law. This was fully in line with

[92] Maas (1972), 11.
[93] Werner Report, 10.
[94] Werner Report, 25.
[95] Szász, A. (1970), 'The Monetary Union Debate', 7 *Common Market Law Review*, 411.
[96] The Werner Report, 11: 'In order to be able to influence the short term economic trend rapidly and effectively it will be useful to have at the national level budgetary and fiscal instruments that can be handled in accordance with Community directives.'

the predominant lines of thinking in economics at the time, which stressed the need for strong government involvement in many economic areas.[97] This was prior to the oil-crises of the 1970's and the infamous stagflation, which led many economists to move beyond the works of Keynes.[98] As the EEC would assume the main economic responsibilities from the national governments, it should likewise be uninhibited in choosing its economic goals and the tools to reach those goals.

Although EEC primary law would regulate EMU only to a minimal extent, it is clear that the Werner Report does build on a specific constitutional vision for the EEC.[99] This is most evident in the new relations between the centre for economic policy and national budgetary authorities. The new centre would hold an unprecedented power over national policy, effectively dominating national politics. This would require a fundamental re-organization of the vertical power balance in the Community in terms of effective powers of intervention and processes of legitimation. The horizontal balance of powers in the EEC would also be affected. The new relationship between the center for economic policy and the European Parliament would resemble the connections between national parliaments and their governments, which in the MS is based on a delicate network of constitutional and conventional rules. As Weiler has emphasized, the constitutionalization of the EEC mainly related to the effects of the policy *output*.[100] Policy input still largely came from the MS. In its politics, the Community was predominantly intergovernmental, rather than supranational. Under the Werner Report, the process of constitutionalization would be extended to the political organization of the EEC.

1.2.3 The Snake

The Werner Report was received rather positively, at least initially, with the Council adopting a resolution in March 1971 endorsing the goal of establishing monetary union within a decade.[101] This goal was re-affirmed a year later, although by then it looked a lot less realistic due to the collapse of the Bretton Woods regime. Two tangible results followed the Werner Report. The first is the creation of a European exchange rate regime, called the Snake, and the

[97] Maas (1972), 11.
[98] McNamara (1998), ch 5.
[99] Tuori & Tuori (2014), 22-23.
[100] Weiler, J.H.H. (1981), 'The Community System: the Dual Character of Supranationalism', 1 *Yearbook of European Law*, 267.
[101] Resolution of the Council and of the Representatives of the Governments of the Member States of 22 March 1971 on the attainment by stages of economic and monetary union in the Community. Compendium of Monetary Texts 1974, 16. James notes that the reception of the Report in France was less positive. James (2012), 83.

second is the creation of the EMCF, described in the introduction to this chapter. Despite these two steps, the 1970's have been called the low-point in European monetary integration, because, as we shall see, both initiatives failed to live up to the high expectations.[102]

In an attempt to restore global exchange rate stability, the key players of the now-defunct Bretton Woods regime informally decided in December 1971 in the Smithsonian Agreement to widen the bands in which currencies could move, allowing currencies to move 9% relative to each other.[103] In response, the Council and the MS adopted in March 1972 a resolution with the aim of narrowing these bands within the EEC, thereby also hoping to take the first steps towards monetary union.[104] The resolution was for the most part addressed to the central banks of the MS acting in their individual capacity,[105] requesting them to keep their currencies within a band of maximum 2,25% to each other. (This created the image of a snake, as the European currencies moved together within the 'Smithsonian tunnel'.) Lastly, the resolution also planned the creation of the EMCF.

The responsibility for the implementation of the resolution mainly fell on the central bankers. Acting outside the CoG, the central bankers adopted the Agreement of 10 April 1972 between the Central Banks of the Member States of the Community on the narrowing of the margins of fluctuation between Community currencies, often called the Basel Agreement. Its provisions mainly related to the extension of credit between the central banks for purposes of intervention. The exchange rates were neither set in the Resolution, nor in the Basel Agreement; they had to be communicated by the central banks to the CoG.[106] Together, the Basel Agreement and the resolution form the foundations of the Snake. But it should be noted that these arrangements were of a minimal character, that is, they were silent on many issues of an exchange rate arrangement. Crucially, no rules or procedures were set on realignments or exiting the Snake.[107]

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[102] McNamara (1998), 109.
[103] De Man, G. (1975), 'The Economic and Monetary Union After Four Years: Results and Prospects', 12 *Common Market Law Review*, 203-207.
[104] Resolution of the Council and of the representatives of the Governments of the Member States of 21 March 1972 on the application of the Resolution of 22 March 1971 on the attainment by stages of economic and monetary union in the Community, OJ C 38/3. James (2012), 99; McNamara (1998), 107.
[105] The CoG was not completely left out of the Resolution. It was requested to give an opinion on the time in which the balances between the central banks would have to be settled.
[106] Art III of the Basel Agreement, Compendium of Monetary Texts 1974.
[107] De Man (1975), 199.

Neither the Basel Agreement nor the resolution were legal acts. Although international treaties do not have to be concluded by heads of state or ministers, the Vienna Convention does define international agreements as "concluded between States".[108] It is unclear on what basis the central banks could bind their respective states, especially given the different positions of the central banks in their respective states. The resolution is also missing legal effect, both under European and international law (this is further discussed in the next section).

The lack of rules (even non-legal rules) concerning realignment and exit is particularly noteworthy in light of article 107(1) EEC. By not explicitly connecting the arrangements for the Snake to this legal obligation, the MS (and their central banks) on purpose ignored a possibility to give the exchange rate regime a stronger legal character.[109]

By contrast, the EMCF was embedded in the EEC legal order, as it was created by Council Regulation.[110] The main tasks of the EMCF were, firstly, to promote the proper functioning of the progressive narrowing of exchange rate bands, secondly, "the multilateralization of positions resulting from interventions", and thirdly, to administer and re-organize the short term loans agreed to earlier by the central banks.[111] As no provision of Title II of the EEC Treaty on Economic Policy enabled the Community to create such a monetary fund, the EMCF Regulation was based on article 235 EEC, known as the flexibility clause.[112] This provision enabled the Community to enact measures necessary to achieve one of the aims of the Community. As the Snake operated *outside* the Community, it is difficult to see, however, how the EMCF is necessary in terms of the goals of the Community.[113]

How can we make sense of the Snake and the EMCF in terms of their relations with the EEC legal order? Why did the Snake have such a meager (legal) framework? Two explanations come up. Firstly, the original idea was that the Snake would be experimental, with a move from

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[108] Aust, A. (2013), *Modern treaty law and practice*, Cambridge University Press., 18.
[109] Two years after the creation of the Snake, and after many countries had already left it again, the Council decided that '[a]ny Member State intending *de jure* or *de facto,* to change, discontinue or re-establish the parity, central rate or intervention points of its currency shall initiate a prior consultation.' Art 7 Council Decision (74/120/EEC) of 18 February 1974 on the attainment of a high degree of convergence of the economic policies of the Member States of the European Economic Community, OJ L 63/16.
[110] Council Regulation (907/73/EEC) of 3 April 1973 establishing a European Monetary Cooperation Fund, OJ L 089/2.
[111] De Man (1975), 206.
[112] Weiler (1991), 2443-2445.
[113] Lauwaars, R.H. (1979), 'Auxiliary Organs and Agencies in the E.E.C.', 16 *Common Market Law Review*; James (2012), 118.

a *de facto* system of concerted action to a *de jure* system depending on the results.[114] As the results of the experiment were less than promising, with membership of the Snake fluctuating heavily, the transition to a *de jure* system simply never occurred.[115] Indeed, the Snake collapsed very quickly after its creation.[116] An additional explanation is that the central bankers, who were responsible for most of the negotiations for the Snake, were hesitant about their integration into the EEC.[117] A comparison with the integration of national judiciaries might explain why. Political scientists have pointed out that a key aspect of the judicial construction of the EEC relied on the empowerment of national judges, especially those in lower courts, within their national arenas through EEC law.[118] By contrast, the central bankers, especially those in the Netherlands and Germany, feared that integration into the EEC legal order would constrain rather than empower them, especially in their ability to act on the international level.[119]

This resistance of the central bankers was also on display in their interaction with the EMCF, of which they formed the Board of Directors. First of all, the central bankers refused to use the headquarters of the EMCF in Luxembourg, continuing to have their meetings in Basel, literally outside the EEC. The central bankers also made a habit of first making decisions amongst themselves in their capacity as heads of their respective central banks, before taking the same decision again in their capacity as board-members of the EMCF.[120] The legal form of the EMCF, an expression of the ambitious idea that EMCF would become a European style IMF, thus remained without consequence.

1.2.4 The European Monetary System

With the failure of the Snake, the goal to achieve monetary union within a decade was abandoned, but not forgotten. Roy Jenkins, President of the Commission, gave an impassioned speech at the European University Institute in 1977 to breathe new life in the project of monetary union, but his enthusiasm was out of touch with the political forces in Bonn and

[114] Maas (1972), 4.
[115] Ungerer (1997), 129.
[116] James (2012), ch 4.
[117] Szász, A. (2001), *De euro: politieke achtergronden van de wording van een munt*, Mets & Schilt, 71.
[118] Burley, A.-M. & W. Mattli (1993), 'Europe Before the Court: A Political Theory of Integration', 47 *International Organization*, 62-65.
[119] Marsh, D. (1992), *The Bundesbank: the bank that rules Europe*, Heinemann.
[120] Rey, J.-J. (1980), 'The European Monetary System', 17 *Common Market Law Review*, 12; Szász (2001), 73-74; De Man (1975), 206.

Paris.[121] A less ambitious project was negotiated during 1978 in the form of a new exchange rate system, called the European Monetary System (EMS). The EMS had a more sophisticated design than the Snake and was more integrated in the EEC, although the exact legal status and the relation with the EEC legal order remained ambiguous.

At the heart of the EMS was the Exchange Rate Mechanism (ERM). For each of the currencies of the participating MS, a central rate was set against the newly created European Currency Unit (ECU). From all the central rates of national currencies against the ECU, the rates of currencies against each other can be calculated (the bilateral exchange rates). The central rates could be amended by consensus amongst the participating countries and the Commission.[122] Around the bilateral exchange rates were fluctuation margins of ± 2.25%. To keep the exchange rates stable, the central banks of the MS were obliged to intervene on the exchange markets when a currency threatened to exceed the allowed margin. Interventions were already presumed to take place when a currency was at 75% of its permitted divergence from its central rate (the divergence indicator).[123] To support these interventions the credit mechanisms of the Snake were refurbished and expanded.[124]

The ECU fulfilled two functions in the EMS: it was used as a denominator (unit of account) of the actions and transactions in the ERM and it was a means of settlement (reserve asset) between the monetary authorities.[125] The ECU was "a composite unit defined by a 'basket' of the nine Community members' currencies".[126] It served mainly public administrative purposes, although over time, the ECU was also used in private transactions.

These central features of the EMS were laid down in a set of measures with divergent (and disputed) legal qualities. The legal framework of the EMS consisted of four different types of measures.[127] Firstly, the Resolution of the European Council on the establishment of the EMS

[121] James (2012), 82-83.
[122] Point 3.2 of the Resolution of the European Council of 5 December 1978 on the establishment of the European Monetary System (EMS) and related matters, Annex 1 to the Conclusions of the Presidency of the European Council of 5 December 1978 (hereafter referred to as the EMS-Resolution)
[123] Point 3.6 of the EMS-Resolution.
[124] There was already in place a Council Regulation on Community loans in case of balance of payment problems for a Member State. This Regulation was not amended in light of the EMS, but can also have been seen as support to it. Council Regulation (397/75/EEC) of 17 February 1975 concerning Community Loans, OJ L 46/3.
[125] Point 2.2 of the EMS-Resolution.
[126] Point 3.8 of the EMS-Resolution. Radicati di Brozolo, L.G. (1980), ' Some legal aspects of the European Monetary System', *Rivista di Diritto Internazionale*, 333.
[127] Rey (1980), 9. Also see Louis (1979).

of 5 December 1978 (hereafter: the EMS Resolution) set out the basic elements, goals and mechanisms of the EMS.[128] Secondly, on the invitation by the European Council, the Council adopted several regulations, thereby creating the ECU and amending the EMCF Regulation.[129] Thirdly, important details of the functioning of the EMS were decided upon by the Central Banks of the Member States of the European Communities in two agreements.[130] One of these amended an earlier agreement on very short-term financing that was concluded in light of the Snake. The other agreement contains the operating procedures of the intervention mechanism of the ERM. These agreements lay down the operational core of the EMS, specifying the conditions and modalities of the interventions to stabilize the currencies and the provision of credit.[131] Lastly, the operating procedures of the EMCF were amended by its Board.[132]

In contrast with the Snake, the legal status of the EMS raised some debate. The controversy mainly related to the legally binding nature of the European Council Resolution, and to a lesser extent to the agreement between central banks.[133] In part, the debate revolved around whether the EMS can be seen as being part of (the legal order of) the EEC.[134] The following paragraphs will firstly deal with the basic questions concerning the legal nature of the EMS, before turning to the role of law in the EMS.

Radicati di Brozolo focused on the international aspects of the rules governing the EMS: "[…] the EMS would still appear to consist only of a set of contractual relationships between the member states governed by traditional rules of public international law".[135] The European Council was in 1978 not yet a formal Community body and the legal status of its resolutions

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[128] Point 1.4 of the EMS-Resolution. It was also envisioned that a 'European Monetary Fund' would be created.
[129] Council Regulation (3181/78/EEC) of 18 December 1978 relating to the European Monetary System, OJ L 397/2. Also see Council Decision (78/1041/EEC) of 21 December 1978 amending Decision 71/143/EEC setting up machinery for medium term financial assistance, OJ L 379/3.
[130] Agreement of 13 March 1979 between the central banks of the Member States of the European Economic Community laying down the operating procedures for the European Monetary System. Agreement of 9 February 1970 setting up a system of Short-term Monetary Support among the Central Banks of the Member States of the European Economic Community, as amended on 13 March 1979. Both as found in Compendium of Community Monetary Texts 1979, available at http://aei.pitt.edu/5126/.
[131] See Radicati di Brozolo (1980), 340. He sees the agreements as being governed by international law. Others saw them as "administrative arrangements". See the references at p 340 fn 42. Also see Rey (1980), 11. Rey speaks of an "intermediate formula", between the central banks acting as principals on the international stage and as agents of their governments. See furthermore Smits (1983), 73.
[132] Rey (1980), 11.
[133] See for a range of other legal questions concerning the EMS, Radicati di Brozolo (1980).
[134] This is simply assumed by many authors. See for example, Fratianni, M. & J. Von Hagen (1992), *The European monetary system and European monetary union*, Westview Press, 1; Myrus (1994), 2113; Eichengreen (2008), 159.
[135] Radicati di Brozolo (1980), 339.

thus depended on the nature of whatever the heads of State or government agreed upon. Radicati di Brozolo states that the Resolution of the European Council can probably be considered an international agreement.[136] The central bank agreement also falls within the purview of international law in his understanding. The EMS in this view was 'to a large extent a system of traditional inter-state cooperation'.[137]

Rey took a dissimilar position. He noted that the Monetary Committee and the Committee of Central Bank governors, both EC bodies, review the 'policy issues raised by the working of the system' and that the Council 'is implicitly qualified to take the decisions of principle involved in the implementation of the Resolution of the European Council. Although the Treaty procedures for the adoption of the measures were bypassed, "[it] does not follow, however, that the commitments written down in the Resolution were not entered into as legal obligations. The unusual form of a Resolution, its presentation and its wording would rather point to the contrary."[138] This hints at the possibility that the Resolution was adopted under EEC law. Smits took a similar approach: "in Community law a resolution need not necessarily be without binding character".[139] His argument was that the CJEU on another topic had apparently considered a resolution (of the Council in that case) to be "more than a mere declaration of political intent".[140] Smits therefore tentatively suggested that the Resolution might have some binding force *within* Community law.[141] The EMS could, in his opinion, be seen as an elaboration of the obligations of the MS under article 107 EEC.

Both of the positions above were rejected in the MS. The French Conseil Constitutionnel, stated that the Resolution was a political declaration that lacked legal effect.[142] It was not an international treaty for the purpose of the French Constitution.[143] The Dutch Government also

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[136] Radicati di Brozolo (1980), 339.
[137] Radicati di Brozolo (1980), 340. The part of the EMS about the pooling of reserves through the EMCF, a Community body, escapes this qualification.
[138] Rey (1980), 13-14 and 30.
[139] Smits (1983), 75-76, fn 170.
[140] On this point, Smits offers a good suggestion, namely that the binding aspects of the EMS might be derived from art 5 and 107 EEC: "it cannot altogether be excluded that the European Court will consider the Member States' obligations under Articles 107 and 5 of the Treaty to have been elaborated in paragraphs of the EMS Resolution." Smits (1983), 75. Also see Usher, J.A. (1994), *The Law of Money and Financial Services in the European Community*, Oxford University Press, 139.
[141] This follows from Smits refutation of the view of Radicati di Brozolo, who has the "mistaken view that European Council Decisions are not Community acts". Smits (1983), 76, fn 170.
[142] Conseil constitutionel, 29 December 1978, Décision n° 78-99 DC available at www.conseil-constitutionnel.fr/decision/1978/7899dc.htm.
[143] Louis (1979), 455; Rey (1980), 8; Radicati di Brozolo (1980), 339, fn 40; Myrus (1994), 2114, fn 171.

considered the Resolution to be without legal effect.[144] The Single European Act (SEA) of 1987 also appears to confirm this view. The new article 102a EEC, stated that progress in monetary integration should take account of the experience under the EMS and that the existing powers (of the MS) shall be respected. The SEA is discussed in depth in the next chapter.

Whatever the legal origins or binding nature of the EMS-Resolution and the central bank agreement, it was clear that these were not meant to be enforced. As Rey noted: "exchange-rate policy commitments cannot suffer the burden of rigid procedural constraints. Nor is it conceivable, in practice, to submit such commitments to jurisdictional sanction".[145] It was unlikely that the CJEU would have considered that it had jurisdiction over the Resolutions of the European Council, Smits' suggestion about article 107 EEC notwithstanding.[146]

That brings us again to the question about the role of (EEC) law. According to Louis, the obligations arising from the Resolution and the regulations were binding upon those who participated in the ERM.[147] In other words, the possibility of exiting the ERM gave credence to the rules of the ERM. The possibility of a (temporary) withdrawal was left open on purpose by the Resolution and the other measures.[148] This did not weaken the ERM, but should be seen as a constitutive element of the success of the ERM. It enabled the rules of the system to function without the need for legal enforcement. Conflicts within the EMS would be resolved through reciprocity or by (the threat of) exiting the EMS completely. These forces worked two ways, both for those who wanted to violate the agreements, and those who wanted to enforce the agreement if there was a violation.[149]

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[144] Parliamentary Documents of the Second Chamber of Parliament of the Netherlands, 1978-1979, 15 533, no 1-2, 12.
[145] Rey (1980), 10. Repeated at 30.
[146] See on this Myrus (1994), 2122; Radicati di Brozolo (1980), 342-343, fn 51 and the references therein.
[147] Louis (1979), 454-455. To be precise: countries could formally take part of the EMS without being part of the ERM. Snyder (1998), 20, fn 73. Also see Usher (1994), 140-141. "It might therefore be suggested that the relative success (until the events of the Autumn of 1992 and the Summer of 1993) of the European Monetary System shows the political and economic will behind that system rather than the effect of enforceable legal rules, or that 'soft' law is highly effective where it coincides with political economic will. … In a sense it is an agreement between all the Member States that those who so wish will be bound by the rules and make use of institutions created under Community law."
[148] Repeated in Smits (1983), 68; Myrus (1994), 2122. The views expressed by Smits conform partly to the analysis by Louis.
[149] The arguments here are inspired by the work of Weiler, who himself builds on the work of Hirschman. Weiler (1991), 2411.

This reliance on non-legal rules was in part also found in the Snake. An important difference, however, was that the rules in the EMS were more extensive, for example also regulating parity changes, the ECU and the divergence indicator. So in the Snake, economic tensions quickly turned into political conflict over the system and exit from the system, whereas in the EMS, economic tensions could be resolved through a negotiated application *of* the system. Nevertheless, it remains remarkable that the legal sources of the much more developed EMS resemble so closely the legal sources of the 'experimental' Snake.

Two hypothetical situations illustrate the argument about the negotiated application of the EMS. One, the currency of Member State A is under upward pressure, requiring substantial interventions from its central bank. The Member State decides to unilaterally alter its central rate, against the will of the others Member States and the Commission and in clear violation of the Resolution.[150] Second, the currency of Member State B is under downward pressure and its central bank requests large credits from the central bank of Member State C. The (central bank of) Member State C decides to refuse to extend the credit, in violation of the Agreement of the Central Banks. There is a good reason why the first situation did not arise. If a Member State had unilaterally altered its central rate, (the central banks of) the other Member States would most likely have been unwilling to provide assistance within the system, or they would have unilaterally amended their own central rates, risking a collapse of the entire System.[151] The second situation was more likely to occur, and in fact manifested itself in 1993. But here a violation of the rules would also be quickly resolved without recourse to legal instruments or courts. Either Member State B exits the System, or, if a legal remedy were available to require the extending of credit, Member State C would leave. Either way, no credit would be extended if Member State C would perceive the costs of extending it as too high in relation to the benefits of the continuation of the EMS. In both instances, the threat of exit from the system disciplines the behavior of the MS within the system.

In these scenarios, it is the credibility of the threat to exit that comes under scrutiny. This was highlighted in the correspondence between the President of the Bundesbank Otmar Emminger and German Chancellor Kohl at the time of the negotiation of the EMS. The correspondence

[150] See for alternative interpretations Smits (1983), 67, fn 120.
[151] Eichengreen, B. & C. Wyplosz (1993), 'The Unstable EMS', 1993-1 *Brookings Papers on Economic Activity*, 60. They note that Germany requested realignment during the upheavals of the EMS-crisis and that the request was denied.

concerned fears of Emminger that in times of crises the Bundesbank would be obligated to extend credit in the form of Deutschmarks on a large scale, which could end up creating inflation in Germany. The Bundesbank had not been an enthusiastic supporter of the EMS and sought guarantees of the Government that the Bundesbank would not be inhibited from protecting its mandate of securing the stability of the Deutschmark.[152] In other words, it feared that it could not credibly threaten to leave the ERM, due to German political commitments to the European project. [153] In that case, the rules of the EMS would *de facto* become binding.

Beyond these political effects of the possibility of exit, there also were notable economic effects, as became painfully obvious in the EMS-crisis of 1992-1993. In the lead-up to that crisis it was becoming clear that it would require tough economic measures for some MS to fulfill the convergence criteria. This set the stage for speculators to gamble that if enough financial pressure would be asserted, MS would have to realign or even exit.[154] The UK and Italy left the EMS and for the other MS the exchange rate bands were widened to 15%. So although the flexibility of the EMS in terms of realignments and exit stimulated and organized political cooperation, it at the same time pushed the financial markets to seek the limits of that cooperation. The EMS crisis demonstrated this weakness in real-life, but the dynamics behind it were already known before.[155] Hence, the Maastricht Treaty would exclaim that entry into the Eurozone would be 'irrevocable'.

To conclude this section, we can start with the observation that from the perspective of EEC law, European monetary integration was a side note. Conversely, from the perspective of European monetary integration, the EEC, though not necessarily the EEC legal order, was quite important. The political fora of the EEC, including the CoG, were crucial for European monetary integration. Both the daily management of the exchange rate regimes and the 'high politics' of the negotiations of these regimes depended on the political structures associated

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[152] Kennedy, E. (1991), *The Bundesbank: Germany's Central Bank in the International Monetary System* Royal Institute of International Affairs, 80.
[153] Otmar Emminger, as found translated in Eichengreen & Wyplosz (1993), 57. "Referring to repeated assurances from the Chancellor and the Finance Minister, the Bundesbank is starting from the premise that, if need be, the German government will safeguard the Bundesbank from such a situation of constraint, either by a correction of the exchange rate in the EMS or, if necessary, by discharging the Bundesbank from its intervention obligations." Emminger wrote on a different occasion that in exceptional circumstances the Bundesbank could suspend its participation in the EMS, awaiting action of the Government. Ungerer (1997), 155. Also see Marsh, D. (2009), *The euro: the politics of the new global currency*, Yale University Press, 85.
[154] Eichengreen & Wyplosz (1993), 5.
[155] Eichengreen & Wyplosz (1993).

with the EEC. Whereas the Werner Report envisioned that the political structures of the EEC would be upgraded so as to closely resemble national governmental structures, the actual steps taken in monetary integration were dominated by inter-governmentalism.

This did not yet answer the central question of this section, about the *legal* linkages between European monetary integration and European integration through the EEC. Here we see a mixed picture. Many aspects of European monetary integration, from financial support to rules on the ECU to institutional provisions of the EMCF were given legal form under the umbrella of the EEC legal order. But, crucially, the main parts of the exchange rate regimes were only based on *informal agreements.* This can partly be explained by the lack of an explicit legal mandate for the EEC to setup an exchange rate regime, but, more importantly, by the lack of political will to give the Snake and the EMS strong legal foundations. Even lawyers were hesitant to submit exchange rate policy to legal sanction.

1.3 Monetary policy in Member States' constitutional law

This section briefly reviews how the constitutional laws of two MS regulated their currencies and central banks prior to the accession to the euro. The two MS, Germany and the Netherlands, are selected because their central banks, the Bundesbank and the Nederlandsche Bank, were considered to be the most independent of the central banks of the MS at the time.[156] Looking at these two countries is furthermore interesting because of their dissimilar constitutional cultures. In Germany, constitutional review is omnipresent; in the Netherlands it is largely absent.

The aim of the review is first to see to what extent the constitution *directly* regulated monetary affairs, and secondly, to examine the broader relations of public power of which a central bank is part. For Germany, the focus is on the relationship between monetary and fiscal policy. For the Netherlands, the focus is on the regulation of international monetary cooperation.

The scope of this section is, by necessity, limited. It reviews only two countries and it is therefore impossible to draw broad conclusions about the relation between constitutional law

[156] See for a comparison with the Bank of England and the Bank de France, Amtenbrink, F. (1999), *The democratic accountability of central banks: a comparative study of the European Central Bank*, Hart, ch 3.

and monetary policy more broadly. In the US, for example, there is a lively, but marginal, strand of literature discussing the unconstitutionality of central banking (the US Federal Reserve) in the light of the Federal distribution of power under article 1 section 8 of the US Constitution. In fact, it was one of the most famous of US Supreme Court decisions (*McCulluch* v. *Maryland*) that settled this matter in 1819.[157] A broader overview would furthermore take into account the rise of constitutionalism in Eastern Europe in the 1990's. For example, the Polish Constitution of 1997 required the central bank to be independent.

1.3.1 Germany[158]

Attitudes in Germany in the second half of the twentieth century towards monetary policy, inflation, and the Bundesbank have been shaped to a large extent by the destructive monetary developments of the first half.[159] It can thus come as a surprise (even to many Germans) that the German Constitution (*Grundgesetz*, GG), adopted in 1949, does not mention price stability or central bank independence. It only requires that there is a Federal central bank that possesses certain competences.[160] Moreover, Article 73(1) GG attributes in broad terms the exclusive legislative power regarding money and the currency to the Federation. The GG thus left much discretion to the legislature[161] to attribute or withhold competences to the central bank, to organize the appointment procedure, to determine the institutional structure and to regulate the relations with the federal government.[162] The question whether independence was implicitly guaranteed by the GG was never directly put before the Federal Constitutional Court (*Bundesverfassungsgericht*). That has not stopped it from providing ambiguous clues about its opinion on the independence of the Bundesbank.[163] By contrast, the Federal Administrative

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[157] Graber (2014), 4-9.
[158] Parts of this section were published earlier in Van der Sluis, M. (2014), *Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank*, in: The constitutionalization of European budgetary constraints (M. Adams, et al. eds.).
[159] Marsh (1992), 154-155.
[160] Joerges, C. (1996), *Comments*, in: Constitutional Dimensions of European Economic Integration (F. Snyder ed.), 23. Art 88 German Basic Law now reads, as translated: "*The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability."* The second sentence was added in 1992.
[161] Stern, K. (1999), *The Note-Issuing Bank within the State Structure*, in: Fifty Years of the Deutsche Mark: Central Bank and the Currency in Germany since 1948 (Bundesbank ed.), 111.
[162] See Schmidt-Bleibtreu, B. & F. Klein (2004), *Kommentar zum Grundgesetz*, Luchterhand, Artikel 88. Also see Stern, K. (1994), *Das Staatsrecht der Bundesrepublik Deutschland. Bd.2 Staatsorgane, Staatsfunktionen, Finanz- und Haushaltsverfassung, Notstandverfassung*, Beck, 464-507.
[163] BverfGE 14, 125 and BverfGE 62, 169.

Court (*Bundesverwaltungsgericht*) has explicitly stated that there is no constitutional guarantee for the Bundesbank's independence.[164] Legal scholarship was divided.[165]

The Bundesbank was created by law in 1957. The Bundesbank Act (*Bundesbankgesetz*) described in Article 3 the main objective of the Bundesbank: 'safeguarding the currency'.[166] The competences to fulfill that objective included: issuing banknotes, conducting monetary policy, setting minimum reserve policy and act as the bank of the federal government.[167] Furthermore, the Bundesbank was obliged to provide advice to the federal government and support its general economic policies, insofar as its own objective allowed. Nevertheless, Article 12 of the Bundesbank Act expressly stated that the Bundesbank was independent from instructions of the federal government in the execution of its competences.[168]

From a legal point of view, one might expect that the relations with the judiciary and the Bundestag would be of strong relevance for the Bundesbank. The former could, through interpretation of the Bundesbank Act, decide on the legal meaning of the objective and competences, whereas the latter could instigate the amendment or abolishment of the Bundesbank Act through its role in the legislative process. However, in practice, the courts hardly supervised or controlled the actions of the Bundesbank.[169] Conflicts over monetary affairs were rarely judicialized, as was seen above in relation to the constitutional status of central bank independence. Likewise, the Bundestag did not maintain an accountability-relationship with the Bundesbank in any way comparable to how, for example, the US Congress holds hearings with the President of the Fed.[170] Instead, the Bundesbank primarily maintained relations with the Federal Government. However, in these relations the legal basis of the independence of the Bundesbank did play a role.

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[164] BverwGE 41, 354.
[165] See Stern (1999), 144-147; Amtenbrink (1999), 159-164; Lastra, R.M. (1992), 'The Independence of the European System of Central Banks', 33 *Harvard International Law Journal*, 478-479.
[166] Translation as found in Amtenbrink (1999), 195.
[167] Sections 14-16 of the Bundesbank Act. Stern (1999), 126; Amtenbrink (1999), 96-97.
[168] The Government did have the right to postpone Bundesbank decisions by two weeks. Marsh (1992), 74 and 174.
[169] Stern (1999), 135-137.
[170] Conti-Brown, P. (2016), *The power and independence of the Federal Reserve*, Princeton University Press, 199-217.

The Bundesbank continuously used its independent status, and the broadly experienced fear of inflation, to influence public debate and governmental policy.[171] The interactions between the Bundesbank and the Federal Government have been most colorfully described by Marsh, who attributes at least the fall of three Chancellors to the actions of the Bundesbank. He quotes Bundesbank president Blessing after Chancellor Erhard resigned because of a conflict with the Bundesbank over expansionary fiscal policies: '*We had to use brute force to put things in order*'.[172] Marsh notes how Blessing had warned against fiscal profligacy several times and had threatened – and made good on those threats – to raise interest rates. In the recession that followed, Erhard resigned.[173] It is, amongst other things, through these interactions with the Government that the Bundesbank gained a reputation as one of the most formidable central banks in the world.[174]

The interactions between the Bundesbank and the government were not a one-way street. Despite its political clout, the Bundesbank might not have been as politically independent as many thought. There is evidence that in times of conflict, the monetary policy of the Bundesbank sometimes was influenced by the government.[175] As the independence of the Bundesbank was guaranteed by law, why would the Bundesbank accept this influence? One reason was to avoid conflict with the Federal Government over the best coordination of fiscal and monetary policy. Monetary policy is most effective when it is credible and in conformance with fiscal and economic policy. So the Bundesbank walked a fine line between appearing independent and accommodating pressure from the government. Both the Bundesbank and the government had an interest in avoiding conflict; differences of opinion were voiced behind

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[171] For a general overview, see Kitterer, W. (1999), *Public Finance and the Central Bank*, in: Fifty Years of the Deutsche Mark: Central Bank and the Currency in Germany since 1948 (Bundesbank ed.). Compare Leaman, J. (2001), *The Bundesbank myth: towards a critique of central bank independence*, Palgrave Macmillan, chs 4-6.
[172] Marsh (1992), 170 and 187. The three Chancellors are Erhard, Kiesinger and Schmidt.
[173] Berger, H. & J. De Haan (1999), 'A State Withing the State? An Event Study on the Bundesbank (1948-1973)', 46 *Scottish Journal of Political Economy*, 34; Holtfrerich, C.-L. (1988), *Relations between Monetary Authorities and Governmental Institutions: The Case of Germany from the 19th Century to the Present*, in: Central Banks' Independence in Historical Perspective (G. Toniolo ed.), 146.
[174] See Leaman (2001), 146-147; Marsh (1992), 170-188; Holtfrerich (1988), 146-147; Kennedy (1991), 80-81; Bernholz, P. (1999), *The Bundesbank and the Process of European Monetary Integration*, in: Fifty Years of the Deutsche Mark: Central Bank and the Currency in Germany since 1948 (Bundesbank ed.), 756-757; Berger & De Haan (1999).
[175] See Lohmann, S. (1996), 'Federalism and Central Bank Autonomy: The Politics of German Monetary Policy 1957-1992', *California Institute of Technology Social Science Working Paper*, 28; Berger, H. (1997), *Does the Bundesbank Give Way in Conflicts with the West German Government?*, Johannes Kepler Universität Linz, 23-24; Berger, H. & F. Schneider (2000), *The Bundesbank's reaction to policy conflicts*, in: The History of the Bundesbank: Lessons for the European Central Bank (J. De Haan ed.). But see Maier, P., et al. (2002), 'Political pressure on the Bundesbank: an empirical investigation using the Havrilesky approach', 24 *Journal of Macroeconomics*.

closed doors.[176] Whether or not to give in to governmental demands might therefore not always have been a question of the best monetary policy, but a result of strategic reasoning to accomplish the goals of monetary *and* fiscal policy.[177] Another reason why the Bundesbank sometimes jeopardized its aura of independence and gave in to governmental demands is because it knew that its independence was only protected by ordinary law.[178] In the words of Bundesbank President Schlesinger, '*Our independence is dependent on our ability not to overstep our limits*'.[179] So the Bundesbank was all too aware that its independence was, in the long term, dependent on broad support from both politicians and the public. As Berger and De Haan have shown, even the initial enshrinement of independence, first in 1951 for the predecessor of the Bundesbank and later in 1957, was a result of public support.[180] The defeat of Chancellor Adenauer, who wanted to rein in the power of the central bankers, came only after the highly public disagreements between the central bankers and the Chancellor in both 1950 and 1956, in which the Chancellor had to back down, due to lack of public support.[181] Lohmann has found that whether or not the Bundesbank would give in to of the government was indeed a function of public support, but not for the Bundesbank, but for the government.[182] The more popular the government, the less inclined the Bundesbank was to go against it.

1.3.2 The Netherlands

The Dutch Constitution of 1815, enacted after independence from France was regained, awarded the King Willem I the 'right of coin' (article 62).[183] This meant that he had the right

[176] Marsh (1992), 169 and 174; Holtfrerich (1988), 145.
[177] Dutzler, B. (2003), *The European System of Central Banks: an Autonomous Actor? The Quest for an Institutional Balance in EMU*, Springer, 133; Verdun, A. (1998), 'The Institutional Design of EMU: A Democratic Deficit?', 18 *Journal of Public Policy*, 116-118.
[178] On the possibility of revoking independence, see Holtfrerich (1988), 106; Berger & Schneider (2000), 60; Maier, P. & T. Knaap (2002), 'Who supported the Deutsche Bundesbank? An empirical investigation', 24 *Journal of Policy Modeling*; Lohmann (1996), 5.
[179] As quoted in Marsh (1992), 256.
[180] Berger & De Haan (1999), 23-27; Bibow, J. (2009), 'On the origin and rise of central bank independence in West Germany', 16 *The European Journal of the History of Economic Thought*, 164 and 181. Bibow describes the political game, played by the predecessor of the Bundesbank, the *Bank Deutsch Länder* during the transition from Allied rule to secure independence. Nevertheless, he mentions public support in the early 1950s as a factor for creating central bank independence, which was then carried over to the Bundesbank.
[181] When in 1967 the Stability Act (*Stabilitätsgesetz*) was introduced with the aim of laying down the general economic objectives of the whole government, there were politicians who wanted to reduce the independence of the Bundesbank to better coordinate policies. Again, they were swimming against the tide of public opinion. Holtfrerich (1988), 149; Sturm, R. (1989), 'The role of the Bundesbank in German politics', 12 *West European Politics*, 3.
[182] Lohmann (1996), 5.
[183] Dutch Constitution of 1815. The multiple amendments to the Dutch Constitution centuries are easily traceable on www.denederlandsegrondwet.nl.

to have his image on minted coins. However, article 200 determined that the value and content of coins would be regulated by law, thereby giving some power to the Parliament. Dutch Constitutional law then underwent a process of democratization, empowering parliament vis-à-vis the monarchy (not taking into account the limited right to vote).[184] This changed the constitutional environment in which these provisions were applied, although the provisions themselves remained largely unaltered until 1983, when the constitution was modernized.[185]

The Dutch Central Bank (De Nederlandsche Bank) was created in 1814 by decision of King Willem I.[186] The bank had a mixed origin: it was established under private law as limited liability company but under Royal Charter (*Octrooi)*. The Charter was limited to 25 years. The shares of the bank were available to the public but control over the bank was exercised by the royal appointment of the president and five other directors. The latter were appointed only on proposal by the supervisory board, which was appointed by the shareholders. The Royal Charter was replaced in 1863 by the Bank Act, which chartered the bank again for another period of 25 years. In subsequent decades, multiple changes were made by legislation to the internal structure of the bank. With the bank operating under a monopoly, the sharing of profit between the state and the shareholders proved to be a thorny issue, highlighting the tension between the public and private nature of the bank. The changes to the legislation concerning the bank often coincided with the renewal of the charter of the bank, as it offered an opportunity for reflection.

After the Second World War, the shares were nationalized. Furthermore, the Bank Act of 1948 allowed the Minister of Finance to give instructions to the direction of the bank. The balance between the public and private nature of the bank had shifted towards the former. Although the opportunity to give instructions has never been invoked officially, it did clearly attribute responsibility for monetary affairs to the Minister of Finance, who as a result, was continuously involved in monetary policy. The mandate of the bank was to "regulate the value of the Netherlands monetary unit in such a manner as will be most conducive to the nation's prosperity and welfare, and in doing so seek to keep the value as stable as possible".[187] This

[184] A good introduction to Dutch constitutional law in English is found in Prakke, L. & C.A.J.M. Kortmann eds. (2004), *Constitutional law of 15 EU member states*, Kluwer.
[185] Prakke & Kortmann (2004). 593.
[186] The bank is a public, limited liability company (*Naamloze Vennootschap*), and thus officially called De Nederlandsche Bank N.V.
[187] Art 9(1) Bank Act, translation as found in Amtenbrink (1999), 192.

rather broad mandate was predicated on the belief that through the coordination of policies, the Government assumed a responsibility for the state of monetary affairs.[188] Nevertheless, the independence of De Nederlandsche Bank became firmly embedded in the practice of central banking in the Netherlands as the importance of monetary policy grew and the expertise of the central bankers was widely respected.

By 1983, the monetary system was to a large extent regulated through ordinary law and the Government saw no reason to keep any constitutional provisions on this topic. Deleting the provisions would not bring any change to the substantive legal framework, nor would it alter the balance of power between the Government and Parliament, as substantial changes in any case would have to be enacted by ordinary legislation.[189] In the two-page explanatory memorandum to this part of the proposals, the Government also devoted attention to the suggestion to introduce the obligation to avoid inflation into the Constitution, but rejected this proposal on the ground that it overestimates the power and influence of the constitutional legislator and underestimates the effects of international developments.[190] Moreover, the Government stated that the accomplishment of the objective could have unforeseen and undesirable social-economic consequences. Preventing inflation was considered a matter best regulated by the ordinary legislator, not the constitutional legislator.

The Dutch Parliament disagreed with the Government and amended the proposal. The abovementioned provisions would be replaced by the following (now article 106 Dutch Constitution): "The monetary system shall be regulated by Act of Parliament".[191] The expressed motivation for this proposal was that all constitutions of civilized countries have a provision on their monetary system, that there should be a constitutional protection against the introduction of a European monetary union without parliamentary approval and lastly to confirm the preeminence of the legislator in this field.[192] Discontent was expressed with the

[188] Vanthoor, W.F.V. (2004), *De Nederlandsche Bank 1814-1998: Van Amsterdamse kredietinstelling naar Europese stelselbank*, Boom, 178.
[189] Parliamentary Documents of the Second Chamber of Parliament of the Netherlands, 1978-1979, 15 468, no 3, 2.
[190] Ibid.
[191] Van der Sluis (2014), ch. 6.
[192] Akkermans, P.W.C. ed. (1987), *De Grondwet: een artikelsgewijs commentaar*, W.E.J. Tjeenk Willink, Artikel 106.

fact that the EMS was created without a treaty thereby not involving the national parliaments.[193]

Discussion on the clause focused on the relation with progressive European monetary integration, especially as to whether the introduction of article 106 would hamper further integration. This discussion took place in the context of the (in)famous Brinkhorst-Motion, which Parliament adopted in March 1980.[194] It stated that, in case of doubt, constitutional provisions should be interpreted in such a way as to not impede further integration. This resulted in confusion about the interpretation and legal effects of the amendment. The Member of Parliament who submitted the amendment held that it would allow monetary union, as long as that would be introduced through a treaty (and therefore with the consent of Parliament). The Government also considered monetary union possible only through Treaty change, but as a requirement flowing from European law. They therefore held the amendment to be superfluous.[195] In light of the above, it is not surprising that the ratification of the Maastricht Treaty did not raise constitutional difficulties in the Netherlands. The Treaty was ratified without recourse to a two-thirds Parliamentary majority, which would have been necessary had there been a violation of the Constitution.[196] Academic discussion produced one dissenting view.[197]

Participation of the Netherlands in Bretton Woods, the Snake and the EMS was based on an ordinary law which mandated the Government to set an exchange rate. This was in line with the general constitutional responsibility of the Government to conduct foreign policy. In 1963, a law laid down the procedure by which the Government could make decisions concerning the exchange rate, including – crucially – the decision not to set an exchange rate or to suspend the exchange rate in case of a crisis. The main procedural obligation was to consult with the Nederlandsche Bank.[198] In 1977 the act was replaced whilst keeping intact the broad discretion for the Government.[199] In accordance with these laws the government had made the official

[193] Transcription of debates in the Second Chamber of Parliament of the Netherlands*, Handelingen II,* 25 March 1980, 4084.
[194] Transcription of debates in the Second Chamber of Parliament of the Netherlands*, Handelingen II* 18 March 1980, 3919-3920.
[195] Ibid.
[196]*,* 1991-1992, 22 647, no 3, 48-50.
[197] Heringa, A.W. (1992), 'De verdragen van Maastricht in strijd met de Grondwet', *Nederlands Juristenblad*, 749-752.
[198] Wet inzake pariwaarde van de gulden.
[199] Wet inzake de wisselkoers van de gulden.

decisions to set the exchange rate within the Snake and the EMS and the subsequent exchange rate changes (also to other currencies within the EMS). However, this emphasis on the official role of the Government should not mask the important role of the central bank in international monetary policy.

Conclusion

European monetary cooperation prior to the Maastricht Treaty did not occur in a legal vacuum. There was an almost constant stream of agreements and rules from a wide variety of sources and with differing legal nature. From global (Bretton Woods), to multilateral (Benelux) and European (from the EPU to the EEC). These rules and agreements were often overlapping. For example, a parity change by Belgium in the 1960's would need support from the Netherlands on the basis of the Benelux agreement, coordination within the Council on the basis of EEC Treaty (at least in some interpretations of the Treaty) and approval by the IMF in some circumstances. With the decline of the Bretton Woods regime at the end of the 1960's and early 1970's and the coincidental rise of the EEC on the European level, the latter's rule-making apparatus began to increase production. However, looking at European monetary integration in this phase solely through legal lenses will give a distorted view. Legal questions were hardly of any relevance in giving shape to the developments in this era. European monetary integration in the form of the Snake and the EMS occurred on the border of the EEC legal framework, with one leg inside, and one leg standing firmly outside. Negotiations often took place within EEC bodies, or in close connection to them, and both the Snake and the EMS relied partly on Community instruments. It is easy to see why both the Snake and the EMS are often described as part of the Community. However, it is imperative to take account of the elements of monetary integration that occurred outside the legal framework of the EEC. The main parts of the agreements and rules that constituted the Snake and the EMS were not part of EEC law, and parts of them cannot even be described as legal rules. The effect was that MS could exit (and enter) freely, not in terms of economic of political cost, but in terms of legal constraints. The possibility of exit was a fundamental element in functioning of the Snake and the EMS.

The similarity between the Bretton Woods regime, the Snake and the EMS is that none was incorporated in a fully developed legal system that was geared towards enforcing the commitments of monetary cooperation within a broader framework of economic cooperation.

Or in the words of Eichengreen, they were not part of a "web of interlocking agreements".[200] Despite the significant differences in the legal backgrounds of the three regimes, neither of the three was supposed to be enforced through judicial means. For the Snake and EMS, this was obvious by their positioning partly outside the EEC legal framework, for the IMF Articles of Agreement it can be inferred from the express lack of credible enforcement mechanism.

Lastly, money was not discussed in constitutional terms, neither in European, nor in national debates. Constitutional law, in its shape of a constraining force on democratic decision-making, was not part of the discourse on monetary integration. Neither was constitutional law part of national monetary policy discussions. The Werner Report in this sense seems to have been inspired by how monetary policy was conducted within the MS, namely on the basis of ordinary legislation, subject to the changing tides of politics.

[200] Eichengreen (2008), 151.

Chapter 2
The choice for Maastricht

Introduction

The introduction of the euro was a historic event, as a group of countries transferred their powers to conduct monetary policy to the EU and authorized a supranational central bank to manage a new single currency. Of all that is remarkable about the euro, this chapter focuses on the legal mechanism by which it was created: The Treaty on European Union as signed in February 1992 in Maastricht, the Netherlands. The Maastricht Treaty regulated in a comprehensive fashion all the important aspects of the euro. The use of an EU Treaty for the creation of the euro seems self-evident and, in any case, was not one of the controversial aspects of the euro. [201] The core aim of this chapter is to question the self-evidence of the choice for the Maastricht Treaty as the legal tool to craft EMU.

The first step then is to ask what is so special about EU Treaties. Although the EU Treaties are international treaties, those treaties are considered to have created a separate legal order. This raises the question how the euro would have been different had it not been the product of an EU Treaty, but of an ordinary international treaty that was unrelated to the EU? How does the special nature of the Maastricht Treaty affect the euro? We can also ask whether a treaty was even necessary at all. As seen in the previous chapter, the constitutions of the MS hardly regulated their currencies. The substantive rules governing the Dutch gulden and the German Mark were laid down in ordinary laws. The European equivalent would have been to create and regulate the euro through secondary legislation using the 'Community method'. The legal basis for such a decision could have been the flexibility clause, as a common currency was thought to be necessary for the operation of the common market, or an explicit legal basis could have been introduced in the EU Treaties. The latter option would differ from the Maastricht Treaty in that it would leave the substantive choices for the objectives of monetary union and the institutional arrangements for the EU legislator. This would not be a difference in kind, but

[201] Snyder (1998), 5. "The concept of evolution tends unfortunately to focus our attention on the winners." Also see Goebel (1998), 286-288.

in degree.[202] So, in short, in the early 1980's there were (at least) four ways of creating a euro: through an international treaty, through a comprehensive EU Treaty, through secondary legislation based on existing legal bases in the EEC Treaty or through secondary legislation on the basis of an enabling clause in an EU Treaty.

This chapter seeks to answer the question of why it matters that there were different legal mechanisms to create the euro. What does it tell us about the euro that, instead of being the product of an EU Treaty, it also could have been created by an ordinary international treaty or by secondary legislation? Which elements does it bring into the analysis about the euro that are neglected if we use the Maastricht Treaty as the starting point of the analysis? In the following analysis, three different aspects of the choice for a legal basis are considered.

Firstly, the choice for a legal basis matters in terms of who would make the decision to create the euro. The legal basis determines how a decision gets made and by whom. This means that the choice for a specific legal basis is therefore about who decides about who decides. Secondly, it matters for the overall legal environment in which the euro would function: the shared space of the European Community/Union, in the realm of international law, or exactly on the boundary between the two? This legal context affects the substantive rules one can plausibly create. A euro embedded in the EU legal order can be assumed to benefit from the qualities of that legal order. It would be difficult, but not impossible, to re-create those qualities through ordinary international law. In other words, the demands placed on the specific aspects of EMU framed the choice for a legal basis. Thirdly, the legal mechanism through which a currency is enacted also tacitly assigns political responsibilities for the future of the euro. Who will bear primary responsibility for decisions about the future of the euro?

The chapter analyzes the process by which the political commitment to use the path of an EU Treaty to produce the euro was formed. For this process, the different avenues to create a monetary union are discussed separately, more or less in chronological order, in four different

[202] Also possible, but highly unlikely, were mixed legal foundations where different rules would be included in different legal spheres, for example using both ordinary international law and national law. This chapter sees monetary union as a connected set of requirements, and created more or less at a single point in time. It thus excludes the idea of a monetary union as the end of a series of small steps. This road to monetary union is not included here because both the creation of a European central bank and the *irrevocable* locking of exchange rate required an explicit political decision of a legal nature. Monetary union, contrary to the gold standard, was very unlikely to grow organically.

sub-sections. For each of the alternatives, it is discussed how it entered the debate on monetary union and for three of them why it failed to become the preferred legal mechanism for monetary union. This will show how the different legal avenues were linked to different visions about the substance of monetary union and (implicitly) to different visions about future responsibilities regarding the euro.

This is certainly not the first study to investigate the mixed constitutional nature of the euro and the ECB. Most commonly, these analyses have tended to accept the political choice of the Maastricht Treaty as given, without examining the legal circumstances surrounding that choice.[203] During the euro-crisis, De Witte and Beukers have examined the opportunities and problems related to different legal bases in connection to monetary integration; De Witte with regards to the use of international law and Beukers for creating flexibility in the Eurozone.[204] Historians and political scientists have sometimes mentioned the possible different legal bases for EMU, but using either simplistic terms or only focused on the substantive aspects.[205]

2.1 Creating Monetary Union Through the Flexibility Clause

In its early decades, the EEC Treaty greatly succeeded in stimulating European integration. Between 1957 and 1987 this was the result of developments *inside* the EEC. The EEC Treaty itself was not substantially amended in this period to accommodate the acceleration in European integration. [206] The success was in part the result of the creation of a robust EEC legal order through the decisions of the CJEU and the national judiciaries, but also of political decisions that entrusted more tasks to the Community. These decisions were sometimes based on expansive readings of the explicit legal bases for Community action found in the Treaty

[203] But see Selmayr, M. (1999), 'Die Wirtschafts-und Währungsunion als Rechtsgemeinschaft', 124 *Archiv des öffentlichen Rechts*, 360. Other notable contributions on the constitutionalization of the euro are Tuori & Tuori (2014), 15, fn 37; Herdegen, M.J. (1998), 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom', 35 *Common Market Law Review*; Lastra, R.M. & J.-V. Louis (2013), 'European Economic and Monetary Union: History, Trends, and Prospects', 2013 *Yearbook of European Law*.

[204] De Witte, B. (2013), 'Using International Law in the Euro Crisis: Causes and Consequences', No 4 June 2013 *ARENA Working Paper*; Beukers, T. (2014), 'Flexibilisation of the Euro Area: Challenges and Opportunities', 2014/01 *EUI Working Paper MWP*.

[205] James, for example, notes that article 236 EEC "provided the legal reason why the establishment of a monetary union required a treaty. James (2012), 42.

[206] Minor revisions occurred through the Merger Treaty (1965), the Budget Treaties (1970 and 1975) and the Accession Treaties of Denmark, Ireland and the United Kingdom (1972), Greece (1979) and Spain and Portugal (1985).

and/or on the flexibility clause (article 235 EEC), especially after 1972, when the Heads of State or Government of the MS declared to make full use of the flexibility clause to promote integration.[207] As seen in the previous chapter, the ECMF was based on the flexibility clause. So, why was monetary union not created through the flexibility clause and without changing the Treaties?

In retrospect, it might seem extraordinary to suggest creating monetary union without changing the Treaties, as it would circumvent the ratification processes in the MS. Using the flexibility clause would create the impression of a power-grab by the Community. However, it might not have been as extraordinary as it now appears, because the arguments used to promote monetary union – namely that it was necessary for the internal market – might also have been used to trigger the flexibility clause. In other words, one could have argued that monetary union was implied in the EEC Treaty. This is what the European Parliament hinted at in 1962 when it stated that monetary union "flows logically from (…) the Treaty of Rome".[208] Under this narrative, the relevant powers had already been transferred earlier, so there would be no illicit power-grab.

One of the most positive statements on using article 235 EEC for moving towards monetary union came from Maas in 1972. It is worth quoting him lengthily:

> "Narrowing, and, later on, abolition, of the fluctuation margins of the currencies of member States cannot continue to depend on voluntary decisions of Central Banks (…) Assuming that such a decision far exceeds the scope of short-term economic policy so that application of Article 103, para. 2, is out of the question, recourse to Article 235 might be considered. In my opinion it is not hard to show that within the Common Market the rates of exchange must be in a fixed relation to each other in order to achieve the objectives of the Community."[209]

Thus, according to Maas, at least one of the elements of what constitutes monetary union – abolition of exchange rate margins – could be constituted by decision of the Council on the basis of article 235 EEC (or by international agreement). As discussed in the previous chapters, this article provided that if necessary to achieve one of the aims of the Community, in the light

[207] Weiler (1991), 2445.
[208] European Parliament Resolution of 17 October 1962, OJ 116/2664, para. 6
[209] Maas (1972), 10.

of the functioning of the Common Market, the Council could unanimously decide to take appropriate action, if the Treaty does not already provide the requisite powers. Maas clearly was of the opinion that fluctuating exchange rates could hamper the development of the common market. This argument was again forcefully put forward in 1996 by Ver Loren van Themaat, the former Advocate-General, when he wrote, "[f]or legal as well as economic reasons, an Economic and Monetary Union is a necessary element of a common market."[210] He referred to a definition of what makes a common market, as used by the CJEU in *Gaston Schul*: "The concept of a common market (…) involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market."[211] Under this definition of a common market, it is obvious that not only the fixing of exchange rates, but full monetary union would be necessary.

Despite the fact that the arguments in favor of a monetary union were often based on improving the common market and thus, at face value, fell under the purview of article 235 EEC, this route for monetary union was anything but popular. Indeed, most legal authors rejected the possibility of erecting monetary union through article 235 EEC. Also both authors mentioned above, Maas and VerLoren van Themaat, who stressed the connection between monetary stability and the common market, rejected the possibility: "a far-reaching extension of the powers of the Institutions of the Community ought to be effected by means of Article 236 rather than Article 235."[212] Article 236 EEC laid down the procedure for amending the Treaty. The main thread in the arguments against using the flexibility clause for monetary union concerned the proper route for deep change in the Community.[213] These arguments revolved around the notion of constitutional legitimacy, which was deemed to be lacking in case this significant expansion of competences was only agreed to by the Council. This transformation

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[210] Ver Loren van Themaat, P. (1996), *Some Propositions on the Legal Aspects of the Planned Economic and Monetary Union in its Political, Economic and Social Context before and after the Ratification of the Treaty of Maastricht*, in: Constitutional Dimensions of European Economic Integration (F. Snyder ed.), 3. He wrote in 1996, so after the adoption of the Maastricht Treaty; it must also be emphasized that he did not argue for adoption of EMU through art 235. In 1991 he had written: "To that extent a monetary union is the logical consequence of the concept of the common market in Article 2 of the Treaty. This logical consequence, however, is not yet a legal consequence…" Ver Loren van Themaat, P. (1991), 'Some Preliminary Observations on the Intergovernmental Conferences: The Relations Between the Concepts of a Common Market, a Monetary Union, an Economic Union, a Political Union and Sovereignty', 28 *Common Market Law Review*, 294.
[211] CJEU, Case 15/81, *Gaston Schul,* EU:C:1982:135.
[212] Maas (1972), 10.
[213] Weiler (1991), 2471; Ioannidis, M. (2016), 'Europe's New Transformations: How the EU Economic Constitution Changed During the Eurozone Crisis', 53 *Common Market Law Review*, 1248.

of Europe could not but accomplished from within but required the blessing of the MS. As in many MS the ratification of a treaty requires the involvement of the national parliament or even a referendum, the use of a treaty had a stronger democratic appeal. In other words, the legal limits of article 235 EEC did not so much depend on whether a measure would be necessary for the functioning of the common market, but on whether it was believed that a measure would unduly expand the competences of the Community. Hence, what is important here is that the legal narrative connecting monetary union to the common market was *deemed* unconvincing.

Given the widely-held opinion that article 235 EEC did not provide a sufficient legal basis for monetary union, it should not come as a surprise that there has been no extensive proposal on this basis.[214] It was an idea without a political owner.[215] Nevertheless, some basic characteristics of how a common currency based thereon would be governed can be distinguished. Most importantly, the main decisions regarding the legislative framework of the currency would continue to be taken unanimously by the Council. The Commission would submit the proposals on the basis of which the Council could act; the European Parliament would be consulted. Of course, the amendment of article 235 EEC, or changes in the practice concerning this clause, would then also affect the governance of the euro. For example, the change introduced by the Lisbon Treaty enhancing the role of the European Parliament in the use of the flexibility clause would have immediately extended to the euro.

One striking feature of the Maastricht Treaty that would have been challenging to reproduce through the flexibility clause is differentiated integration, meaning that monetary union would most likely have covered all MS. As the argument for using the flexibility clause revolves around improving the common market, it would be difficult to sustain long-term differentiated integration under this legal base. Hence, this procedure would also not easily lend itself to the use of convergence criteria for entry into monetary union. In this sense, the flexibility clause certainly favored a monetarist approach to monetary integration, which saw monetary union as

[214] Lauwaars, R.H. (1976), 'Art. 235 als Grundlage für die flankierenden Politiken im Rahmen der Wirtschafts- und Währungsunion ', 11 *Europarecht*, 563-564; Ryan (1978); Gericke, H.-P. (1970), *Allgemeine Rechtsetzungsbefugnisse nach Artikel 235 EWG-Vertrag*, Appel.
[215] Tomuschat, C. (1976), 'Die Rechtssetzungsbefugnisse der EWG in Generalmächtigungen, insbesondere in Art. 235', *EuR Sonderheft*. Also see Hahn, H.J. (1991), 'The European Central Bank: Key to European Monetary Union or Target?', 28 *Common Market Law Review*, 793.

a driving force for further economic integration, in contrast to the economist approach, which saw monetary union as the end of a process of economic convergence.[216]

Perhaps most difficult, from a legal point of view, would have been the creation of a European central bank through the flexibility clause. The creation of a new body in the Community would, in itself, not have been problematic, as was shown in the previous chapter in relation to the EMCF. It would be the assignment of discretionary powers to a new body that might have run afoul of the Meroni-doctrine of the CJEU. The Meroni decision of the Court in 1954 held that a delegation of powers which goes beyond the execution of powers bases on objective criteria and allows for a wide margin of discretion is impermissible.[217] In 1980, the Court in *Romano* furthermore noted that agencies may not be attributed legislative powers through a delegation by the Council.[218] Whereas in Meroni, the core issue was the institutional balance created by the Treaties, in Romano the main concern was the lack of judicial protection stemming from delegation.[219] From a principled legal perspective, a European central bank created through the flexibility clause would certainly be problematic, but it would by no means have been certain that the CJEU would have continued its line of argumentation. Legal practice starting in the 1980's showed considerable willingness to accommodate the ongoing process of agencification, with little opposition from the CJEU. In 2014, in the *ESMA*-case, the Court appears to have largely abandoned the Meroni-doctrine.[220] Nonetheless, the Meroni-doctrine would have in the 1980's would have created a formidable bias in the negotiations against a powerful and strongly independent central bank.

In 1987, with the entry into force of the Single European Act, any speculation about creating monetary union through the flexibility clause became moot.[221] The second section of the newly introduced article 102A EEC required that any institutional changes necessitated by further monetary integration would have to be based on article 236 EEC. The provision thus confirmed the reading above on the lack of legitimacy for the Community to establish monetary union

[216] James (2012), 93.
[217] CJEU, Case 9/56, *Meroni,* EU:C:1958:7.
[218] CJEU, Case 98/80, *Romano,* EU:C:1981:104.
[219] Chamon, M. (2011), 'EU agencies between Meroni and Romano or the devil and the deep blue sea', 48 *Common Market Law Review*, 1063.
[220] CJEU, Case C-270/12, *ESMA*, EU:C:2014:18. Scholten, M. & M. Van Rijsbergen (2014), 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants', 41 *Legal Issues of Economic Integration*.
[221] For a broader assessment of the SEA, see Bermann, G.A. (1989), 'The Single European Act: A New Constitution for the Community?', 27 *Columbia Journal of Transnational Law*, 555.

without the explicit consent of the MS through a treaty-amendment procedure. What is curious though, is why this provision was necessary at all. As stated above, the use of the flexibility clause was never taken seriously as a possibility to create monetary union.

Article 102A EEC is best understood in relation to other – more ambitious - aspects of the SEA and in its rejection of a proposal for a European Monetary Fund. Article 102A was the only article in a new chapter of the EEC Treaty, which (in parentheses) mentioned monetary union in its title. Somewhat ambiguously, the SEA thus expressed monetary union as a goal of European integration. [222] Furthermore, the SEA stimulated the further development of free movement of capital, which would make exchange rate alterations more difficult. In other words, the SEA had monetary union on its mind, without actually conferring any new competences to the Community in this regard.[223]

The political pressure to speed up monetary integration came mainly from France, which demanded that monetary union became an official goal of the Community in exchange for accepting the expansion of the free movement of capital.[224] The British were opposed to further steps in monetary integration and even opposed the opening of the Intergovernmental Conference that led to the SEA. [225] During the IGC, recognizing the possibilities of an improved internal market for the British services sector, the British no longer objected to treaty change, but continued to be strongly opposed to monetary integration. Germany and the Netherlands strongly favored a renewed push for European integration, but were fearful of a premature move towards monetary union without the necessary parallel development of economic union. Delors, the ambitious new Commission President, favored further monetary integration, but was pragmatic as to the route to get there. He presented a proposal to the IGC that would expand article 107 EEC and incorporate the EMS into the EEC legal structure.[226] The main innovation of the proposal would lie in the new section 4 of article 107 EEC: "The European Monetary Cooperation Fund will be replaced, at the right moment, by a European Monetary

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[222] Louis, J.-V. (1988), '"Monetary Capacity" in the Single European Act', 25 *Common Market Law Review*, 22.
[223] Also see CJEU, Opinion 1/91, EU:C:1991:490, para 17: "It follows inter alia from Articles 2, 8a and 102a of the EEC Treaty that that treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union". Pescatore, P. (1987), 'Some Critical Remarks on the "Single European Act"', 24 *Common Market Law Review*. Moravcsik, A. (1991), 'Negotiating the Single European Act: national interests and conventional statecraft in the European Community', 45 *International Organization*, 19.
[224] Louis (1988), 9.
[225] Moravcsik (1991), 41. Also see Van Middelaar (2009), ch. 3.
[226] A representative of the Commission would become member of the board of governors of the EMCF. Szász (2001), 109.

Fund with institutional autonomy." [227] The Council, on proposal from the Commission and after consulting the Assembly, would unanimously "approve arrangements whose adoption it will recommend for the Member States, in conjunction with the respective constitutional rules".[228]

What is of main interest here is the procedure to create this new fund, which is quite similar to what article 236 EEC prescribed in that it also required ratification of some sort by the MS. It would give the UK, and all other MS, a veto over the creation of the European Monetary Fund. It would come as close as possible to the procedure for treaty-change, without formally amending the treaties. The main difference is that the process towards a real treaty-amendment is much more open in terms of which topics are discussed. Under the proposed article 107 EEC both the goal and instrument of further integration would already be settled. MS would keep their veto, but lose control over the context in which that veto would be exercised.

The proposal by Delors was rejected and instead article 102A confirmed that a treaty amendment was necessary to achieve the goal of monetary union. The SEA thus shows how monetary integration could proceed, even with a stanch opponent that held a veto, that is, by re-confirming collective MS control over the process.[229]

2.2 Creating Monetary Union Through an Enabling Clause

The second method of creating a common currency was to insert an enabling clause into the Treaty. The enabling clause would authorize or instruct the secondary legislator of the Community to create a monetary union. In doing so, the enabling clause could set, in broad terms, the conditions under which the single currency would operate, for example by stating that there would be an independent central bank or that convergence is necessary for MS to participate in monetary union. These conditions are of course reminiscent of the Maastricht Treaty, but the key difference is that the secondary legislator would have a wide discretion in giving meaning to these conditions. Hence, creating a single European currency through this

[227] See Louis, J.-V. (1989), 'A Monetary Union for Tomorrow?', 26 *Common Market Law Review*, 322.
[228] Agence Europe, 28/29 October 1985, No. 4193.
[229] Bermann (1989), 555.

route would resemble most closely the national situations in the MS in terms of the relation between ordinary and constitutional law.

An early proposal for far-reaching European integration by way of a European Constitution – including an enabling clause concerning a single currency – was developed in the U.K. prior to and partly during World War II. A number of prominent intellectuals were seeking to unite the democratic nations of the world under a federal banner as the only means to prevent war. These idealistic plans of the Federal Union included a Rough Draft of a Proposed Constitution for a Federation of Western Europe in which "The Federal Legislature shall have power to make laws relating to: a) Currency, coinage and legal tender."[230] This was in line with statements by a famous economist of the same group, Lionel Robbins, who had written:

> "In drawing up the Constitution (…) the essential requirement is that the Federation should have adequate powers of control. It may desire to use these powers to institute a common currency, or it may decide that some looser system is desirable; but in any case it is agreed that it must have full powers to carry out whatever policy is thought desirable."[231]

This indeterminacy with regard to the eventual shape of monetary union fitted the strategy of the Federal Union to make a European federal structure appealing across the political spectrum. This meant that different economic policies would not be excluded beforehand, allowing people with dissimilar economic ideologies to support the plans. Also interesting is that the proposal mirrors the text of the US constitution (1787), which in article I section 8 allows Congress to "[t]o coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures". What Robbins' statement acknowledged, and what had been the case in the US, is that an enabling clause need not be used immediately or continuously. This is also telling for the significance of these provisions; within the documents of which they were a part, these monetary provisions were of relatively minor importance. The US Constitution was not adopted *because* of the monetary provision, but because of a desire to

[230] Bosco, A. & P. King (1991), *A constitution for Europe: a comparative study of federal constitutions and plans for the United States of Europe*, Lothian, 103.
[231] Ibid.

transform an ineffective and loose confederation of states into an autonomous political body.[232] Monetary union was just one part of this transformation.

Within the EEC, the Draft Treaty Establishing the European Union (hereafter: the Spinelli Draft Treaty) aimed at a similar transformation.[233] Promoted by long-time federalist Altiero Spinelli and adopted by the European Parliament in February 1984, the Spinelli Draft Treaty was an attempt to invigorate integration by removing the treaty as an obstacle of integration.[234] Competences would be phrased in open-ended terms and the decision-making process within the Union would no longer prioritize unanimity.[235] This is most visible in the overall length of the draft: a mere 87 articles. These included provisions on monetary union, but monetary integration was hardly at the center of the proposal.[236] Some have even called the monetary provisions of the Spinelli Draft Treaty unambitious.[237]

Article 33 of the Spinelli Draft Treaty included the European Monetary Fund in the list of "organs of the Union" and stated that the EMF would have "the autonomy required to guarantee monetary stability". Organic laws should lay down the rules governing the competences and power of the organs of the Union, as well as their organization and membership. Article 52 concerned the transition from the EMS to monetary union. It obliged participation in the EMS (but not the ERM)[238] and noted that "the Union shall have concurrent competence for the progressive achievement of full monetary union". Again, organic laws were envisioned that would regulate the Statute of the EMF and the "progressive conversion of the ECU into a

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[232] But see for a scathing economic critique Beard, C.A. (1913 - 2004), *An Economic Interpretation of the Constitution of the United States*, Macmillan.

[233] See for a contrary opinion Jacque, J.-P. (1985), 'The Draft Treaty Establishing the European Union', 22 *Common Market Law Review*, 28. "the draft Treaty of Union seems much less revolutionary than might have been supposed."

[234] European Parliament Resolution of 14 February 1984, Draft Treaty Establishing the European Union, OJ C 77/33, hereafter referred to as Spinelli Draft Treaty.

[235] Competences would either be exclusive or concurrent (art 12). Under the concurrent competences, the MS could act as long as the Union had not. Concurrent competences included conjunctural policy (art 50), monetary and credit policies (art 51), monetary union (art 52.2), agriculture and fisheries, transport, telecommunications, research and development, industry, energy (art 53), and social and health, consumer protection, regional, environmental, education and research, cultural and information policies (art 55). See Constantinesco, V. (1985), *Division of fields of competence between the Union and the Member States in the Draft Treaty establishing the European Union*, in: An ever closer Union: A critical analysis of the Draft Treaty Establishing the European Union (R. Bieber, et al. eds.), 50.

[236] For example, in his analysis of the Spinelli Draft Treaty, Jacque does not mention monetary union. Jacque (1985).

[237] Jacobs, F.B. (1991), 'The European Parliament and Economic and Monetary Union', 28 *Common Market Law Review*, 366.

[238] Art 7 section 4 of the Spinelli Draft Treaty nevertheless provides that "acts adopted in the context of the European Monetary System … continue to be effective."

reserve currency", the responsibilities of central banks with regard to the money supply and lastly, "the procedures and the stages for attaining monetary union".[239] The final shape of monetary union, and the path towards it, would be governed by organic law, which was to be a special category of law within the Union. Most importantly, it meant that the Council and European Parliament would vote on proposals by qualified majority. For the former, this would mean two thirds of weighted votes cast, comprising a majority of the representation, in contrast to the requirement of absolute majority for ordinary legislation, requiring a majority of weighted votes cast, and comprising a majority of representations.

The Spinelli Draft does not set out what 'full monetary union' means, especially in relation to economic union.[240] This meant on the one hand that the Union legislator would have a wide discretion in determining the proper tools and goals of monetary union, but on the other hand was restricted in venturing into policy areas more commonly associated with economic policy. Article 33 noted that the EMF ought to be autonomous, but the degree of autonomy is left open. For economic policy, the Spinelli Draft did not foresee a broad enabling clause. Article 50 made conjunctural policies a concurrent competence of the Union. Law in this policy area would be adopted with ordinary majorities. Hence, in terms of the substantive vision of EMU, the Spinelli Draft thus builds on the call at the start of the EMS to set-up a European Monetary Fund, and took little inspiration from the Werner Report with its call for a "centre of economic policy making".[241]

Jacobs was right in his assessment of the level of ambition of the Spinelli Draft Treaty insofar it concerned the lack of a time-schedule and clear agenda for the enactment of monetary union. Pinder moreover noted some discrepancies in the way the Spinelli Draft Treaty dealt with the provisions on credit policy, which had a *dirigiste* approach, and the autonomy of the proposed EMF, which had supposedly more neoliberal undertones.[242] Surely, these discrepancies show that the proposal was underdeveloped on this point. Had the Spinelli Draft Treaty been taken up for further negotiation, these provisions would have been subject to intense scrutiny and amendment. However, this should not distract from the fact that with the Spinelli Draft Treaty,

[239] Art 52(3) Spinelli Draft Treaty.
[240] Pinder, J. (1985), *Economic and social powers of the European Union and the Member States: Subordinate or coordinate relationship*, in: An Ever Closer Union: A Critical Analysis of the Draft Treaty Establishing the European Union (R. Bieber, et al. eds.), 116.
[241] Pinder (1985), 116; Jacobs (1991), 365.
[242] Pinder (1985), 115.

the MS would have empowered the Union to establish a monetary union. Especially because the next steps to monetary union would not rely on the consent of the individual MS, this could be seen as the surrender of monetary sovereignty. From this perspective, the Spinelli Draft Treaty should be seen as revolutionary rather than as unambitious.

Instead of being rejected outright, the Spinelli Draft Treaty received the deadly embrace of mild enthusiasm. After the draft was adopted by the European Parliament in February 1984, the European Council in June of that year decided to set up an *ad hoc* Committee "to make suggestions for the improvement of the operation of European co-operation".[243] The resulting Dooge Committee Report of March 1985 embraced a more functional approach to European integration and listed a wide range of policy fields in which common action was deemed necessary. Monetary integration was limited to strengthening of the EMS and expanding use of the ECU. The Commission White Paper of June 1985 on completing the internal market then validated this approach by describing in more detail the needs of an internal market. Within this functionalist perspective, step-by-step approach, there was little need for monetary union. [244]

After the rejection of the Spinelli Draft Treaty as the basis for negotiations, and especially after the entry into force of the SEA in 1987, the chances for this kind of constitutional treaty rapidly declined. Despite skepticism from commentators such as Pierre Pescatore, the small-steps approach of the SEA had nonetheless launched a period of European "optimism and institutional momentum".[245] This meant that the most likely route for an enabling clause to appear in the EU Treaties had been closed off. The alternative route was to try to influence the negotiations leading up to the Maastricht in such a way as to reduce the amount of detail in the Treaties, thus creating more discretion for the secondary legislator. This was what the European Parliament tried in the run-up to Maastricht. Over the years, the EP has adopted numerous resolutions and reports on the necessity and shape of EMU, building on the idea that most of the rules on EMU should be set through EU legislation, with the European Parliament participating in the ordinary legislative procedure (previously called the co-decision

[243] European Council Conclusions, 26 June 1984, Fontainebleau.
[244] Agence Europe, 28/29 October 1985, No. 4193. See Szász (2001), 110-114; Louis (1988), 10.
[245] Moravcsik (1991), 19.

procedure). [246] For example, in a resolution of May 1990, the EP considered it necessary that the "principles of monetary stability and the autonomy of the European central banking system … be enshrined in the Treaties, and for the mechanisms establishing this autonomy to be subject to legal guarantees".[247] This mix between Treaty based principles, and further legal guarantees (in secondary legislation) returns in a resolution of October 1990, which set out concrete proposals for Treaty provisions. Most importantly, article 3 provided that the ECB would be governed under the statutes, created by regulation of the Council in co-decision with the European Parliament.

This route was beset by difficulties. As other drafts circulated, the substantive differences that resulted from the European Parliaments approach became apparent. The vision of monetary union in the Delors Report (discussed in the next section) relied in part on the fact that the proposed rules would be included in the Treaty. It was obvious that in the proposals from the European Parliament, the independence ECB would become less firmly embedded in the legal instruments. Under these circumstances it also appears as if the European Parliament is merely trying to strengthen its own position, rather than promote a new form of integration for the Union as a whole. More fundamentally, the proposals by the European Parliament challenged the notion whose currency the euro would be. At the moment when the EP adopted these resolutions, it was already beyond doubt that the MS collectively would want remain in control over the future of the currency. Hence, these proposals by the European Parliament are not credited as having influenced the negotiations on the Maastricht Treaty.

The idea that the treaty should contain the essential principles of monetary union but that the statutes should be created through secondary legislation was also suggested in 1989 by an expert-group on central banking, under the guidance of Jean-Victor Louis.[248]

2.3 Creating Monetary Union by Detailed Treaty Revision

[246] A collection of resolutions by the European Parliament on EMU was published in 2012. European Parliament (2012), 'The Long Road to the Euro', *Cardoc Journal*, No 8, February 2012.
[247] European Parliament Resolution of 18 June 1990 on Economic and Monetary Union, OJ C 149/66. Also see Jacobs (1991), 373.
[248] Louis, J.-V. ed. (1989), *Vers un système européen de banques centrales: projet de dispositions organiques*, CEPREM, 33-34. Also see Hahn (1991), 814.

European integration after the SEA entered a new period, with an emphasis on the completion of the Single Market.[249] One example of this was the aim to get free movement of capital on the same level as the other three free movements (goods, workers, services). The strengthening of free movement of capital, in combination with fixed or inflexible exchange rates, reduces the discretion of national monetary policy authorities to set monetary policy.[250] Moreover, the Basel/Nyborg Agreement of the central bankers in the CoG (Basel) and the European Council (Nyborg) on the reform of the EMS had the effect of making exchange rate interventions less likely. Under these conditions, deepened monetary cooperation became imperative. So, in 1988 in Hanover, after advances by the French Finance Minister E. Balladur and German Foreign Secretary H.D. Genscher[251], the European Council created the Committee for the Study of Economic and Monetary Union under the leadership of Jacques Delors, then President of the European Commission.[252] Besides Delors, the Committee consisted of the governors of the central banks of the member states in their personal capacity and three experts.[253]

The Delors Report was presented on 17 April 1989 and was a crucial step on the road towards a monetary union based on a detailed EU treaty amendment. James mentions in his book on the making of the monetary union that the participants of the Delors Committee had few expectations that their report would have much impact, akin to the Werner Report.[254] However, the Treaty of Maastricht follows in many aspects the Delors Report.[255] To explain this success, Dyson and Featherstone emphasize the weight of the composition of the Delors Committee: combining the expertise (and prestige) of the central bankers with the political sensitivity of Jacques Delors.[256] Implied in this assessment is that the Report itself had the right vision – politically at least – about further integration. This section therefore looks at how the substance

[249] Jacobs (1991), 367.
[250] McNamara (1998), ch 2.
[251] Dyson & Featherstone (1999), 164 and 327-329.
[252] See for negotiations leading up to the Hanover meeting, Dyson & Featherstone (1999), ch 16; James (2012), ch 7.
[253] Given the strong negative opinion of Prime Minister Thatcher towards monetary union, it is surprising that the Governor of the Bank of England participated in the Committee and agreed to the report. See Marsh (2009), 110. Verdun suggests that the British concurred with the creation of the Delors Committee because it was afraid they would proceed on a multilateral basis. Verdun, A. (1999), 'Governing By Committee: The Case of Monetary Policy', 1995-5 *European Union Center of California Working Paper*.
[254] James (2012), 211. Also see Marsh (2009), 121.
[255] Verdun, A. (1998), 'The Role of the Delors Committee in the Creation of EMU: An Epistemic Community?', 1998 *EUI Working Paper of the Robert Schuman Centre*; James (2012), 211.
[256] Dyson & Featherstone (1999), 712-713.

of the Delors Report is connected to a specific vision about the role of EU constitutional law in European monetary integration.

The definition of monetary union in the Delors Report closely follows the Werner Report: assurance of total and irreversible convertibility of currencies, liberalization of capital movement, locking of exchange rates. [257] The responsibility for monetary policy would rest with an independent European institution. Economic union is also defined in the Delors Report: an unrestricted common market governed by a set of rules indispensable for its proper working, comprising four elements: firstly, a single market for (free movement of) persons, goods, services and capital; secondly, competition policy; thirdly, common policies directed at structural change and regional development; and lastly, macroeconomic policy coordination.[258]

The Delors Report observed that Treaty amendment was necessary for monetary union and concluded that "[f]or this reason the union would have to be embodied in a Treaty which clearly laid down the basic functional and institutional arrangements".[259] As discussed in the previous section, a broad enabling clause would have sufficed to overcome the lack of legal basis for monetary union. The suggestion that only the basics should be included in the Treaty, leaving the rest for secondary legislation, is contradicted by the rest of the Report. This is seen for example when the Report identifies two options of moving towards EMU: using different treaties for each of the three steps towards EMU, or a single treaty incorporating the three different steps and setting the procedures for moving towards the next stages. Using secondary legislation to make arrangements for the second and third stage was apparently not an option.[260] On many occasiasions, the Delors Report states that rules should be included in the Treaty. The design of EMU was intertwined with its legal basis. This is particularly visible in relation to three elements of the Report: the dominance of the monetary policy objective over other economic objectives, the institutional position of the new European central bank and lastly the binding rules for national fiscal policy.

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[257] The Delors Report argued for stronger centralization of monetary competences than the Werner Report. Louis (1989), 304.
[258] The Maastricht Treaty did not include this broad definition of Economic union in its setup, instead including Title VI on Economic and Monetary Policy. As such, it stands separate from other areas of Union economic policy, such as competition policy, the four freedoms and regional policies.
[259] Delors Report, para 18. Also see Louis (1989), 305-306.
[260] Delors Report, para 50-52. The first stage would include amending several pieces of secondary legislation, most notably the 1974 Covergence Decision and the 1964 Council Decision setting up the CoG. Before the transition to the second stage the treaty change should be "prepared and ratified".

The goals and objectives of both economic union and monetary union are enumerated in the Delors Report. For monetary union, price stability is paramount, as it is the first and primary objective of the ESCB.[261] For economic union, the objective of price stability also pops up, together with economic growth. Other objectives are converging standards of living and high employment. However, the Delors Report sets a hierarchy between the objectives, making the wide range of objectives of economic union subordinate to the (monetary) objective of price stability.[262] This hierarchy between objectives forms the intellectual foundation of the Delors Report. It is the starting point of the design of EMU and as such influences all the different aspects of it. This also meant that once EMU came into effect, this primary objective itself would no longer be subject to political contestation.

With regard to the institutions of EMU, it should first be noted that the Delors Report did not envision an economic policy decision center.[263] Only for monetary policy would a new body be necessary. This new body would be created and governed by the Treaty: "[The ESCB] would operate in accordance with the provisions of the Treaty".[264] This is a peculiar observation because it appears to be stating the obvious: public institutions are generally supposed act in accordance with the rules. However, the meaning of this sentence becomes clear in light of the proposed design of the ESCB: it would be an autonomous Community institution, committed to the objective of price stability. Other institutions would not be given the competence to veto or co-decide the policies of the ESCB. The statement thus emphasizes that the ECB stands *only* under the authority of the Treaty. The responsibility over the ECB would thus lie first and foremost with those that negotiate the Treaty, namely the MS. As the Delors Report primarily addresses them, it was appropriate that the Report discusses the mandate, functions, policy instruments, structure and organization, and status of the ECB.[265]

[261] Louis (1989), 311.
[262] Delors Report, 21 and 17. There is only one instance in which the burden of coordination of monetary and fiscal policy does not fall on fiscal policy. On that occasion, however, the independence of the ECB is stressed. Delors Report, para 24.
[263] Tuori & Tuori (2014), 26.
[264] Delors Report, 32.
[265] Delors Report, 22. The only reference to Community legislative discretion on the ESCB is found in the attribution of "policy instruments". The Delors Report states that these instruments should be specified in the ESCB Statutes, "together with a procedure for amending them".

For economic policy, the Delors Report proposed binding rules and procedures. Apart from the fact that the procedures would also be laid down in binding rules, the Report makes a distinction between the two.[266] Binding rules are substantive and pre-determined prohibitions on the discretion of the Member States in setting their fiscal policy. Limits on government deficits (as percentage of GDP) are an example of such binding rules. The coordination of a wider spectrum of economic policies would take place through procedures, regularly updated to take account of assessments of short-term and medium-term developments. Whether or not the outcome of these procedures would be binding upon the Member States remained inconclusive.[267] The Delors Report states: "Apart from the system of binding rules governing the size and the financing of national budget deficits, decision on the main components of public policy (…) would remain the preserve of Member States even at the final stage of economic and monetary union".[268] And "in the event of non-compliance by Member States, the Commission (…) would be responsible for taking effective action to ensure compliance; the exact nature of such action would have to be explored."[269] The binding rules on national budgets would also exclude the possibility of "access to direct central bank credit and other forms of monetary financing".[270]

The prominence of treaty-based rules in the Delors report, especially compared to the Werner Report, is an effect both of the political need to keep MS in charge over the negotiations of EMU and the economic requirements of EMU. Extensive treaty amendment was thus not only appropriate, but *necessary* for EMU. The economic vision on monetary integration, wherein rules play an important role in constraining political actors, coincided with a political vision for further European integration that put the MS collectively in charge first over the immediate negotiations of EMU and secondly, over the future negotiations of EMU. That last aspect, on the long-term future of EMU, was implicit in the Delors Report. In other words, the Delors Report was concerned with outlining the rules needed to govern EMU, not with how these rules themselves ought to be governed.

[266] Snyder (1994), 82.
[267] James (2012), 252.
[268] Delors Report, 19.
[269] Delors Report, 23.
[270] Delors Report, 20.

The Delors Report was only the first report on route to the Maastricht Treaty, albeit an important one. Many of the reports that followed built on the premise that EMU was to be based on an extensive treaty. As such, the idea became largely uncontested. This did not mean that the issues concerned with the choice for a legal basis of EMU disappeared completely, as can be witnessed below in relation to three examples found in reports dealing with further proposals for EMU.

In preparation for the IGC, the Monetary Committee produced a document titled 'Economic and Monetary Union Beyond Stage 1'.[271] The innovative part of the document is on giving shape to the principles that govern fiscal policy in EMU, where it says: "the points below should be considered for incorporation in the Treaty", followed by three principles: 1) "Monetary and compulsory financing of public deficits should be excluded"; 2) "Each Member State must bear the responsibility for its own budgetary management" and 3) "Excessive deficits must be corrected, even if there is no monetary financing".[272] With regard to the last point, it is mentioned that the criteria for the application should be in the Treaty, but "implementation should depend on secondary legislation." About monetary policy the Monetary Committee was much less straightforward and therefore has little new to add, except for one particular paragraph on the legitimacy of the new central bank:

> "The constitutional legitimacy of the ECBS [the European Central Bank System, *MvdS*] would derive from its being set up by a treaty duly ratified by national parliaments. The legitimacy of its particular actions would derive primarily from the objectives set for it by the treaty, notably the duty to ensure price stability."[273]

The Commission of course also participated in the preparation for the IGC, by helping to establish a standard narrative on the economic benefits of EMU and by making suggestions on the institutional constructions.[274] Over the course of 1990, the Commission adopted the position of a more or less completely Treaty based EMU. Where early on in the preparations the Commission was ambiguous about what should be regulated in the Treaty, later the

[271] Monetary Committee (1990), 'Economic and Monetary Union Beyond Stage 1', as found in Agence Europe, 3 April 1990, No 1609.
[272] Ibid.
[273] Hahn (1991), 809.
[274] In *Pringle* and *Gauweiler*, discussed in chapter 5, the CJEU refers for the negotiating history of the Maastricht Treaty. In both cases, it uses the works of the Commission, without first assessing whether the Commission is the most relevant actor in this regard.

Commission followed the same line as the Monetary Committee and the CoG. For example, in March 1990, the Commission wrote that the credibility of the commitment to stability depended on the ECB's freedom from obligations to take actions and the length of the appointment of ECB officers.[275] A few months later and after the Commission had noted that the statutes of the new monetary institution should be attached to the Treaty, a third factor was mentioned: "Legal status of its statutes". This addition was explained in the following way: "The last element determines the conditions under which the statutes of the central bank can be changed; the more difficult this is, the more secure the central bank — and hence the public – could be that its independence is permanent."[276]

The CoG drafted the statutes at the request of the European Council.[277] Attached to the draft, submitted in November 1990, were an introduction and explanatory memorandum. As the draft articles themselves are silent on their own status, it is in the Introduction that it is made clear that the statutes are meant to be attached to the Treaty, and thereby are of the same status: primary Community law. As mentioned above, the Delors Report foresaw a simplified amendment procedure for the technical details of the rules on the new monetary institution. Which details should be included in this regime is not yet specified in the draft itself, but the Introduction nevertheless states: "The Committee of Governors is firmly of the view that all fundamental features of the System should definitely be excluded from simplified amendment procedures".[278]

2.4 Creating Monetary Union Outside the European Community

Both the MC and the CoG referred in their contributions to the constitutional legitimacy of the new monetary institution. The ECB would become a constitutional central bank. Within the French government the introduction of an independent monetary institution into the EC Treaty

[275] Commission (1990), 'Economic and Monetary Union: The Economic Rationale and Design of the System', as found in Agence Europe, 23 March 1990, No 1604/1604.
[276] Commission (1990), 'One market, one money: An evaluation of the potential benefits and costs of forming an economic and monetary union', 44 *European Economy,* 97. Another example is that in April the Commission had stated that '[a] distinction will have to be made at a later stage between the matters that will be governed by the Treaty itself, the Eurofed Statutes and by secondary legislation'. This statement is repeated in August, but then only after an extensive summary of all the elements that will have to be regulated in the Treaty and in the statutes. Moreover, a list of which elements should in any case be regulated in secondary legislation is not included.
[277] James (2012), 283.
[278] Committee of Governors, *Draft Statute of the European System of Central Banks and the European Central Bank, Introduction*, as found in Agence Europe, 8 December 1990, No 1669/1670.

met with resistance and ideas floated around to have EMU created outside the EC.[279] However, the French Draft Treaty that was eventually proposed did see EMU created inside the EC. It was in the early stages of intra-governmental discussions that the idea of an extra-EC European central bank would be take shape. This section looks at the ways EMU could have been created outside the EC and why these routes were already rejected in the French proposal. One route was to go fully outside the established structures and institutions of European integration and create a new institutional framework. Another option was to incorporate EMU in a fourth pillar of the EU, outside the EC.

The French tried the first route only a few months before the creation of the Delors Committee. At least part of the French aspiration to move towards monetary union was that it would restrict the power of the Bundesbank, or more precisely, that the Bundesbank would be obligated to take into account their interests as well. As the actions of the Bundesbank generated effects beyond the German borders as part of its role as anchor in the EMS, those who were effected should have a say in the policy making, so the argument went. The French attempted to tackle the problem head-on during the celebrations of the Elysée-Treaty in 1988.[280] The Elysée-Treaty was originally signed in 1963 to solidify the political relations between France and Germany. In 1988 – celebrating its 25 years of existence – two new protocols were attached to the original treaty. One protocol would improve military cooperation; the other would result in an Economic Council. The Economic Council would, amongst other things, aim at monetary cooperation as close as possible. The presidents of the central banks of both countries would be members of the Council. The impact of the protocol would – of course – revolve around the question whether the Economic Council could make binding decisions. On this point the German Minister for Economics apparently told the Bundesbank right before the publication of the negotiated treaty that it would commit them to coordinate their policy with the French government.[281] In response, the Bundesbank used its political muscle to assemble a broad coalition to fight its subordination to this new international body – and won. It received first the reluctant assurance from Chancellor Kohl that it would remain independent, and eventually a preamble was attached that clarified the interpretation of the tasks of the Council. The

[279] For this section, the distinction between EC and EU is relevant.
[280] See Kaltenthaler, K. (1998), *Germany and the politics of Europe's money*, Duke University Press, ch 4; Szász (2001), 121; Dyson & Featherstone (1999), 324-325; Segers, M. & F. Van Esch (2007), 'Behind the Veil of Budgetary Discipline: The Political Logic of the Budgetary Rules in EMU and the SGP', 45 *Journal of Common Market Studies*, 1093.
[281] Kaltenthaler (1998), 64.

unsuccessful attempt to constrain the Bundesbank through international law shows the willingness of the French to go outside the EMS and the EC to accomplish its goals. By no means was the incorporation of EMU into the EC Treaty a necessity. However, the affair also shows the difficulty of using a simple international treaty to bind the Bundesbank. The treaty was very easily opened for modification even after it was signed and it was dependent on how the participating countries themselves interpreted the treaty. Binding the Bundesbank would require a more firm commitment.

In the preparation for the IGC, the 'location' of EMU was hotly debated in French governmental circles. In their seminal work on the negotiations of EMU, Dyson and Featherstone note repeatedly how some in the French Government opposed the application of the model of the Treaty of Rome (which was appropriate for technical areas) to monetary policy (which touched the core of national sovereignty).[282] The relevant concerns were twofold: firstly, the French saw as vital the coordination of monetary policy and economic policy through a political institution and secondly, that political institution should be strongly intergovernmental in nature.[283] These considerations also lay at the foundation of the idea of a 'gouvernement économique'.[284] Especially within the Ministry of Finance there was aversion to the EC Treaty: "Trésor officials had continued to favor a more flexible institutional arrangement outside the Treaty as a means of avoiding issues relating to the powers of the EC Commission and European Parliament".[285] It remained unclear as to how EMU should then be given shape, as the ideas for shaping EMU still involved the Council and the European Council. In the draft treaty, presented by France in January 1991, these ideas were rejected and it saw EMU created within the EC Treaty.[286] Several reasons explain why the proposal in the end did not go outside the EC legal framework. Firstly, it was argued that it would find opposition from the smaller countries, whose interest lay in strengthening the Community institutions. Secondly, Delors was strongly opposed to it. Dyson and Featherstone describe EMU as a fourth

[282] Dyson & Featherstone (1999), ch 5.
[283] Howarth, D. (1999), 'French aversion to independent monetary authority and the development of French policy on the EMU project', *Paper presented at the biannual ECSA conference, Pittsburgh*, 12-13.
[284] Howarth (1999).
[285] Dyson & Featherstone (1999), 225.
[286] It is noteworthy that the numbering of the articles in the proposals differs from the other proposals. Whereas other proposals follow already the EC Treaty numbering, starting from article 102, the French proposal is numbered from article 1 to article 5-11.

pillar as Delors' "worst fear".[287] Lastly, it was a strategic move that helped to keep other policy areas outside the EC.[288]

Although the French proposal would create EMU under the EC Treaty, this did not mean that the goal of political oversight over monetary policy was given up. Despite the fact that the ESCB would explicitly be independent from the Council, the Commission, the EP and the national governments (article 2-3 section 3), the European Council would set broad guidelines for EMU and would "guarantee its satisfactory operation" (article 4-1 section 2).[289] The economic policy coordination would occur mostly through the Council, marginalizing the role Commission and especially the European Parliament.

The early French plans have sometimes been referred to as a 'fourth pillar' proposal, in reference to the pillar structure of the Maastricht Treaty.[290] The pillar structure was suggested in April 1990 in a so-called 'non-paper' of the Luxembourg Presidency. Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) would not be part of the European Community, but would be governed under the 'roof' of the EU.[291] The EC would be (part of) the first pillar. The common provisions of the EU Treaty for all the pillars gave a strong position for the European Council. Within the EC, this dominance was countered by the involvement of the European Parliament, the Commission and the CJEU. Within the other two pillars, however intergovernmentalism loomed large. As the IGC on European Political Union did not develop on the basis of extensive drafts and notes, in contrast to the IGC on EMU[292], there was no emerging consensus on how to give shape to the elusive notion of 'political union' at the time of the French EMU proposal was presented in January 1991.

The pillar structure of the EU caused some controversy when it was established by the Maastricht Treaty. In practice however, the pillar structure was not as influential and with the

[287] Dyson & Featherstone (1999), 729.
[288] Dyson & Featherstone (1999), 730.
[289] Article 4-1. Also see Howarth (1999).
[290] See for example Zilioli, C. & M. Selmayr (2000), 'The European Central Bank: An Independent Specialized organization of Community Law', 37 *Common Market Law Review*, 601.
[291] Already in the SEA there had been a separation between the "Treaty Provisions on European Co-operation in the Sphere of Foreign Policy" (Title III of the SEA) and the 'Provisions Amending the Treaties Establishin the European Communities' (Title II of the SEA). The structure of the EU Treaty was thus not wholly new.
[292] Curtin, D. (1993), 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review*, 17.

Treaty of Lisbon the pillar structure was formally abolished.[293] The reason for using this rather complicated structure in the Maastricht Treaty was to satisfy the objective of proceeding in a cooperative fashion on these matters, whilst keeping at bay the strict 'Community discipline'.[294] The compromise to include the two pillars in the EU but not in the EC clearly struck a chord amongst the MS. A Draft Treaty on EPU produced by the Dutch Presidency in September 1991 did not follow the earlier proposals and instead included a unitary vision. It was resoundingly rejected.[295]

Weiler has argued that the metaphor of a trinity would have better described the different elements of the EU Treaty than the pillars and that "[w]hatever separateness is possible could have been achieved within the Community framework which, after all, allows immense flexibility in its decision-making procedures".[296] For example, the exclusion of the CJEU "could have been settled at the constitutional level by explicit language in the TEU".[297] The reverse would have been equally possible. Just as CFSP and JHA could have been incorporated in the EC, so could the French proposal have easily been redrafted as a proposal for a fourth pillar. As the French proposal was prepared prior to the presentation of the pillar structure in the Luxembourg non-paper, the former could not build on the latter.[298] It is remarkable however, to what extent the motivations for the French proposal for EMU overlap with the motivations for creating the difficult structure of the EU: fear of losing control over a policy area that has traditionally been perceived to lie at the core of national sovereignty, exclusion of the European Parliament, minimal responsibility for the Commission and a limited role for the Court of Justice. For monetary union, this would mean a less than fully independent central bank.

This is not to say that there was no difference between staying in the EC and moving to a fourth pillar, the difference being mainly at the stage of negotiation. The choice for a pillar would

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[293] Curtin, D. & I.F. Dekker (2011), The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows, in: The Evolution of EU Law (2nd edition) (P. Craig & G. De Búrca eds.), 155-156.
[294] Weiler, J.H.H. (1993), *Neither Unity Nor Three Pillars - The Trinity Structure of the Treaty on European Union*, in: The Maatricht Treaty on European Union: Legal Complexity and Political Dynamic (J. Monar, et al. eds.), 49.
[295] Van den Bos, B. (2008), *Mirakel en Debacle: De Nederlandse besluitvorming over de Politieke Unie in het Verdrag van Maastricht*, PhD Thesis, defended at Leiden University.
[296] Weiler (1993), 51.
[297] Weiler (1993), 51.
[298] Szasz quotes with some incredulity a fellow Dutch participant to the negotiations who claims that Luxembourg had contemplated including EMU in a fourth pillar. Szász (2001), 231.

bring with it a presumption about a particular style of governance. Pillars two and three (and possibly four) would – by default – be dominated by the European Council, any inclusion of particular elements of the Community method would have to be explicitly regulated. It would certainly have been possible to integrate CFSP and JHA into the EC, keeping their intergovernmental flavor. However, their incorporation would be seen as an exception to the ordinary Community method and would have to be negotiated as such.

It is the position of the central bank that sticks out most prominently in the French proposals. Either under international law or, supposedly, under a fourth pillar, it would have been highly unlikely that a new monetary authority would become as independent as a central bank envisioned by the Delors Report embedded in the EC Treaty. On a day-to-day basis, the larger Member States would retain control over the management of monetary union.

Conclusion

The central claim of this chapter is that an analysis of the role of (constitutional) law for the euro should not take the Maastricht Treaty as the starting point of the analysis, but should, instead, take the Maastricht Treaty as the end of a process in which multiple options were considered for the legal basis of monetary union. It is through an analysis of this process that the meaning of the choice for an extensive EU treaty amendment becomes apparent.

It should first of all be observed that the choice for a legal basis for monetary union is a political choice in the narrow sense, meaning that it was the choice of the respective political leaders in the EU based on their beliefs and preferences about economics, politics and European integration. However, by analyzing the process through which the political decision was made, it was shown in this chapter in which ways law shaped the context in which that decision was made. The main challenge of this chapter was then to assess the extent to which law can be said to have steered (or nudged, in modern parlance) the political decision in one direction or another, on the basis of three aspects: the principal decision makers, the substance, and the future decision makers. The three rejected legal bases were seen as problematic for a varying mix of reasons related to these three aspects. Conversely, the choice for an extensive EU treaty amendment to regulate in detail the legal framework of the euro allowed the MS full control over the negotiations of EMU, was in line with the desire for a specific vision of a rules-based

EMU as expressed in the Delors Report and, lastly, also kept the MS collectively in control over the future of EMU.

Especially in the section on the use of the flexibility clause the relevance of the views on the constitutional nature of the EU were apparent. The arguments on whether article 235 EEC could be used to create a monetary union rested mainly on the beliefs concerning the legitimacy of the EEC. In a similar manner, the constitutional thinking on European integration enabled the Maastricht Treaty. As seen in the previous chapter, national constitutional law, even in Germany, was hardly involved in monetary affairs. In the Netherlands, the Dutch government had opined a mere decade before Maastricht that constitutional law ought not to limit the discretion of the legislature in matters of central banking. For all the discussion on the constitutionalization of the EU during the 1980's and 1990's, one aspect usually included in national debates on constitutional law was largely absent from the European debate, namely concerning the appropriate balance between constitutional and ordinary law. Whereas on the national level plans about the extensive constitutionalization of monetary policy and to a lesser extent fiscal policy would surely have invited controversy, for European monetary integration the broadly shared consensus was that an extensive EU treaty amendment was the proper way forward.

Chapter 3
The Constitutional Euro

Introduction

In February 1992, after months of intense negotiations, the Treaty of Maastricht was signed.[299] The use of another treaty, so soon after the Single European Act, to promote integration was hardly a topic of discussion. It was shown in the previous chapter how the substantive demands for EMU aligned with the political need to keep the MS collectively in control over the process of integration, resulting in a broadly shared consensus on the desirability of a treaty-based/constitutional EMU. After Maastricht, one of the main constitutional questions was how EMU would affect the Union/Community. [300] Here, the question is reversed. Not: what did the creation of the euro mean for EU constitutional law? But: wat did EU constitutional law mean for the euro at its creation?

The provisions on EMU in the Maastricht Treaty have – of course – been extensively analyzed by legal scholars, political scientists and economists. Political scientists primarily focused on explaining the coming into existence of the Maastricht Treaty[301] and have tried to explain the provisions in light of the relative strengths of the negotiating-positions of different actors involved.[302] Economists mainly debated whether EMU would create the proper circumstances for long-term economic stability and growth.[303] Legal scholars started off by trying to making sense of the whole of the provisions of EMU.[304] Quickly after this first round of commentary,

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[299] Title VI of the EC Treaty on Economic and Monetary Policy is found in the annex.
[300] See for example Chirico, A. (2004), *Monetary sovereignty and the ESCB: towards a multilayered approach to the "Euro-sovereignty" game in the EMU*, European University Institute, 65. "Since currency and monetary sovereignty used to be one of the essential attributes of statehood, does this mean that a piece of a European State has, in fact, already been created?"
[301] Sandholtz, W. (1993), 'Choosing Union: Monetary Politics and Maastricht', 47 *International Organization*; McNamara (1998); Moravcsik, A. (1999), *The choice for Europe: social purpose and state power from Messina to Maastricht*, UCL Press.
[302] Italianer, A. (1993), *Mastering Maastricht: EMU Issues and How They Were Settled*, in: Economic and Monetary Union: Implications for National Policy Makers (K. Gretschman ed.); Dyson & Featherstone (1999).
[303] Kenen, P.B. (1995), *Economic and Monetary Union in Europe*, Cambridge University Press; De Grauwe, P. (1992), *The Economics of Monetary Integration*, Oxford University Press.
[304] Hahn (1991); Louis, J.-V. (1993), *The Project of a European Central Bank*, in: Financial and Monetary Integration in the European Economic Community: Legal, Institutional and Economic Aspects (J. Stuyck ed.); Dunnett, D.R.R. (1994), *Legal and Institutional Issues affecting Economic and Monetary Union*, in: Legal Issues of the Maastricht Treaty (O´Keeffe & Twomey eds.); Pipkorn, J. (1994), 'Legal Arrangements in the Treaty of

more critical analysis appeared that questioned the role of law in monetary integration. Snyder observed that the Treaties regulated many matters that national constitutions would leave to ordinary legislation and suggested that EMU should lead to a "fundamental rethinking of the nature and role of the Community's Constitution".[305] Everson questioned whether using 'de-nationalized' European law to create a monetary union might be 'exceptionally ill-advised'.[306] Those with a constitutional interest in European integration mainly studied EMU in respect of the effect it would have on the EU as a whole.[307] In relation to the ongoing theoretical discussions regarding the nature of European integration the decision of the German Bundesverfassungsgericht on the Maastricht Treaty proved a focal point. In this discussion, Joerges was one of the few authors to note the importance ascribed by the Bundesverfassungsgericht to the fact that the rules of EMU were inscribed in the Treaty itself.[308] Later works using a constitutional approach to EMU are from of Tuori and Tuori, who place EMU in the ordo-liberal tradition of European integration.[309] Legal discussions concerning specific aspects of EMU took note of its peculiar legal basis mainly in relation to the position of the ECB.[310] For example, Gormley & De Haan, in their discussion of the democratic deficit of the ECB, concluded that the European Parliament should "be responsible for the legislative framework of the ECB".[311] Discussion on the constitutional nature of the obligation to avoid excessive deficits arose mainly later, in relation to the Stability and Growth Pact (discussed in the next chapter).[312]

This chapter asks a different question, namely how the constitutional environment of which EMU would become part affected its different aspects. It was argued in the previous chapter that substantive demands for EMU influenced the legal route through which EMU would be

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Maastricht for the Effectiveness of Economic and Monetary Union', 31 *Common Market Law Review*; Brentford (1998). The standard handbook on EMU would become Smits (1997).

[305] Snyder (1994), 99.

[306] Everson (1999), 119-120.

[307] Beaumont, P.R. & N. Walker (1999), *The Euro and the European Legal Order*, in: Legal framework of the single European currency (P.R. Beaumont & N. Walker eds.), 169-170.

[308] Joerges, C. (1994), *European Economic Law, the Nation-State and the Maastricht Treaty*, in: Europe After Maastricht: An Ever Closer Union (R. Dehousse ed.). See later Joerges, C. (2015), *Constitutionalism and the Law of the European Economy*, in: Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation (M. Dawson, et al. eds.), 220.

[309] Tuori & Tuori (2014).

[310] Gormley, L. & J. De Haan (1996), 'The democratic deficit of the European Central Bank', 21 *European Law Review*; Amtenbrink (1999); Magnette, P. (2000), 'Towards 'Accountable Independence'? Parliamentary controls of the European Central Bank and the Rise of a New Democratic Model', 6 *European Law Journal*.

[311] Gormley & De Haan (1996), 112.

[312] Herdegen (1998); Hahn, H.J. (1998), 'The Stability Pact for European Monetary Union: Compliance With Deficit Limit as a Constant Legal Duty', 35 *Common Market Law Review*.

created. Once the choice for an extensive EU Treaty as the legal basis was made, how did that influence the substance of EMU?

The easy answer to this question would be that EU primary law formed the overall context in which EMU was negotiated. As EMU would be embedded within the EU, the traditions, customs and peculiarities of EU law would affect EMU as well. To give an example, one aspect of the system of legal protection in the EU is that individuals have limited possibilities to directly challenge acts by the institutions and bodies, because of how the CJEU interprets the Treaty provision on standing.[313] So, if the Maastricht Treaty would be silent on this topic, it can readily be assumed that it also would be difficult for individuals to challenge actions by the ECB. In this way, EMU build on the existing constitutional framework of the EU that had developed over three decades its own set of political practices, legal traditions, administrative procedures and cultural heritage. To put it a bit more dramatically, the future of the euro was the future of the European Union.

The intellectual challenge is therefore not to prove that EU primary law was relevant for the creation of the euro, but to identify the parts of EMU that directly depended on some of the special characteristics of EU primary law as discussed in the introductory chapter. One important question is how the treaty basis can be taken into account when constructing the objective of a provision.[314] Due to their subject-matter, provisions of EMU are often interpreted solely or mainly in light of their (supposed) economic purpose. Constitutional law brings with it another set of considerations. The question then is whether the special characteristics of EU constitutional law complement or even supplant the more economic considerations. For example, where the creation of a specific power for an institution can be viewed in light of the economic aims to be achieved, it can in the context of EU primary law also be seen in the light of the principle of conferred powers (article 3b EC, now article 5 TEU).[315]

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[313] Craig, P. & G. De Búrca (2015), *EU law: text, cases and materials*, OUP, 517-533; Craig, P. (1999), *EMU, the European Central Bank and Judicial Review*, in: Legal Framework of the Single European Currency (P.R. Beaumont & N. Walker eds.), 104-105.

[314] One theory that would offer a comprehensive framework for the interpretation of constitutional provisions on economic matters is ordo-liberalism. See Tuori & Tuori (2014), ch 2.

[315] It is noteworthy that art 235 EC, the infamous flexibility-clause, was not applicable to EMU. Art 2 EC made a clear distinction between the tasks of establishing the common market and EMU. The flexibility clause then explicitly refers only to the common market. See Chapter 1.

Another avenue through which the constitutional nature of EMU can be seen to have influenced the specific content of EMU is through the process of negotiations. Naturally, every legal provision is shaped by the (negotiating) process through which it was created, not in the least because of the policy preferences of the different participants in the process. EMU negotiated by the European institutions would look different from EMU negotiated by the MS also because of their different political preferences. Here, the focus is not on the effect of the inclusion or exclusion of specific policy preference on the negotiations, but on the structural effects of the choice to negotiate EMU as an EU Treaty.

The aim of this chapter is to highlight how the constitutional basis can be taken into account when looking at EMU as it was adopted in Maastricht. The analysis will focus as much as possible on the provisions and their interpretation at the time when they were adopted, so before they could be seen in the light of other developments, such as the Eurogroup and the Stability and Growth Pact. Those are discussed in the next chapter. The chapter starts with an examination of the provisions on membership of the Eurozone, including the provisions on the transition to the third stage of EMU. This is followed by sections on the institutional relations of the ECB and economic pillar of EMU. Lastly, considerable space is devoted to the history of the no bailout clause.

3.1 Joining the Euro[316]

A striking feature of the euro is that its membership does not fully overlap with membership of the European Union.[317] In contrast to becoming a member of the EU, entry into the Euro area was made dependent upon fulfilling, amongst other things, certain economic requirements.[318] MS ratifying the Maastricht Treaty were not guaranteed membership of the

[316] This section is in part based on ideas elaborated upon in Beukers, T. & M. Van der Sluis (2015), 'The variable geometry of the euro-crisis: A look at the non-euro area Member States ', 2015/33 *EUI Working Paper Law*.
[317] Louis, J.-V. (2001), *Differentiation and EMU*, in: The many faces of differentiation in EU law (B. De Witte, et al. eds.).
[318] Schimmelfennig & Winzen distinguish between instrumental and constitutional differentiation. Instrumental differentiation is when successful cooperation between the MS requires that the participants show a similar level of economic development. The use of convergence criteria is then a prime example of instrumental differentiation. Constitutional differentiation is when some MS do not want to participate in a specific program. The euro thus combines both forms of differentiation. Schimmelfennig, F. & T. Winzen (2014), 'Instrumental and Constitutional Differentiation in the European Union', 52 *Journal of Common Market Studies*, 365.

Euro area.[319] However, they were obliged to try to fulfill the requirements to join the euro (abbreviated here as: the obligation to join). Two Member States, the UK and Denmark, were granted a special status, discharging them from the obligation to join the euro. Once a MS would join the Eurozone, there would be no way out; monetary integration is irreversible. In the Maastricht Treaty, considerable attention is paid to the question of membership of the euro, with an entire chapter devoted to transitional provisions.

A first observation regarding the obligation for MS to join the euro is that it is well hidden within the Treaty. No provision explicitly states that MS must aim to become members of the Euro area. Nevertheless, there was a broad consensus after the entry into force of the Maastricht Treaty that such a legal obligation existed.[320] Instead of being found in one provision, the obligation is the foundation upon which the other transitional provisions are based, with only indirect references to the obligation. For example, article 109j stated that the Commission would report "on the progress made in the fulfilment by the Member States of their obligations regarding the achievement of economic and monetary union." This leaves open what exactly those obligations are. Even if we assume that it means that every MS must join the Eurozone for EMU to be achieved, it does not specify when that goal ought to be reached or what the consequences are of violating the rule. Enforcement of this rule by a court likewise seems implausible. The lack of clarity is easily explained in light of the fact that the Treaty of Maastricht would be ratified by all MS individually, with an eye on joining the euro.[321] As long as there was the broadly shared understanding that the Maastricht Treaty included the obligation to join the euro, there was no need to spell out the details of that obligation. What was important was that all MS politically committed themselves to join the euro. As the common currency was at the heart of the Maastricht Treaty, ratification meant a commitment to the euro. The next chapter will show how this would be different for new MS, who joined the Union after Maastricht.

[319] Sideek, M. (1997), 'A Critical Interpretation of the EMU Convergence Rules', 24 *Legal Issues of Economic Integration*.
[320] Louis, J.-V. (2004), 'The Economic and Monetary Union: Law and Institutions', 41 *Common Market Law Review*, 603-606.
[321] Smits noted in 1994 that "a State's failure to fulfil the convergence criteria could not easily be considered a matter for judicial review". Smits, R. (1994), 'A Single Currency for Europe and the Karlsruhe Court', 21 *Legal Issues of Economic Integration*, 120.

Nevertheless, it was of vital importance that the obligation to join the euro was recognized as a *legal* obligation.[322] As Louis noted, a general opting out clause would "have compromised the smooth functioning of the Ecu market", "set a dangerous precedent", "create a legal and political uncertainty contrary to the imperative of irreversibility of the whole construction" and it "would have made it impossible to convince European citizens to accept the sacrifices inherent to the achievement of economic convergence".[323] To this can be added that the obligation to join is the logical result of the decision to pursue monetary integration through an extensive EU treaty amendment. As explained in the previous chapter, this decision was premised on the belief that the MS collectively would be in charge, firstly, over the negotiations for the Maastricht Treaty and, secondly, over the future of the euro. This collectivity is not without coercion.[324] For a MS to make itself so dependent on others, a minimal requirement is that the other MS at least share in the same fate, meaning here to also join the euro. Even for MS *not yet* part of the Euro area, the obligation to try to become a member of the Euro area ties them to the fate of the other MS. Their shared control over the legal framework of the euro is then justified by the fact that at some point they will also join the euro.

This principle of collective participation in the euro found its limitation in the fact that the Maastricht Treaty would build upon prior European integration through the EEC and thus required the consent of all MS.[325] In exchange for their consent to the Treaty, the UK and Denmark received opt-outs, with the former having no obligation to move to the third stage of EMU and the latter having an exemption from the obligation. Especially for the UK, which opposed the move to monetary union, the exemption must be seen in the larger context of the Maastricht Treaty. [326] The compromise with the UK was not just that the UK would not block the euro in exchange for an opt-out. Also – because EMU would be firmly embedded in EU constitutional law – the UK got a veto over the future reforms of the euro that involve treaty-amendment.

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[322] Pipkorn discussed the effects of this obligation and found it that "[i]t would be contrary to established Community practices to oblige a Member State to a step of the importance of that of accepting the single currency if it has serious constitutional difficulties in doing so." Pipkorn (1994), 290.
[323] Louis (1993), 4.
[324] Van Middelaar (2009), 43.
[325] Pipkorn (1994), 268; Louis (2001), 44; Tuytschaever, F. (2000), *EMU and the Catch–22 of EU Constitution-making*, in: Constitutional Change in the EU: From Uniformity to Flexibility (G. De Búrca & J. Scott eds.), 181.
[326] For the opposition of the UK to monetary union, see Marsh (2009); James (2012); Moravcsik (1999).

The transition to full monetary union entailed three stages. The first stage had already commenced before the Maastricht Treaty was signed and had built upon the SEA. The Maastricht Treaty specified that the second stage would start 1 January 1994 (only several weeks after its entry into force).[327] It was the transition to the third stage that was most controversial. Two aspects stand out, firstly, the use of convergence criteria and secondly the use of a Council decision based on qualified majority in combination with a deadline to start the third stage. The latter aspect was in line with the idea described above concerning the collective leap into monetary union. Article 109j EC unambiguously – and repeatedly – stated that the decision concerning the start of the third stage and which MS would participate would be taken by qualified majority. At least theoretically, this meant that MS could not veto their own admission into the Euro area (if they fulfilled the convergence criteria).[328] The moment for a MS to decide whether to become part of the Euro area was before the ratification of the Maastricht Treaty, not thereafter. After entry into force of the Maastricht Treaty, the decision to start the third stage of EMU was an *internal* matter of the EU, not a decision of the MS collectively, or of the MS individually.[329] The use of a formal deadline for the start of EMU even though it was unclear how many, if any, MS would fulfill the convergence criteria, reinforced the idea that entry into the third stage of EMU was an internal decision of the EU.[330]

The detailed description of the procedure towards the third stage is paradoxical. On the one hand, the MS collectively instructed the Council to make the decision concerning the start of the third stage of EMU, thus signaling that euro membership is an internal matter of the EU, whilst on the other hand giving the Council very strict parameters regarding those decisions.[331] Especially the convergence criteria can be read as the expression of the overbearing *Herren der Vertrage* who are distrustful towards that same Council that will decide upon euro-membership. In this light, the convergence criteria are the compromise between the monetarists and the economists who had debated endlessly in the 1970's and 80's on the proper path towards monetary union: as the start or as the finish line of economic integration.[332] However, the detailed description of the decision-making process on the third stage of EMU also invites

[327] Smits (1997), 41-45.
[328] Smits (1997), 133.
[329] Pipkorn (1994), 287-291.
[330] For the legal effects of the deadline, see Usher (1994), 153-156.
[331] Sideek (1997).
[332] Kenen (1995), 77. "There has been more debate – academic and official – about Stage 2 of EMU than about Stage 3".

an alternative reading whereby the MS used the Treaty to protect the process of integration against themselves.[333] Despite the legal nature of the obligations concerning membership of the Eurozone, it was obvious that the transition to the third stage of EMU would be politically contentious. In the period between the signing of the Maastricht Treaty and the envisioned start of the third stage (about 6 years), all MS would have general/presidential elections, thus creating opportunity for political contestation of the agreements of Maastricht.[334] As the next chapter will show, political maneuvering before the start of the third stage would lead to the creation of the Stability & Growth Pact and the Eurogroup. The detailed description of the decision-making process then had the purpose of preventing a MS or a group of MS from blocking the entry into force of the third stage by reason of disagreement over the necessary convergence-criteria.[335] Instead, the Treaty channeled the conflict to disagreement over the *application of* the convergence criteria.

Membership of the Euro area would be irreversible. The Maastricht Treaty mentioned this explicitly with regard to the locking of the exchange rates of the currencies of the MS in relation to each other and to the new currency.[336] This is a logical addition to the rules on entry into the euro-zone and the idea that the euro would be a shared, collective enterprise. More importantly, the fact that irreversibility is mentioned in the Treaty was meant to distinguish EMU from previous forms of monetary integration. Enshrining the irreversibility of EMU was supposed to prevent the destructive dynamics that beleaguered the EMS and the Snake whereby the *possibility of exit* invited speculation against a MS staying in the exchange rate arrangement. Although the intertwinement of economies and the costs involved in switching back to national currencies would be the main lines of defense against speculative attacks on EMU, the legal stipulations thus serves mainly to emphasize the difference with the EMS.[337] The fact that the irreversibility is laid down in the Treaty further underscores this point, in the sense that the rigidity of the Treaties would prevent a speedy amendment-process in case of emergency.

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[333] Marsh (2009), 147.
[334] Segers & Van Esch (2007), 1101; Pisani-Ferry, J. (2014), *The euro crisis and its aftermath*, Oxford University Press, 40.
[335] Dyson and Featherstone instead focus on the use of a deadline to guarantee that Maastricht would irreversibly set the path towards monetary union. Dyson & Featherstone (1999), 245-252. Also see Heipertz, M. & A. Verdun (2010), *Ruling Europe: the politics of the Stability and Growth Pact*, Cambridge University Press, 26; Tuytschaever (2000), 180.
[336] See the Protocol on the transition to the third stage of Economic and Monetary Union, annexed to the Maastricht Treaty. In this Protocol the phrase 'irreversibility' refers to the stages leading to full monetary union, not the irreversibility of monetary union itself.
[337] Marsh (2009), 254-255.

Nevertheless, the importance of this legal reasoning is easily overstated, as it is unclear how a single line in the Treaty would prevent a MS from enacting emergency-measures during a crisis.

3.2 The ECB as a Constitutional Central Bank[338]

With the start of the third stage of EMU in 1999, monetary union came into effect. As of then, there is one monetary policy for the whole of the Eurozone.[339] The national currencies were first irreversibly locked together and then replaced by a single currency in 2002. This surely was the main achievement of the Maastricht Treaty. The ECB was created to conduct European monetary policy, independent from EU institutions and Member State governments. As seen in the previous chapter, the desire for a strongly independent central bank was one of the reasons why the rules on EMU were included in an extensive EU Treaty. It is no surprise then that the main rules governing the ECB are found in the Treaties. Attached to the Treaties, and having the same legal status, is the Protocol on the ESCB/ECB which partially repeats and partially goes beyond the rules found in the Treaties. Topics regulated in the Treaties and the Protocol are the independence of the ECB[340], the primary and secondary goals of the ECSB[341], the tasks of the ESCB[342], the respective roles and functioning of the Executive Board and the Governing Council of the ECB[343], the external monetary policy of the Union[344], the financial structure of the ECB[345] and the relationship between the ECB and the national central banks[346]. Except for a few provisions in the Protocol, these provisions are not amenable to change other than through Treaty amendment and in most instances, the ECB can act without interference from other EU institutions.[347]

[338] This section is based in part on Van der Sluis (2014).
[339] The term 'Eurozone' is only introduced in the Treaty of Lisbon.
[340] Art 107 EC.
[341] Art 105(1) EC.
[342] Art 105(2) EC.
[343] Art 10-11 ESCB/ECB Statute.
[344] Art 109 EEC.
[345] Chapter VI ESCB/ECB Statute.
[346] Art 14 ESCB/ECB Statute.
[347] Art 41-42 ESCB/ECB Statute.

Legal academia has done ample research on the institutional relations of the ECB.[348] Many of these analyses also take into account the fact that the legal framework of the ECB is entrenched in the EU Treaties.[349] It is one of the reasons why the ECB is sometimes considered to be more independent than the Bundesbank.[350] That the constitutional basis is relevant for the independence of the ECB is an important conclusion for this section, albeit a rather obvious one in light of the existing literature. Therefore, this section will focus on another part of EU constitutional law and its effects on the ECB, namely the lack of an institution at the EU level responsible for fiscal and economic policy. This role would on the national level be fulfilled by the Ministry of Finance, in cooperation with other parts of the government responsible for economic policy. Some political scientists have pointed out that the institutional position of the ECB is affected by this "institutional loneliness".[351] Mainly because of the interdependencies between fiscal policy and monetary policy, central bankers and other policy makers are forced to cooperate. As fiscal policy remained largely a national responsibility in EMU, this special relationship was missing at the European level. Hence, in order to fully grasp both aspects of the ECB as a *constitutional central bank* it is paramount to examine the relation between fiscal and monetary policy makers and its effects on the organized institutional relations of the ECB under the Treaty.

3.2.1 The Effect of the Institutional Loneliness of the ECB on Its Independence

Monetary policy is never exercised in a political-economic vacuum.[352] It responds to, and in turn helps to shape, economic and political developments.[353] This is not the place, nor is the author qualified, to discuss the intricacies of modern day central banking theory and practice

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[348] See Van den Berg, C.C.A. (2005), *The Making Of The Statute Of The European System Of Central Banks: An Application Of Checks And Balances*, Purdue University Press.
[349] See for example Brentford (1998), 89; Amtenbrink (1999), 367-368; Amtenbrink (2012), 27.
[350] Howarth, D. & P. Loedel (2003), *The European Central Bank: The New European Leviathan?*, Palgrave, 118.
[351] The term 'institutional loneliness' is from Padoa-Schioppa, as quoted in Torres, F. (2013), 'The EMU's Legitimacy and the ECB as a Strategic Political Player in the Crisis Context', 35 *Journal of European Integration*. See especially Verdun (1998). Legal academics also note the importance of the fiscal and economic policy but rarely discuss the institutional implications for the ECB. But see Louis, J.-V. (2002), *The euro-group and economic policy-coordination*, in: The Euro in the National Context (J.V. Louis ed.), 365-366; Smits (1997), 84, fn 280; Smits, R. (2007), 'The European Central Bank's Independence and Its Relations with Economic Policy Makers', 31 *Fordham International Law Journal*, 1617-1618; Amtenbrink (1999), 26; Beukers, T. (2013), 'The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention', 50 *Common Market Law Review*, 1582.
[352] De Grauwe (1992); Issing, O. (2008), *The Birth of the Euro*, Cambridge University Press. For the importance of international economic developments see Eichengreen (2008).
[353] See for a broader approach about the embeddedness of central banks Crouch, C. (2000), *The Political and Institutional Deficits of European Monetary Union*, in: After the Euro: Shaping Institutions for Governance in the Wake of European Monetary Union (C. Crouch ed.), 10-14.

as they relate to the fiscal and economic policy. What can be observed here however is that traditionally, on the national level, central banks maintained close connections to the government, and the Ministry of Finance in particular.[354] This is because the objectives of monetary policy, the effectiveness of the tools and therefore the credibility of the central bank, are influenced by fiscal and economic policy.[355] Conversely, fiscal policy in some cases responds to the conditions set by monetary policy. This is reminiscent of the constitutional principles of checks and balances, whereby an institution needs the support of other institutions in order to act.[356] The difference here being that this balancing is accomplished not through legal limitations on the exercise of competences but through the interconnectedness of the policies.

The dynamics by which fiscal/economic policy and monetary policy influence each other can be described by the terms 'monetary dominance' and 'fiscal dominance'. Monetary dominance describes the situation in which monetary policy creates the circumstances in which fiscal policy is decided.[357] Fiscal policy follows monetary policy. In contrast, in a situation of fiscal dominance the fiscal policy makers set the terms in which monetary policy is determined. Yiangou, O'Keeffe and Glocker describe this as follows: "a situation where fiscal policy would manoeuvre governments into such an untenable position that monetary policy-makers would be forced into deficit financing".[358] In this situation, central banks would not be 'forced' in the sense of receiving binding instructions, but forced through the economic circumstances, as created by the fiscal/economic policy maker. The two terms are rather unsophisticated descriptions of extreme positions. In between them lies a wide range of intricate and multifaceted relations between fiscal policy (fiscal policy makers) and monetary policy (monetary policy makers). The terms 'monetary dominance' and 'fiscal dominance' are hardly

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[354] See for example Vanthoor (2004), 210.

[355] See for some colorful descriptions of the confrontations in this relationship Marsh (1992). For a critical analysis, see Leaman (2001). For a descriptive analysis of the interaction between monetary and fiscal policy in Germany, see Kitterer (1999).

[356] See the references in Van der Sluis (2014), fn 5 and 27.

[357] See also the speech by ECB President M. Draghi in Jerusalem on 18 June 2013, available at www.ecb.europa.eu/press/key/date/2013/html/sp130618.en.html:
"…Does the fact that our operations entail some credit risk on the balance sheet of the central bank imply a violation of our ordoliberal principles? Does it imply that the ECB policy interferes with credit allocation? My answer is no. The risks we take onto our balance sheet in the context of our operations are controlled, and they are accepted only insofar as they are strictly necessary for the pursuit of price stability. This is entirely consistent with the concept of monetary dominance, which stipulates that fiscal considerations cannot stand in the way of the achievement of price stability."

[358] Yiangou, J., et al. (2013), ''Tough Love': How the ECB's Monetary Financing Prohibition Pushes Deeper Euro Area Integration', 35 *Journal of European Integration*.

useful as legal terms, as they aim to capture the intangible and ever-shifting balance of powers between the central bank and the fiscal and economic policy maker. They nevertheless serve as a useful reminder here that the ECB would not be operating as just any other Union body, but as a central bank and that the limits on the power of a central bank and the quality of the institutional relations of a central bank are to a large extent the result of the fiscal and economic environment.[359]

With regard to the fiscal environment in the Eurozone, which is discussed in more detail in the next section, it is of course the (in)famous imbalance of EMU that is noteworthy. Fiscal policy would remain primarily a responsibility for the individual MS, with only the obligation to avoid excessive deficits and an obligation to participate in the process of economic policy coordination being included in the EU Treaties. For the ECB as a constitutional actor, this meant that there would be no single body responsible for fiscal policy in the EU.

Naturally, it was expected that the ECB would create and maintain intensive relationships with the governments of the Euro area MS, especially the bigger MS. Nonetheless, such interactions would be of a different nature than the interactions between, for example, the Bundesbank and the German Federal Government prior to the euro: individual MS cannot sway economic policy in the Euro area to such an extent as to force the ECB to change its monetary policy, or the other way around.[360] Monetary policy is to be set for the entire Euro area, and the possibilities for differentiation are limited.[361] As a consequence, the ECB cannot – in most circumstances – credibly use its monetary policy to persuade an individual Member State to change its fiscal policy, because that Member State knows the ECB has to set monetary policy for the entire Eurozone. The coordination of economic policies through the multilateral surveillance procedure or any informal arrangements of cooperation amongst the Eurozone MS would most likely not be able to affect this dynamic, as these arrangements would not lead the MS to speak with a single voice.

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[359] Crouch takes a broader perspective and talks about the social and political embeddedness of central banks. Here the economic and fiscal institutions are seen as the primary manifestations of the social and political environment. Crouch (2000), 14. "There are no institutions at European level, and precious few at individual national levels, which can either stand effectively for alternative economic approaches or, probably more important, strategically anticipate the Bank's actions."

[360] Masson, P.R. & M.P. Taylor (1993), 'Fiscal Policy within Common Currency Areas', 31 *Journal of Common Market Studies*, 31.

[361] Pisani-Ferry (2014), 5.

How then, should this 'institutional loneliness' of the ECB be taken into account in our understanding of the independence of the ECB? How to analyze the effect of something which is not? Chapter 1 showed that the two central banks of the MS considered to be very independent before the euro did not rely on the judiciary to protect their independence. Conflicts over the actions of the central bank or the ministry were not judicialized as the benefits of legal clarity would not outweigh the costs of protracted public disagreement. Also in a broader sense, the relations of the central bank were less focused upon law and legal arguments and more upon the balance of power that followed a particular combination of monetary and economic policy decisions. In other words, the institutional loneliness of the ECB alters the structure in which political conflict over the best combination of monetary/economic/fiscal policies would be settled. This was also noted by Louis as he argued that the absence of an "interlocutor in economic affairs" does not necessarily strengthen the independence of the ECB: "[u]nilateral interventions by governments are to be feared more outside a structured dialogue in a clearly organized framework."[362] Also Verdun found the lack of political embeddedness of the ECB worrisome as there would be no European institution "responsible to correct any possible imbalances" that might result from the single monetary policy.[363] One effect of the institutional loneliness of the ECB might therefore be a stronger reliance on the legal rules of the institutional position of the ECB as the mechanism to organize the relations of the ECB with various public bodies and institutions.[364] Instead of having one public counterparty, the relationship with which is primarily structured on the basis of the interconnectedness of policies, the ECB has a variety of institutional relations, primarily organized on the basis of legal obligations.

Moreover, as Verdun also noted, the ECB would be a new central bank, which could not rely on tradition or reputation to insulate itself. The ECB would, at least initially, truly be a product of EU constitutional law.[365]

The question then arises whether this reliance on law for the ECB would translate into a high level of judicialization. As discussed in Chapter 1, monetary policy and central banks have traditionally not been at the center of constitutional conflict. Did (the constitutionalization of)

[362] Louis (2002), 365-366.
[363] Verdun (1998), 127.
[364] This can be seen for example in Beukers (2013).
[365] Verdun (1998), 109.

EMU create the conditions for a break with this tradition? Craig noted in 1999 that the history of the EU was "replete with examples of resort to the courts in order to resolve inter-institutional disputes, and it would be surprising if such disputes were to be entirely absent from this area."[366] This suggests that judicialization would be the result of the *Europeanization* of central banking, with the CJEU having a hand in many of the affairs of the EU. A problem with this argument is that it fails to show why conflicts over the combination of monetary and fiscal policies or the institutional position of the ECB would necessarily lead to judicialization. The argument that the constitutionalization of EMU would cause judicialization has the benefit of explaining *why* judicialization would occur, namely the removal of political buffers, both in the absence of legislative control over the ECB as well the lack of a fiscal policy partner, but it fails to specify *how* a conflict would arise. That requires a closer analysis of the substance of the rules of the independence and mandate of the ECB.

3.2.2 The Independence and Mandate of the ECB

The independence of the ECB is one of the hallmarks of the Maastricht Treaty. It was explicitly enshrined in article 107 EC (now article 130 TFEU). Other provisions are then concerned with specific aspects of this independence, such as the institutional independence, the functional independence, personal independence and financial independence. This independence is often seen in conjunction with the strict mandate of the ECB, which is firstly, to maintain price stability and, secondly, without prejudice to the primary objective, to support the economic policies in the Union. The independence and strict mandate of the ECB are seen as mutually dependent. [367] The ECB was given independence in order to secure its primary objective and it was the consensus at the time that *only* an independent central bank could fulfill that goal. Therefore, independence requires a strict mandate and the mandate required independence.[368]

There is a difference, however, in how the independence and the mandate of the ECB can be legally effectuated before the CJEU. The ECB would have a strong interest in using its authority under the treaty to bring any perceived infringement of its prerogatives before the Court and such a conflict would most likely concern a rather specific legal question, given that the different aspects of the independence are rather well-defined in the Treaty.[369]

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[366] Craig (1999), 115.
[367] Issing (2008), 58; ECB (2010), 'The ECB's Relations with European Union Institutions and Bodies - Trends and Prospects', January 2010 *ECB Monthly Bulletin*, 73.
[368] Van der Sluis (2014), 117.
[369] Craig (1999), 113-114.

Disagreement over the interpretation of the mandate of the ECB would take a different form, for three reasons[370]: firstly, the mandate of maintaining price stability is conceptually weak in the sense that it provides few easy clues for the Court to assess the conduct of the ECB. Although "maintaining price stability" is a more precise concept than the mandate for the Bundesbank (safeguarding the currency because it more clearly refers to the internal value of the currency), it is still vague. The only real clue to its meaning is that both inflation and deflation should be prevented.

Secondly, the mandate is also inherently forward-looking, meaning that it is concerned with price-developments in the medium to long term, not with past inflation.[371] That this is relevant (from the point of view of constitutional law) becomes clear when the relation between the primary mandate and secondary mandate is taken into account. Besides the objective of maintaining price stability, the ECB (as part of the ESCB) is bound by a multitude of other objectives. Without prejudice to the primary objective of maintaining price stability, the ESCB is bound to support the general economic policies of the EU. The ESCB is furthermore bound to act in accordance with the principles of an open market economy and free competition.[372] The activities of the EU in the field of economic and monetary policy should also comply with the principles of stable prices, sound public finances and monetary conditions, and a sustainable balance of payments. The general objectives of EU are also applicable to the ECB, such as a high level of employment, the quality of life and economic and social cohesion.[373] In order to determine the relation between the primary and secondary objectives, it is paramount to evaluate the particular nature of the primary objective. What exactly does maintaining price stability mean? Economic theory guides the interpretation here. When economists and central banks are concerned with inflation, they generally mean future inflation.[374] Monetary policy cannot – or at least should not – be concerned with offsetting the negative effects of past inflation, but with the expectations of future inflation. The primary objective of the ECB clearly reflects this by emphasizing that price stability must be *maintained*.[375] The primary objective

[370] The following paragraphs are found in Van der Sluis (2014), 118-120. Also see Tuori & Tuori (2014), 37-41.
[371] Goldmann, M. (2014), 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German Law Journal*, 268.
[372] Art 105 EC Treaty.
[373] Zilioli, C. & M. Selmayr (2001), *The law of the European Central Bank*, Hart, 35.
[374] Issing (2008), 65.
[375] But see Smits (1997), 184. Smits sees the 'maintaining' of price stability in the same light as 'maintaining' law and order, as denoting 'the authority involved in the System's primary objective'.

of the ECB is never fulfilled: the specter of inflation might be just around the corner. As a result, the obligation to support the general economic policies of the EU without prejudice to the primary objective is quite insubstantial. The secondary objective can hardly ever play a role in limiting the discretion of the ECB to set monetary policy because the primary objective is never achieved.[376] The inherently forward-looking nature of the mandate also makes it difficult to apply as a legal standard for reviewing the actions of the ECB.[377] The actions by the ECB cannot be scrutinized based on the levels of inflation of the past, but only on the basis of the predictions on inflation in the future and through the (possible) influences of monetary policy.

Thirdly, the exercise of monetary competences is a rather technical discipline, one in which the CJEU would be hesitant to intervene. Smits expected that the Court would apply similar restraint in assessing the actions of the ECB as it does to economic policy actions by other institutions, or even more so, because of the independence of the ECB. He referred to the wide discretion of the ECB to determine the goal of monetary policy as "auto-interpretation".[378] Craig also expected the Court to scrutinize actions of institutions "less intensively where the subject matter involves complex economic determinations".[379] In this regard there is a difference with other policy areas. For example for competition policy, the CJEU has received plentiful cases, which allowed it to get familiar with both the theoretical background of competition policy and the practical implications of its decisions.[380] Even though monetary policy has become embedded in the legal structure of the EC and the functioning of the ECB is highly contingent on its legal framework, it was unlikely that the CJEU would deal with similar volumes of cases regarding monetary policy as with competition policy.[381] The CJEU could moreover benefit from the different traditions in competition law in the MS, where competition law enforcement by independent agencies and courts was already in place. The CJEU would not have similar opportunities to engage as extensively with monetary policy, nor could it benefit from MS experience in this field.

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[376] For the relationship between inflation and employment and the role of the ECB, see Issing (2008), 65. Dutzler states that only the ECB can decide whether to pursue its second objective. Dutzler (2003), 207.
[377] Smits (1997), 110. Smits sees a role for the Court in "determining whether the level of price stability achieved is within the limits of the law". The focus by Smits is thus on the achieved level, not on future levels of inflation. Also see Dutzler (2003), 113. She notes that the "obligation to maintain price stability is not a justiciable benchmark, as the ECB's acts are not illegal if its objective is not fully met".
[378] Smits (1997), 186.
[379] Craig (1999), 111. Also see Everson (1999).
[380] Tuori & Tuori (2014), 39.
[381] See Tuori & Tuori (2014), 41.

To conclude, one of the main effects of the constitutionalization of EMU has been the creation of a central bank whose independence is enshrined in constitutional law and therefore difficult to amend. This has been widely observed and analyzed. This section has focused on two additional effects, namely the increased importance of law in the organization of institutional relations of the ECB due to a lack of a unified fiscal/economic policy decision-maker and the disparity in how the independence and the objective of the ECB can be invoked before the Court.

3.3 Economic Union

One of the key differences between the reports by the Werner Committee and the Delors Committee was the required level of integration of economic policy.[382] Whereas the former had suggested strong centralization and institutional innovation, the latter favored weak centralization and rules-based cooperation. The result in Maastricht is often described as imbalanced, with a high level of integration in monetary union and only cooperation and coordination in economic union.[383] For economists, the level of integration in economic/fiscal policy required for monetary union has been an ongoing debate.[384] The provisions on economic policy are often assessed solely as to whether the required economic results are achieved.[385] Not surprisingly, the overall judgement is then that economic governance has failed.

This section argues that the goals of the economic policy provisions were as much of a constitutional nature as they were economic in nature. The main goals of the provisions are therefore: to limit the discretion of MS in conducting their economic policies; to attribute and limit the powers of the institutions involved in the processes of economic governance; and to ascribe a limited role for the EU legislator to complement the rules of primary law. It is the second and third aspects that determine the extent to which the limitations on the discretion of the MS are actualized.[386] Rather than using economic theory to interpret the goals and

[382] See Chapters 1 and 2. Amtenbrink, F. & J. De Haan (2003), 'Economic Governance in the European Union: Fiscal Policy Discipline Versus Flexibility', 40 *Common Market Law Review*, 1078; Amtenbrink (2012), 22.
[383] Hinarejos, A. (2012), 'The Euro Area Crisis and Constitutional Limits to Fiscal Integration', 14 *Cambridge Yearbook of European Legal Studies*, 244.
[384] Mundell, R.A. (1961), 'A Theory of Optimum Currency Areas', 51 *The American Economic Review*. A poignant critique on OCA is developed by McNamara. McNamara, K.R. (2015), *The Forgotten Problem of Embeddedness*, in: The Future of the Euro (M. Matthijs & M. Blyth eds.).
[385] See for example Stiglitz, J. (2016), *The Euro: And its Threat to the Future of Europe*, Allen Lane.
[386] Harden, I. (1999), *The Fiscal Constitution of EMU*, in: Legal Framework of the Single Currency (P. Beaumont & N. Walker eds.), 72.

procedures of economic governance, this section argues that the procedures of economic governance should inform our view on the goals of economic governance.

The analysis that follows focuses on the discretion of institutions in implementing the economic governance of the Union, either in applying the relevant procedures or in providing further rules on those procedures. This requires a detailed reading of the relevant provisions. To make the argument that the drafters of the Treaty were primarily concerned with delineating the tasks of the institutions, it is paramount to show that those lines are indeed drawn in the Treaty itself and to show that when it comes to formulating economic goals or limits, the Treaty stays silent. To give an example, article 104c(6) EC required that the Council must examine in each case *after an overall assessment* what an excessive deficit is. Not only does this mean that the Treaties do not contain a "3% rule", but it also prohibits the legislator from restricting the discretion of the Council.

The first article in the Chapter on Economic Policy sets out the basic principles of Economic Union: "Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Community, as defined in article 2, and in the context of the broad guidelines referred to in article 103(2)."[387] Article 102a EC furthermore stated that both the MS and the Community must act in accordance with the principle of an open market economy with free competition and in compliance with the principles of article 3a EC. Taken together, the economic policies must take account of a large number of principles: sustainable and non-inflationary economic growth, high level of employment, raising the standard of living and quality of life, sound public finances, sustainable balance of payments and solidarity between the MS. Given the extremely broad scope of these principles and the lack of a hierarchy amongst them, it must be concluded that these principles were hardly meant as an effective limitation on the economic policies of the MS, nor as a helpful interpretive tool for the provisions on the multilateral surveillance procedure and the excessive deficit procedure.

3.3.1 The Multilateral Surveillance Procedure

The primary tools of the Community concerning economic policy were the excessive deficit procedure (article 104c EC, now article 126 TFEU) and the multilateral surveillance procedure (article 103 EC, now article 121 TFEU). The latter builds on previous forms of economic coordination in the Community (article 103 EEC), as is it stated that: MS "shall regard their

[387] Smits (1997), 67.

economic policies as a matter of common concern." But whereas under the EEC Treaty the MS should consult with each other *and with the Commission*, under the Maastricht Treaty coordination should take place *in the Council*.[388] Another contrast with the provision in the EEC is that the former article 103 EEC did not further specify the procedures through which consultation would take place, thus leaving the Community legislator the opportunity to develop such procedures, as it did continuously after the 1960's.[389] Sections 2-4 of article 103 EC are therefore examples of provisions that give the impression that their main function is to attribute specific tasks to the institutions, but are nonetheless better seen as provisions limiting the Union as a whole to organize its affairs.[390]

At the heart of the multilateral surveillance procedure lie the Broad Economic Policy Guidelines (BEPGs).[391] Article 103(2) EC outlines the method to adopt these BEPGs. It includes a recommendation from the Commission and cooperation between the Council and the European Council to develop the guidelines. It is the Council that, based on qualified majority voting, adopts the BEPGs in the form of a recommendation. The European Parliament is informed at the end of this process. The multilateral surveillance procedure then consists of two stages. In the first stage (article 103(3) EC), the Council "monitors economic developments in each of the Member States as well as the consistency of economic policies with the broad guidelines", on the basis of information submitted by the MS and reports from the Commission. The second stage (article 103(4) EC) starts when the Council considers the economic policies of a MS to be inconsistent with the broad economic policy guidelines, or if it finds that they "jeopardize the proper functioning" of EMU. In such instances, the Council may make recommendations to the MS by qualified majority, on the basis of a recommendation from the Commission. Although the recommendation to the MS does not have binding force (article 189 EC, now article 288 TFEU), MS are obliged to conduct their economic policies "in the context of" the BEPGs (article 102a EC, now article 120 TFEU). Section 5 authorizes the Council to adopt detailed rules concerning the procedures in section 3 and 4.

This description above confirms that the organization of institutional relations is at the core of the Treaty rules on the multilateral surveillance procedure. This is noticeable mainly in the fact

[388] Art 103 EEC.
[389] See chapter 1.
[390] Art 127(6) on the attributions of specific tasks on banking union has a similar effect.
[391] A good description of the multilateral surveillance procedure is found in Smits (1997).

that the institutions are awarded a high level of discretion in making assessments as to economic priorities, but very little with regard to the procedural steps. The procedure is mainly described in terms of sequence and the different responsibilities of the institutions at each stage. For the formulation of the BEPG's, the institutions are only bound by the goals as formulated in article 102a EC.[392] For the review of the economic developments of the MS the Council can also test whether there is risk to the functioning of EMU, but this necessarily involves again broad discretion for the Council. It is therefore impossible to attribute a specific economic goal to the multilateral surveillance procedure. As the procedure is largely aimed at formulating economic goals, those economic goals cannot *a priori* be determined.

The rather detailed description of the procedure also limits the possibilities of the Council (later in combination with the European Parliament) as the legislator of the Union to adopt further rules. Especially as the competence of the legislator is restricted to sections 3 and 4, no implementing rules can be made concerning the adoption of the BEPGs. With regards to the obligations of the MS in the multilateral surveillance procedure, legislation could specify the timing and scope of the information that MS need to provide on their economic policies. As noted above, such rules could already have been introduced through legislation *prior to* the Maastricht Treaty.

3.3.2 The Excessive Deficit Procedure

The main innovation of the Maastricht Treaty on economic policy lay in the excessive deficit procedure.[393] Section 1 of article 104c offers, contrary to the multilateral surveillance procedure, a clear instruction to the MS: avoid excessive deficits. Looking at EMU from the perspective of economics, the often-ascribed purpose of this instruction is to maintain certain economic conditions in which the ECB can conduct its monetary policies and in which MS are protected from the negative externalities of excessive borrowing by another MS. The Treaties do not explicitly connect these goals to this provision and assign the full responsibility to determine what is an excessive deficit to the Council. It is therefore up to the Council to decide when a deficit unduly affects economic conditions in the Eurozone and therefore can be considered excessive. In this assessment, the Council is condemned to be free, meaning that

[392] Smits (1997), 71.
[393] A detailed description of the excessive deficit procedure is found in Italianer, A. (1997), *The Excessive Deficit Procedure: A Legal Description*, in: European Economic and Monetary Union: The Institutional Framework (M. Andenas, et al. eds.).

the instruction to make an overall assessment prohibits the legislator from restricting the scope of the arguments that the Council can take into account. Economic theories are therefore only helpful in explaining the purpose of the excessive deficit procedure insofar the Council itself, in each decision on the existence of an excessive deficit, subscribes to those theories.

Over the years, the excessive deficit procedure has often been misinterpreted so as to find a "3% rule".[394] Much of that confusion is the result of section 2 of article 104c, read in conjunction with the Protocol on the Excessive Deficit Procedure. It instructs the Commission to "monitor the development of the budgetary situation and of the stock of government debt in Member States with a view to identifying gross errors." In particular, the Commission is instructed to examine compliance with budgetary discipline on the basis of two criteria, namely the ratio of government deficit to GDP and the ratio of government debt to GDP. These criteria are in detail described in the Treaty, and the reference values for the different ratios are provided in the Protocol. The protocol also explicitly refers back to article 126(2) TFEU. It may not be assumed without further explanation that these reference values are relevant for the rest of the procedure.[395] Section 3 then instructs the Commission to prepare a report if a Member State does not fulfill the requirements under one or both of these criteria, or if there is a risk of an excessive deficit. It furthermore notes that the Commission shall *also* take into account all other relevant factors. 'Also' means here that the report must take into account the two criteria under 104c(2) EC, but, crucially, the Treaty does not specify how to weigh the other relevant factors against the two criteria, thus leaving this assessment to the Commission. After the report by the Commission, the Economic and Financial Committee gives its opinion and if the Commission considers that there is a (risk of) excessive deficit, the Commission shall address an opinion to the Council. The "3%-rule" can therefore only mean that the Commission must make a report if the two criteria are not fulfilled. It is the Council that decides by qualified majority whether an excessive deficit exists (section 6). The Council may even consider a

[394] See for example De Streel (2013), 'The Evolution of the EU Economic Governance Since the Treaty of Maastricht: An Unfinished Task', 20 *Maastricht Journal of European and Comparative Law*, 341. "Since the beginning of the EMU in 1992, the TFEU has imposed two simple limits on national public finances. The first limit requires that Member States maintain their effective deficits below 3% of GDP, unless either the ratio declined substantially and continuously and reached a level that comes close to 3%, or, alternatively, the excess over 3% is only exceptional and temporary and the ratio remains close to 3%." Savage, J., D. (2007), *Making the EMU: the politics of budgetary surveillance and the enforcement of Maastricht*, Oxford University Press, 159. "The Treaty requires that the member states avoid excessive deficit and debt levels of 3 and 60 percent of GDP"

[395] Italianer speaks of a presumption of an excessive deficit if the Commission submits its report under art 126(3) TFEU. This could only be a political assumption, not an assumption with legal relevance. Italianer (1997), 203.

deficit lower than 3% GDP to be excessive. The decision is made after an overall assessment, taking into account any observations by the MS in question, after a recommendation from the Commission.

The discretion for the Council to assess what constitutes an *excessive* deficit in each case throws into question the exact meaning of the original legal obligation of the MS to avoid excessive deficits.[396] How are they to avoid excessive deficits if it is unclear what is excessive? Here the particular wording of section 1 is helpful, as the provision is not phrased as a prohibition ("MS may not have an excessive deficit"), but as an order to avoid excessive deficits. This implies that it was firstly up to the MS to interpret and give effect to the obligation under article 104c(1) EC. Through the procedure found in sections 2-6, the Council can then overrule these interpretations by the MS. This reading is confirmed by the fact that the second part of the excessive deficit procedure is primarily concerned with the corrective actions by MS to reduce the deficit, not with the existence of the excessive deficit. As Stark noted, the excessive deficit procedure does not punish the sin, but the failure to repent.[397]

Sections 7-13 of article 104c EC dealt with the situation in which a MS is found to have an excessive deficit. When that is the case, the Council shall (by two-thirds majority, excluding the MS concerned) recommend to the MS in question measures to end the situation in a determined period of time (section 7). If the MS takes no effective action in response to the recommendation, the Council may make the recommendation public (section 8). If the Council finds that the MS "persists in failing to put into practice" its prior recommendations, it may give notice of the actions it considers necessary to remedy the situation within a given time limit (section 9). As long as the MS in question fails to comply with the notice, the Council may apply measures, ranging from instructions to publish certain information before a bond-issue to fines (section 11). To the extent that the excessive deficit is corrected, the Council shall abrogate the decisions described in the paragraph above (section 12). No mention is made here that the assessment by the Council takes into account all relevant factors. If the Council considers that an excessive deficit no longer exists, all measures will be abrogated and the procedure closed. Also, if a MS makes improvements but an excessive deficit still exists

[396] Harden (1999), 77 and 79.
[397] Stark, J. (2001), *Genesis of a Pact*, in: The Stability and Growth Pact: the architecture of fiscal policy in EMU (A. Brunila, et al. eds.), 83.

according to the Council, the measures adopted pursuant to section 11 must be softened, as appropriate.

Article 104c(14) EC regulated how the rules on the EDP procedure could be complemented. The second sentence of section 14 instructs the Council to adopt "appropriate provisions", that will "replace the said Protocol".[398] The Protocol is part of the Treaty and this provision therefore creates a special Treaty amendment process (a mini-revision[399]). This raises questions about the exact purpose of this special procedure, and the relationship between the provisions of article 104c and the (new) Protocol. Can the Council adopt a Protocol that substantially adds to the legal obligations of the MS? As both have the status of primary law, there would not *a priori* be a hierarchical relationship between them.[400] The first sentence of section 14 suggests the opposite however, by stating that "[f]urther provisions relating to the implementation of the procedure described in this Article are set out in the Protocol". The purpose of this provision seems to be to limit the discretion of the Council in replacing the Protocol, so that also the new Protocol may only relate to the implementation of the excessive deficit procedure or at least may only be concerned with the topics that are already included in the Protocol.[401] However, this interpretation raises the question about the purpose of the technique of a mini-revision process. Why bother with creating a process that could raise significant constitutional opposition in the MS because of potential claims about a *Kompetenz-Kompetenz,* if the purpose is merely to provide for gap-filling competence? Providing an exact legal answer to the question to what extent a replacing protocol might amend the excessive deficit procedure, requires giving due regard to both considerations. However, what is more interesting than providing an answer to this legal question is the observation that the drafters chose to posit this legal question within a specific political context, namely on the edges of Treaty amendment, but within the Council. As discussed in the previous chapter, there is a profound difference between *intra*-Treaty integration and integration through Treaty change. This provision appears to invalidate that distinction by making the Council responsible for replacing the Protocol, thus pulling the issue of Treaty change into the realm of EU politics and law.[402]

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[398] Smits (1997), 80, fn 259. Smits also refers to Pipkorn (1994), 280.
[399] De Witte, B. (2012), *Treaty Games - Law as Instrument and as Constraint in the Euro Crisis Policy*, in: Governance for the Eurozone: Integration or Disintegration? (F. Allen, et al. eds.), 122.
[400] Italianer (1997), 191.
[401] See Italianer (1997), 228.
[402] In *Pringle* (Case C-370/12, ECLI:EU:C:2012:756, discussed in Chapter 5), the CJEU had to consider whether it was competent to review a decision by the European Council under the simplified revision procedure to amend article 136 TFEU. The Court considered that it did and that it could review the European Council decision against

Just as the multilateral surveillance procedure, the excessive deficit procedure is largely focused on the Council, with particularly little involvement of the European Parliament and the CJEU. Section 10 explicitly states that sections 1-9 may not be invoked before the Court as grounds for a failure by a MS to fulfill an obligation under the Treaty (articles 169 and 170 EC). This excludes the possibility that failure to comply with all but the last stage of the Excessive Deficit Procedure by a MS can be brought before the Court. However, institutional (in)action during the excessive deficit procedure can be challenged before the Court and also failure to abide by the measures imposed on a MS pursuant to section 11 can lead to a judicial challenge.[403]

It must be remembered that the excessive deficit procedure is not completely in a judicial vacuum. Although the Court is prevented from assessing whether a MS is acting in accordance with article 104c section 1 to 9, the actions of the Council under the excessive deficit procedure are not excluded. Both the Commission and the MS may therefore challenge decisions by the Council.[404] However, for the Court to become heavily involved in the Excessive Deficit Procedure it would have to take an extremely narrow approach to the discretion given by the Treaty to the Council.

To conclude this section, it is correct that the provisions on economic governance created a rules-based system of governance. However, the main object of this system was not the economic policies of the MS, but the procedures followed by the institutions. The main purpose of these procedures lies in the formulation, through the participation of the appropriate institutions, of either broad economic policy guidelines, or of an opinion on the existence of an excessive deficit and the appropriate measures to combat that excessive deficit. The economic policy provisions are not phrased as minimum-requirements for the MS or the institutions, to which the legislator could add new obligations, but as exhaustive. The legislator is left to fill some of the procedural blanks. This means, at the least, that any examination of the success or failure of the economic policy provisions must also test whether the provisions have succeeded in actually restricting the powers of the relevant institutions. Hence, in the next chapter the

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the requirements found in the Treaty. This would suggest that the CJEU could also review a decision by the Council to replace the protocol.

[403] Articles 169, 173 and 175 EC (now art. 258, 263 and 265 TFEU respectively).

[404] Italianer (1997), 226-227.

question will be to what extent the Stability and Growth Pact merely implements or deviates from the procedures as found in the Treaty.

3.4 Thou Shalt Not Bail Out

The last part of the Maastricht Treaty analyzed in this chapter is article 104b EC (now article 125 TFEU). This clause is often named the no bailout clause, but as will become clear, the name itself cannot be accepted without reservation. The main argument presented in this section is that the no bailout clause is a prime example of how its inclusion in EU constitutional law shaped to the negotiations on, and logic of, the no bailout clause. The no bailout clause cannot be properly understood without reference to its constitutional status. Placing the clause within the context of EU constitutional law does not mean that the political choices and economic reasoning underlying the clause are disregarded, but rather that these aspects are seen to react to the specific legal circumstances of EU primary law. The main benefit of the approach presented below is that it connects the idiosyncratic language of the clause to an improved understanding of the purpose of the clause.

The starting point of the analysis is the economic argumentation that is often used to explain the no bailout clause. The first step is to show that this argumentation can be complemented by explaining how the rigidity of constitutional law can serve the credibility of a no bailout pledge, which in turn will help explain the opposition to the unqualified adoption of the economic argumentation as the basis for the no bailout clause. In its pure form, a constitutional no bailout clause could have severe negative effects on the relations between the judiciary and the political institutions. These negative effects can be mitigated by introducing ambiguity into the clause, thereby increasing the scope of discretion of any court in interpreting the no bailout clause at the cost of decreasing the credibility of the clause.

It is important to stress from the outset that the economic logic that has dominated the discourse on article 125 TFEU (at least until the euro-crisis[405]), was disputed during the negotiations on

[405] See for exampl, Wilsher who in 2013 speaks of a ‘no liability clause’. Wilsher, D. (2013), 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis', 15 *Cambridge Yearbook of European Legal Studies*, 527.

the Maastricht Treaty. The Delors Report had not considered it necessary to preclude financial assistance and during the early stages of the negotiations different kinds of provisions were proposed that had varying aims. As the economic logic of a no bailout clause became leading in the negotiations, the key question became how much ambiguity the clause should contain. The final version of the clause is an amalgam of different parts of the various proposals, the purpose of which is difficult to construe on the basis of the text. Nevertheless, the name 'no bailout clause' became common currency, not in the least due to the strategic interventions of the Commission.

3.4.1 A Constitutional Understanding of the No Bailout Clause

The crux of no bailout *pledges* lies in their credibility. Rodden has argued that all federations have to deal with the basic problem that:

> "[w]hen lower-level governments face a serious long-term negative revenue shock requiring fiscal adjustment, they are tempted to avoid the political pain of expenditure cuts or tax increases. This temptation is driven by the belief that the higher-level government can eventually be compelled to assume their debts."[406]

This is a problem of moral hazard. To avoid this moral hazard, Rodden notes, "[t]he higher-level government often makes some sort of formal no-bailout pledge, and its leaders publically state that bailouts are impossible."[407] The problem then is that the lower level government, here a MS, knows that it might nonetheless be in the interest of the higher-level government, here the other MS or the EU itself, to provide financial assistance in case of a crisis. A no bailout pledge is therefore a promise to act against own interests in the future by not providing a bailout, in an attempt to alter the behavior of the other so as to avoid a situation in which a bailout would be necessary. The aim of a no bailout pledge is to incentivize the lower-level governments to conduct more appropriate fiscal policies. For EMU, an additional benefit would be that more prudent fiscal policies would help protect the independence of the ECB. [408] The economic gain of a no bailout pledge results from of its ability to persuade lower-level

[406] Rodden, J. (2012), *Market Discipline and U.S. Federalism*, in: When States Go Broke: Origins, Context, and Solutions for the American States in Fiscal Crisis (P. Conti-Brown & D. Skeel eds.), 125.
[407] Rodden (2012), 125.
[408] See for a broader approach to the changing incentives for fiscal policy under monetary union Masson & Taylor (1993).

governments to conduct good policies, that is, from its credibility.[409] The economic gain lies not in the actual enforcement of the clause at a moment of crisis. Living up to the promise of not bailing out might be very costly.[410]

In the previous paragraph, the emphasis was on no-bailout *pledges* in the form of political promises. At least in theory, a political pledge to not bail out is different from a legal no-bailout *rule*, because the actors involved in the latter are different.[411] A political agreement requires the continuous support of the actors, usually (federal) governments, who made the pledge. If at one point in time the incentives for a government to support the promise disappear because of overriding immediate economic demands, the promise will likely be broken.[412] If the no bailout pledge becomes a legal rule, this dynamic changes because the actors assign the enforcement of the promise to another actor who (supposedly) has no direct stake in the outcome. The question whether a MS will attempt to shift the costs of a crisis to its neighbors or to the federal government now also revolves around the question whether it is expected that the courts will uphold the no bailout clause.[413] In other words, a political pledge says "I will not bail out"; a legal no bailout rule says "Thou shalt not bailout". The aim of a legal no bailout rule is thus to strengthen the credibility of the political pledge.

Following this line of reasoning and turning our eye to the EU, it is easy to explain why the logic of a no bailout rule dictates that the clause should be included in the Treaty, instead of in secondary legislation.[414] The 'threat' of judicial enforcement fades if the same political actors that would decide on a bailout would be able to amend or expunge the no bailout clause through

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[409] This is not to suggest that a political agreement is easily broken. Governments might be willing to take a small loss in a crisis in order to improve the credibility of their pledge, thereby hoping to prevent future crises. Also, the composition of the actors must be taken into account, for example by looking at veto-players and their time-horizons in the governmental decision-making process. MS are not unitary actors. Rodden (2012), 126.

[410] This shift in incentives from pledging to not bail-out to then providing assistance is what Hutchison & Kletzer call "dynamic inconsistency". Hutchison, M.M. & K.M. Kletzer (1995), *Fiscal Convergence Criteria, Factor Mobility, and Credibility in Transition to Monetary Union in Europe*, in: Monetary and Fiscal Policy in an Integrated Europe (B. Eichengreen, et al. eds.).

[411] By political agreement I mean a non-legal agreement (a promise) between the relevant authorities. A legal no bailout rule thus always encompasses a political agreement, but not vice-versa.

[412] This means that the context in which financial problems arise must be taken into account. For example, in the US, the federal government has not bailed out states since the 1840's. See Henning, C.R. & M. Kessler (2012), 'Fiscal Federalism: US History for Architects of Europe's Fiscal Union', *Bruegel Essay and Lecture Series*, 10-16.

[413] Early doubts about the credibility of no bailout clause are found in De Grauwe (1992), 174; Bovenberg, L.A., et al. (1991), 'Economic and Monetary Union in Europe and Constraints on National Budgetary Policies', 38 *Staff Papers - International Monetary Fund*, 382.

[414] As with the legal enshrinement of the irreversibility of joining the euro, the no bailout-clause also aims to be a statement on the values on which EMU is based.

the ordinary legislative procedures. To be a credible rule, it may not be part of the same political game it aims to regulate. As ordinary legislation in the EU can be amended relatively quickly through the cooperation of the Commission, the European Parliament and the Council, with the latter acting on the basis of qualified majority voting, a no bailout clause embedded on this level would gain little extra credibility. By contrast, amendment of the EU-Treaties was seen as a long and arduous process, mainly because of the many national veto players.[415] The no bailout rule is then truly a constitutional rule in the sense that it is a rule that aims to organize political relations without itself being subject to the ordinary political game.

These attempts to strengthen the credibility of a no-bailout pledge through the use of (constitutional) law come at a cost, namely the potential involvement of the judiciary in delicate economic matters. As stated above, the economic gain of the no bailout clause lies in its ability to create incentives for MS to conduct better fiscal policies, not in the actual enforcement of the clause. Enforcement of the clause by a court would occur in a situation where political actors have already deemed the situation so troublesome that intervention is necessary, that is, where their own interests are most likely to be severely hurt. This would be the setup for a serious constitutional conflict, where either the Court enforces a strict no bailout clause leading to contagion of the economic crisis (and possibly raising questions about the future of the euro) or where the law is altogether ignored under a state of emergency. The more the discretion of the court is limited in this matter, the fewer opportunities the court has to avoid these effects. Formulated in another way, the gain in credibility of the no bailout clause exactly depends on the stress it can put on political-judicial relations.

However, the choice for a no bailout clause is not binary. As we will see below, there are multiple ways to frame this type of clause. The point is that the different options balance in different ways the need for judicial discretion and the desire for extra credibility. The purpose of introducing ambiguity in the no bailout clause is therefore to invite a shift in the interpretation of the clause right before or during a crisis so as to avoid a deep economic or even a constitutional crisis.[416]

[415] Not further taken into account here is the role of non-Eurozone MS.
[416] See for this Chapter 5.

It would certainly have been possible to adopt a version of the no bailout clause that without compromise or confusion would prohibit financial assistance to MS in financial need. As we will see below, the German proposal was in that direction. However, such a choice would run counter to the constitutional traditions of both the MS and the EU itself. Despite the fact that EU constitutional law is more instructive on economic matters than most national constitutions, the economic provisions of EU law always provided room for interpretation.[417] Or to put it differently, the discretion provided to the institutions under the economic provision of the treaties did not stand diametrically opposed to the economic rationale of those provisions.[418] The idea of a no bailout clause that is aimed solely at gaining extra credibility therefore does not fit neatly in the constitutional tradition of the EU. This does not mean that it was not possible to adopt such a clause, only that there is a strong bias against it.

Complementing the mainstream economic logic of the no bailout clause with a constitutional approach thus leads to a better understanding of the no bailout clause in two ways. Firstly, by emphasizing how the rigidity of the EU Treaties in combination with the threat of judicial enforcement can be employed to gain credibility for the rule "thou shalt not bail out". Secondly, by showing the potential costs of using EU constitutional law in this way and thereby explaining the forces that at the stage of negotiation will try to increase the discretion of the judiciary.

3.4.2 Negotiating the No Bailout Clause

What follows below is the negotiation history of article 125 TFEU.[419] It shows three things. First, that at the start of the negotiations the economic rationale of the clause was a matter of dispute. The economic logic of the no bailout clause as presented above was merely one of the three options available. Second, that article 125 TFEU is an amalgam of the different proposals, without a clear reconciliation of the different goals underlying these proposals. The ambiguity this created was by intention. Thirdly, that the Commission promoted the use of the name of

[417] See for example, with regard to free movement of goods Maduro (1998).
[418] One other clause in the Maastricht Treaty where the limitation of discretion was directly connected to the achievement of economic goals is the independence of the ECB. However, the ECB then has considerable discretion in defining both its own mandate ("maintaining price stability") and its tasks ("monetary policy").
[419] In contrast to the EEC Treaty and the SEA there is a wealth of material available on the negotiating history of the Maastricht Treaty. The history of specific provisions of EMU have been analyzed in Van den Berg (2005); Italianer (1993); James (2012). Borger notes that in two of the important cases on euro-crisis law, the CJEU uses the negotiating history of Maastricht. Borger, V. (2016), 'Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*', 53 *Common Market Law Review*, 189 and 191.

the 'no bailout clause' without regard to the ambiguity of the clause. This was an attempt to strengthen the credibility of the clause, without actually reducing the discretion of the Court in enforcing the clause. Together, these three aspects show that at least some of those involved in the drafting of the no bailout clause were aware of the dynamics of a constitutional no bailout clause.[420]

The first official proposals for a no bailout clause were introduced sometime during the early phases in the preparation for the IGC. Neither the Delors Report, nor the Werner Report two decades earlier, had mentioned a no bailout clause. [421] The Delors Report did mention twice the exclusion of access to central bank credits and was concerned with other ways Member States could try to escape from budgetary pressure resulting from monetary integration.[422] The proposed solution included rules on excessive deficits and economic policy coordination. However, one member of the Delors Committee, Lamfalussy, had argued in a paper accompanying the Delors Report that another reason the restrictions on national budgetary policy were necessary, was to prevent bailouts. An explicit no bailout clause could enhance the effectiveness of market forces.[423] No such recommendation found its way into the Delors Report.[424] The first appearance of the no bailout clause in the negotiations on EMU was during an informal meeting of the ECOFIN Council in Ireland on 31 March 1990.[425] Here we find the first two models for a no bailout clause.

Model 1: The 'no obligation' proposal

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[420] See for an opposing view Menendez who sees the clause as a form of "legal hubris": "They failed to realise that the use of law as a means of conveying credibility is highly problematic when future breaches of the law are highly probable." Menéndez, A.J. (2014), 'Editorial: A European Union in Constitutional Mutation?', 20 *European Law Journal*, 136, fn 24. The argument presented here precedes the argument made by Ortiz that the no bailout clause must be viewed in light of a process of de-determination and re-determination. The argument here is that such a process was to be foreseen in case of the no bailout clause and should be included in any explanation of the clause. Ortiz, P.J.C. (2016), 'The Political De-determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause', Online September 2016 *Social and Legal Studies*.

[421] Especially in the Werner Report such a provision would be a misnomer, because control of national budgets would be centralized. Werner Report, 11. See Ch. 1. Werner Report, 13: 'Moreover, the Community System of Central Banks would be able to grant loans to "public and private sectors".

[422] Delors Report, 20.

[423] Lamfalussy, A. (1989), *Macro-coordination of fiscal policies in an economic and monetary union in Europe*, in: Collection of papers submitted to the Committee for the Study of Economic and Monetary Union (D. Committee ed.), 96-97.

[424] The Guigou Report, presented in November 1989 with the task of listing the important question in anticipation of the IGC, also did not include any reference to a no bailout clause. Agence Europe, No. 1580, 9 November 1989.

[425] For an earlier reference in the economic literature, see Bishop, G., et al. (1989), Market Discipline CAN Work in the EC Monetary Union, Salomon Brothers, 5. Italianer (1993), 62.

The first model is found in a note from the Commission.[426] After describing the advantages of economic and monetary union and three different conceptions of such a union, it described the main points of disagreement and consensus on both monetary union and economic union.[427] It noted:

> "Also subject of virtual consensus is the proposition of two rules which could feature in the Treaty: (a) no monetary financing of public deficits or market privileges for the public authorities; (b) no bailing-out, in the sense that the Community would have no obligation to rescue a Member State in budgetary difficulty (no guarantee). This would not exclude ad hoc conditional assistance."[428]

Part b of this proposal makes clear that MS could not *automatically* rely on the Community in case of difficulties. It excludes Community solidarity as a legal argument for compulsory assistance. Hence, the proposal would leave intact the *possibility* that MS could default.[429] That there would not be a guarantee for assistance of course does not exclude the possibility that aid would be provided, which the note also explicitly states.

The proposal is best viewed in relation to another proposal by the Commission that the Community should create some mechanism for reacting promptly to asymmetric economic shocks.[430] Such a mechanism was already proposed in the Delors Report, which added that such mechanism should not be a permanent system for correcting differences in standards of living.[431] The note adds to this that the shock-absorber mechanism should not be a program of fixed allocations for certain regions. This also explains why the no guarantee proposal speaks about *ad hoc* measures. Ergo, the aim of the no guarantee proposal seems to have been to counter extensive interpretations of its proposal on the shock-absorber.

Model 2: The no bailout clause

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[426] Agence Europe, No. 1604/1605, 23 March 1990. The note was prepared by Vice-President of the Commission Christophersen.
[427] Idem, 10.
[428] Idem, 10.
[429] Harden (1999), 76; Herdegen (1998), 22 and 26.
[430] Agence Europe, No. 1604/1605, 23 March 1990, 11. The EEC already provided for the possibility of financial assistance.
[431] Delors Report, 18-19.

The second model presented before the informal ECOFIN meeting is found in a note prepared by the Monetary Committee (MC), which was tasked with preparing Council meetings.[432] The question before the MC in this case was the extent to which budgetary discipline in EMU would have to be organized on the European level, whilst accepting that the MS would retain as much as responsibility for their budgets as possible. The MC saw a role for the Community in protecting budgetary discipline and organizing economic policy coordination.[433] This resulted in three principles for sound budgetary policies. The first and third are the exclusion of "monetary and compulsory financing of public deficits", and the avoidance of excessive deficits. The second is that:

> "[e]ach MS must bear the responsibility for its own budgetary management and must ensure that it is in a position to honour its engagements. It must be clear that the MS do not stand behind each other's debts. This "no bail-out" rule would ensure that financial markets exercise a degree of discipline on any MS pursuing unsound budgetary policies, by imposing differential terms on its paper, and ultimately refusing to lend."[434]

This proposal follows closely the economic ideas of a no bailout clause as described above, even though it is phrased in rather colloquial language.[435] As will become clear below, this is a recurring issue: how to capture the economic logic of a no bailout clause in appropriate legal language.

Model 3: The 'no unconditional guarantees' proposal

The 'no obligation'-proposal of the Commission was remodeled for a note on institutional matters of EMU, presented before a meeting of foreign ministers in Dublin on 28 April 1990, a month after the first proposal. Instead of excluding automatic assistance, the proposal is now formulated as a prohibition:

> "Each Member State shall be responsible for its own budget management and, in the event of any imbalance, may not benefit from an unconditional guarantee given by either the Community or another Member State in respect of its public debt. Under

[432] Agence Europe, No. 1609, 3 April 1990. See for more on the Monetary Committee Verdun (1999).
[433] Agence Europe, No. 1609, 3 April 1990, 1-2.
[434] Idem, 2.
[435] The proposal does not mention the Community. This is corrected in a later version of the note.

> exceptional circumstances, Community financial assistance may be granted provided certain conditions are met."[436]

The object is no longer to prevent a MS in trouble from making a legal claim towards the Community, as in model 1, but instead to have such a claim be rephrased as a request for financial assistance, which the Community can grant on certain conditions. Although this was only made explicit later, the conditions the provision refers to are those that flow from the rules on economic governance.[437] The financial assistance provision that the Commission proposed in December 1990 did not further provide limitations to the situations under which assistance might be offered.

Elements of these three models can be found in the numerous proposals for the no bailout clause that followed this initial set, both before and during the Intergovernmental Conference that started in December 1990. In preparation for the European Council meeting of October 1990, the President-in-Office of the ECOFIN Council, Italian Treasury minister Mr. Carli submitted a report on the progress of the negotiations. It included the following provision: "No state may take advantage of the guarantee of other Member States of the Community or of the Community budget in operations to finance its own budget."[438] It is significant that it leaves out the word 'unconditional', so that all guarantees, conditional or not, would be prohibited. It therefore appears as if this proposal aimed to give legal form to the second model, although the use of the word 'guarantee' is problematic in this approach in that it does not prevent other forms of financial assistance. The Conclusions of European Council then return to the earliest proposal of the Commission, stating that any responsibility for the Community or the MS for the debt of another MS is precluded.[439] It is interesting to note that the Dutch version of the conclusions already speaks of *aansprakelijkheid*, which would be translated as liability. The

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[436] Agence Europe, No. 1620, 26 May 1990, 3.
[437] Agence Europe, No. 1660, 7 November 1990. A wide collection of resolutions by the European Parliament on EMU is found in EP (2012), 'The Long Road to the Euro', 8 *Cardoc Journals*.Also see Bulletin of the European Communities, Supplement 2/91, *Intergovernmental conferences: Contributions of the Commission*, 15, 24 and 30. "Two rules concerning budget deficits (no monetary financing and no bailing-out) should be introduced into the Treaty. (…) Furthermore, two new economic policy instruments would be created: (…) and a specific financial support scheme which would be activated when major economic problems arise or when economic convergence calls for a particular Community effort alongside national adjustment strategies in the sense of positive conditionality." Later, the Commission suggested a prohibition on "automatic bailouts".
[438] Agence Europe, No. 1657, 25 October 1990.
[439] European Council Conclusion, 27-28 October 1990, Rome, 6: "The second phase will start on 1 January 1994 after: (…) the monetary financing of budget deficits has been prohibited and any responsibility on the part of the Community or its Member States for one Member State's debt precluded".

French proposal from January 1991, then built on the proposal by Carli and stated that: "The Member States alone shall be responsible for their public debts and shall not benefit from any guarantee, under Economic and Monetary Union, from the Community or other Member States."[440] The impression these proposals leave is not so much one of disagreement, but of a collective search for the appropriate words and goals. The proposals have a very similar vocabulary, but vary in their scope and reference to the three models.

The German proposal for EMU of March 1991 deals extensively with the no bailout clause. It sets out three complementary versions of the no bailout clause.[441] Together, these three articles apparently aimed to be an extensive prohibition of all sorts of financial assistance, with the two most extensive clauses stating that "neither the Community, nor the Member States shall be answerable for the commitments of another Member State" and "[n]either the Community, nor the Member States, are answerable for errors committed in a Member State in the conduct of its economy." It furthermore prohibits assuming the commitments of other Member States. Logically, no mention is made of a financial assistance scheme or of a prohibition of unconditional guarantees.

The language of the German proposal is telling, as it does not relate to existing legal concepts.[442] This should not come as a surprise, as their aim was evidently to prohibit a whole range of legal actions, from loans to guarantees. Similarly, the German proposal is the first that uses the word 'commitments', which covers both debts and deficits.[443] This suggests that the German proposal attempted to give the strongest legal expression of the second model. This is confirmed by the lack of a clear relationship between the three parts of the proposal. For example, what would be the difference between being answerable for commitments and assuming the commitments? The former has a broader scope and seems to envelope the latter.

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[440] Agence Europe, No. 1686, 31 Januari 1991, art 1-4(1). Furthermore, the addition of the phrase 'under EMU', raises the suggestion that guarantees outside EMU would not be problematic, but it is not clear what exactly is meant by this. This might be the origin of what later would be the – much more narrowly phrased – exception included in art 104b.

[441] Agence Europe, No. 1700, 20 March 1991. Article 8D, section 2: "The second phase of economic and monetary union shall begin on 1 January 1994, as long as the following conditions have been fulfilled: (…) d) The creation of currency to finance budgetary deficits is forbidden; it is also forbidden for the Community and the Member States to assume the commitments of another Member State". Article 102E: "Neither the Community, nor the Member States, are answerable for errors committed in a Member State in the conduct of its economy." Article 105B, section 4: "Neither the Community, nor the Member States shall be answerable for the commitments of another Member State."

[442] View of Advocate General Kokott, delivered on 26 October 2012 in Case C-370/12, *Pringle*, EU:C:2012:675.

[443] Ohler, C. (2012), *Art. 125*, in: EWU: Kommentar zur Europäische Währungsunion (H. Siekman ed.), 183.

The strategy seems to have been to stress the importance of the no bail-out rule by piling on top of each other three different expressions of the same rule. Nevertheless, the use of language that does not have a well-established legal meaning has the downside that it is still possible under the German proposal to argue that it is allowed for a MS or the Union to provide financial assistance to another MS. The German proposal thus fails to translate the idea of a constitutional no bailout clause into appropriate legal language.

The Luxembourg Presidency of the Council published a so-called non-paper on certain elements of EMU late February 1991. This is the first proposal that prohibits MS and the Community from being *liable* for the commitments of other MS.[444] The term liability of course has a well-known, albeit broad, legal definition. Being liable for the debts of other MS would indicate a direct legal relation between the Community or the MS and the creditors of the MS in trouble. This is a modification of the proposal by the Commission that no unconditional guarantees could be made to another MS in relation to its public debt. This modification is only of minor importance however, as it relates to only one element of how financial assistance could be structured. Moreover, the proposal includes an exception to the prohibition, namely "mutual financial guarantees for the joint execution of a specific economic project". The use of the word guarantee in this context signals that the proposal was not a radical break with the Commission proposals in this regard. Nevertheless, the introduction of the exception invites *a contrario* arguments. If the prohibition was supposed to be narrow, why was an exception necessary?[445] The Luxembourg proposal is also the first proposal to include an extra section that allows the Council to lay down further rules in secondary legislation. The question of the financial assistance scheme is not yet resolved at this time.[446]

The final shape of the no bailout clause, except for one small detail, appears in the draft Treaty presented by the Dutch Presidency of the Council, near the end of the IGC but before the final round of discussions.[447] The question whether there should be a financial assistance scheme is

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[444] Agence Europe, No. 1693, 27 February 1991, 4: "Neither the Community, nor a Member State shall be liable for the commitments of Community institutions or bodies, governments, local authorities or public agencies of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific economic project."

[445] Beck, G. (2013), 'The Legal Reasoning of the Court of Justice and the Euro Crisis: The Flexibility of the Court's Cumulative Approach and the Pringle Case', 20 *Maastricht Journal of European and Comparative Law*, 645.

[446] Hahn (1991), 816-817.

[447] Agence Europe, No. 1740/1741, 1 November 1991. Article 104 B: "The Member States shall not be liable for or assume the commitments of Central Governments, regional or local authorities, public authorities, other bodies

answered in the affirmative now, although the negotiation on the details is clearly not finished.[448] Included now in the text is one element from the German overall proposal: commitments of another MS may also not be assumed. Whereas in the German proposal, this phrase clearly added another branch to the tree of an overall proposal, its addition to the Luxembourg version does not have a similar effect. Assuming commitments is – of course – different from being liable for commitments, as in the latter the obligation remains in the first place in the hands of the original MS. This difference is of little consequence however, since it still does not involve financial assistance that is not directly linked to the commitments of a MS. Hence, the addition only marginally broadens the prohibition.[449]

3.4.3 The Name 'The No Bailout Clause'

One of the questions that article 104b EC raises is why it is so commonly called the 'no bailout clause'. Especially after the Luxembourg proposal, which had stripped several crucial parts of the German proposal, the *text* of article 104b EC could not be said to prohibit all forms of financial assistance to a MS in economic troubles. It certainly is possible to construct an interpretation of the clause that prohibits such assistance, for example by constructing an overall economic purpose of the clauses of EMU, but it should be obvious by now that the text of the clause does not unambiguously prohibit bailouts. Why then, was the phrase 'the no bailout clause' so widely accepted?

Based on the negotiating history itself and the theoretical discussion presented above, two reasons come to light. Firstly, it appears to have been a strategy of the Commission to downplay the relevance of the different versions of the clause but to nevertheless promote the phrase 'no bailout clause'. Secondly, after the text had more or less come into its final shape, even the proponents of a strict no bailout clause had little incentive to object to the use of the name. As discussed above, the main benefit of a no bailout clause lies in its ability to convince the lower-level governments to conduct proper fiscal policies. For this purpose, a broadly shared understanding of article 125 as 'the no bailout clause' would be a sufficient replacement for an actual, strict no bailout clause.

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governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific economic project."

[448] This involved the important question on the voting modalities regarding financial assistance.

[449] Ohler (2012), 185-186.

The Commission's strategy is visible on numerous occasions. For example, in February 1991, in the early phase of the IGC, the Commission published an explanatory memorandum to its Draft Treaty that it had published in December.[450] The memorandum stated that "[t]here is unanimity that certain rules (no monetary financing, no automatic bail-outs) and a principle (the avoidance of excessive deficits) should be enshrined in the Treaty."[451] Obviously, this discounts the proposal of the Monetary Committee. On other occasions, the Commission used the name "no bailout clause", even though its proposals clearly did not ascribe to the economic logic described above. This was clear for example in a report from the Commission in August 1990, when it proposed that the following rule be included in the Treaty: "no bailing-out; in the case of imbalances, a Member State could not benefit from an unconditional guarantee concerning its public debt either from the Community or from another Member State."[452] The phrase 'no bailing out' is then used on two other occasions in the Report, without any accompanying explanation that this prohibition was only meant to cover unconditional guarantees.

The motivation for this strategy was firstly that the Commission preferred the inclusion of a (limited) financial assistance scheme in the Treaty.[453] Naturally, the inclusion of both a financial assistance scheme as well as a strict no bailout clause could give mixed signals, unless the financial assistance scheme would be strictly delineated. Hence, the Commission promoted the alternative models of the clause. Secondly, the Commission had doubts about the efficacy of a 'hard' no bailout clause within the EU. This became apparent in its report *One Market, One Money*, which dealt with the economic ideas behind EMU.[454] The Commission argued here that an "absolute" no bailout clause could be adopted in order to try to convince markets that financial solidarity was excluded, but that because the Community (Union) had already institutionalized expressions of solidarity, "markets cannot be expected to behave as if financial solidarity were completely ruled out in such an environment." Within the EU, an absolute no bailout clause could not work.

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[450] Agence Europe, No 1687, 1 February 1991.
[451] Idem.
[452] Bulletin of the European Communities, Supplement 2/91, *Intergovernmental conferences: Contributions of the Commission,* 24.
[453] On the importance for Delors of a financial assistance scheme, see Dyson & Featherstone (1999), 731-732.
[454] European Commission (1990), *One market, one money,* 110-11. Another condition would be that the EuroFed would be independent and not diverge from its mandate of fighting price stability.

The argument here is not that the Commission deceived its negotiating partners. There is no indication that the MS were 'tricked' into accepting a confusing clause. As with other parts of the Maastricht Treaty, article 125 TFEU is the result of political choices and compromises. Instead, the actions of the Commission are better seen as setting the stage for those compromises, with the name of no bailout clause apparently being an acceptable alternative to actually having a strict no bailout clause in the Treaty.

To conclude this section: the wording of article 125 TFEU is no coincidence or a matter of bad drafting. Instead, it is the result of a process of balancing between the need for credibility and the need for ambiguity. The final compromise leans heavily towards the latter, which was made easier by the fact that – paradoxically – the common understanding still was that the provision would be referred to as the no bailout clause. This preserved to a large extent the messaging function of a no bailout rule towards potentially prodigal MS, whilst at the same time giving interpretative discretion to any court that might be called upon to enforce the rule.

Conclusion

The euro is a constitutional currency, meaning that its main features were laid down in EU constitutional law. This has shaped the context into which the euro was negotiated and created. This is not to say that EU constitutional law is responsible for, mandated or prevented any particular rule of EMU. The euro is – and remains – a political choice. What EU constitutional law can be seen to have done for the euro is to provide fertile ground within which the rules of EMU could be planted. The soil does not decide which seeds get planted, but it will favor certain species over others.

The rules of EMU were negotiated as *constitutional* rules, that is, in full awareness of the characteristics of EU primary law, such as its rigidity, its supremacy and its institutional environment. In this context, attributing a competence also means a restriction of competence. The most interesting question then is *how* the competence is framed and to what extent it is designed to be used by other institutions as a check on the discretion of the institution to which the competence is attributed. This leads, firstly, to the conclusion that for some rules, the constitutional goal of restraining public power was as important as the economic goals to be achieved. Or rather, we should look at those provisions as organizing a political process, with

the exact goal of that process being dependent on what the participants themselves wanted to achieve. Secondly, it follows that the constitutionalization of EMU would not lead by itself to judicialization, but it would be a contributing factor.

In his book on the Passage to Europe, Luuk van Middelaar compliments lawyers for their ability to turn legal fictions into reality. What first is mere legal form, slowly gets filled with substance. That compliment also applies to the drafters of the Maastricht Treaty. As an exercise in law-making, the Maastricht Treaty laid down a set of rules for the euro that only slowly materialized into reality. In this process the rules of the euro were not a reflection of what was being built, continuously amended to reflect current developments, but a blue-print set in stone.

Chapter 4
The Unfortunate Success of EMU Primary Law

Introduction

Critics of the euro have an easy job making fun of official statements about the euro in the period between the Maastricht Treaty and the start of the euro-crisis.[455] Especially when the 'success' of the euro was celebrated in 2009 at a decade of monetary union, the imagery becomes powerful: public officials, eager to toot their own horn about the stability of the euro, were almost comically unaware of the coming catastrophe that would invalidate their optimistic and arrogant opinions.[456] But the easiness with which – in hindsight – self-aggrandizing statements by Eurocrats can be rejected, should not distract us from the intellectual challenge this period poses: to what extent is the euro-crisis the direct and inevitable result of the Maastricht Treaty, that is, the original decision to start with EMU as envisioned in the Treaty, and to what extent is the crisis the result of forces, trends and actions independent from that decision? Did those celebrating officials actively contribute to the coming crisis, or were they just passengers on the Titanic? In short, what is the relation between the Maastricht Treaty and the euro-crisis?

This chapter focuses on one aspect of this question: the stability of EMU primary law. The purpose is to find, describe and analyze particular moments in the life of EMU primary law that were of importance in the development (or lack thereof) of the euro, particularly as they relate to the allocation of responsibility in the interpretation and application of EMU constitutional law. The aim is not to give a complete account of the development of the euro, but to highlight those developments that are deemed especially relevant for the constitutional

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[455] Majone describes a culture of "total optimism". Majone, G. (2014), *Rethinking the Union of Europe Post-Crisis: Has integration Gone Too Far?*, Cambridge University Press. Krugman mocks an article published by two economists that criticized other economists who thought the euro would never work. The article was published in 2010 and quickly became, according to Krugman, an honor roll. Krugman, P. (July 20, 2015), *Europe's Impossible Dream*, The New York Times.

[456] See for example the European Commission 2008, *EMU@10: successes and challenges after 10 years of Economic and Monetary Union*, *3-4*. "Ten years into its existence, the euro is a resounding success. (…) Fiscal policies have supported macroeconomic stability in EMU." Nevertheless, the Report is also critical on persistent imbalances in the Eurozone. See for a critical analysis of the EMU@10 report Andrews, D. (2013), 'Merged Into One: Keystones of European Economic Governance, 1962–2012', 35 *Journal of European Integration*.

framework of the euro. The previous chapter concluded that the Maastricht Treaty placed great faith in the ability of law to manufacture a reality and emphasized that the rules of EMU were negotiated as constitutional rules. This chapter then examines whether and how EMU primary law functioned as constitutional law in the period from 1993 (entry into force of the Maastricht Treaty) until 2010 (start of the euro-crisis, after the entry into force of the Lisbon Treaty).

The main observation of this chapter is that the legal framework of EMU hardly changed between 1993 and 2009. Neither Treaty-amendments, nor court decisions, nor ambitious regulations significantly impacted the framework of EMU. EMU was boring, as some have said.[457] Take for example this observation from 2009: "the institutional choices made in Maastricht have largely determined the path of the institutional evolution of EMU over the first eight years".[458] Also political scientists observed that EMU had not launched a renewed process of deeper political integration, in contrast to what some had expected.[459] This led Moravcsik to argue in 2007 that European integration had reached a "stable constitutional equilibrium" which was unlikely to be disturbed in the short term.[460] In this sense, EMU constitutional law functioned as expected.

The observation that EMU primary law worked as expected might seem unexciting and not worthy of a large chapter in a thesis.[461] Recent books on the euro-crisis hardly deal with the legal and institutional developments in this period. They speak of the mistakes of Maastricht, not of the mistakes of the Nice Treaty or the Lisbon Treaty, or of the responsibility of the EU institutions and the MS to repair EMU in between these treaty reforms.[462] This neglect of the period from the Maastricht Treaty to the beginning of the euro-crisis is only partially justified. Although it is true that the EMU legal framework has remained remarkably stable until

[457] Pisani-Ferry (2014), 4. Eleftheriadis called this period an "era of quiet obscurity". Eleftheriadis, P. (2013), 'Democracy in the Eurozone', 49/2013 *University of Oxford Legal Research Paper Series*.
[458] Salines, M., et al. (2011), 'Beyond the Economics of the Euro: Analysing the Institutional Evolution of EMU 1999-2010', No. 127, September 2011 *ECB Occasional Paper Series*, 16.
[459] Hodson, D. (2009), 'EMU and political union: what, if anything, have we learned from the euro's first decade?', 16 *Journal of European Public Policy*, 522.
[460] Moravcsik, A. (2007), *The European Constitutional Settlement*, in: Making history: European integration and institutional change at fifty (S. Meunier & K.R. McNamara eds.), 23.
[461] Eleftheriadis observed that many handbooks of EU law did not include a chapter on EMU. Eleftheriadis (2013), 2, fn 3.
[462] Particularly telling is that Tuori and Tuori have a chapter on the economic narratives of the causes of the crisis, not on political/institutional narratives. Tuori & Tuori (2014). Hinarejos does discuss the period after the Maastricht Treaty, focusing on the Stability and Growth Pact. Hinarejos, A. (2015), *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, 7-10.

2009/2010, this was not a matter of course. Ignoring the 'inter-war period' of EMU disregards the fascinating dynamic between the opposing forces of continuity and change in this period. Laws do not implement themselves but are used, interpreted, challenged and debated by a wide variety of actors. Especially in an area as contentious as monetary union, the statement that the legal framework worked largely as expected is therefore anything but dull – and as will become clear later in this chapter, not quite straightforward.

The statement that EMU primary law functioned 'largely as expected', means both more and less than that the MS and the institutions acted in compliance with EMU primary law. It means more in the sense that the overall legal framework has also remained remarkably stable in substance. The claim is not that the EMU legal framework has not seen interesting developments during this period. But what is important is that these developments have only minimally affected the overall orientation of the EMU legal framework. The nature of these developments is familiar for legal scholars: judicial interpretation of the Treaty, Treaty-amendment, secondary legislation, and non-legal actions. What is so remarkable about these developments is that all of them are rather unremarkable, at least from a constitutional perspective. Implied in the stability of the EMU legal framework is that it was largely effective in organizing monetary integration along the lines of the Maastricht Treaty.

It means less in the sense that it does not mean that all legal rules were always fully adhered to. A modicum of violations does not necessarily undermine the effectiveness of the legal regime of EMU as a whole. What is especially relevant in case of suspected violations of the rules is the level of discretion awarded to the institutions in applying the Treaty. For example, in the Excessive Deficit Procedure (EDP) the Council is responsible for making the economic and political judgements concerning the necessity to impose sanctions. The simple observation that no fines have been imposed in the EDP, even though there have been numerous excessive deficits, cannot by itself lead to the conclusion that the Council failed to correctly apply the Treaty.

The developments in Greece are an exception to the general argument presented here. Greece's profligacy is not discussed in detail here, mainly because it is considered just that, an exception

to the otherwise successful functioning of EMU primary law as constitutional law.[463] As will become clear in the next chapter, the euro-crisis is more than just problems in Greece.

This chapter builds upon observations made about EMU from the time right before the start of the euro-crisis. As mentioned above, the sentiment at that time was one of stability and equilibrium. It is easy to see from an economic point of view why that sentiment was misguided. In this view, the euro-crisis is the proof that 'Maastricht' was defective. From a legal point of view, it is not so simple. The euro-crisis is not, by itself, evidence that the rules of the euro failed. The euro-crisis might rather be seen as the result of the success of the law in maintaining the allocation of responsibilities under the Maastricht Treaty. The success of EMU primary law therefore had quite unfortunate effects. The analysis below disregards both the 'culture of optimism' of the period of Maastricht, as well as the deep skepticism of the euro-crisis. The focus is purely on the rules as they were found in the Treaty and on how they functioned over a period of around 15 years.

The developments in this period are described in four sections. The first concerns the period leading up to the introduction of the euro in 1999. The period is characterized by the bigger MS making demands to amend or complement Maastricht before they gave up their national currencies. This tested the ability of the Maastricht rules to withstand such pressure. The second section concerns membership of the Eurozone. Enlargement of the Union meant that the political commitment underlying the obligation to join the Eurozone was undermined. The legal rule to join the Eurozone nevertheless masked the change in membership policy. The institutional relations of the ECB are at the center of the third section. The challenge is to see how it was possible that despite a tumultuous start with an intervention by the CJEU and a treaty-amendment the institutional position of the ECB remained largely the same. The last section analyzes the functioning of the EDP in light of the case before the CJEU and the subsequent reform of the Stability and Growth Pact (SGP).

4.1 Preparing for Monetary Union

[463] Pisani-Ferry notes how Greece was the "perfect culprit" in the euro-crisis and suggests that the general perspective towards the crisis would have been very different had the euro-crisis started with Ireland. Pisani-Ferry (2014), 52-53.

A key characteristic of EMU was the use of stages to come to full monetary union. This created the possibility that monetary union would be politically challenged in the time between the adoption of the Maastricht Treaty and start of the third stage. [464] Especially the bigger MS might use the opportunity to try to re-negotiate the core elements of EMU before renouncing their treasured national currencies.[465] It should therefore not come as a surprise that the creation of the Stability & Growth Pact and the Eurogroup happened *before* the start of the third stage of EMU in 1999.

4.1.1 The Stability and Growth Pact

In 1997, after two years of negotiations, the Stability and Growth Pact was adopted in the form of two regulations and a European Council resolution. The two regulations provide further rules on the coordination of economic policies (the preventive part, based on article 103 EC) and the excessive deficit procedure (the corrective part, based on article 104c EC). [466] The Resolution contains promises of the MS, the Council and the Commission in how they will apply the rules of the SGP and EDP.

The most extensive discussion on the coming into force of the SGP is found in the work of Heipertz and Verdun: *Ruling Europe*.[467] They discuss four different theories of European integration and for each theory examine its explanatory strengths and weaknesses with regard to the SGP. Briefly summarized, and without doing justice to the theoretical nuances of their work, the negotiations can be summarized as follows: in 1995, politicians from the opposition in Germany gave voice to the deep ambivalence in that country towards EMU by demanding extra guarantees that the euro would be as stable and sound as the German Mark. They feared that other MS might unduly benefit from monetary union by not sticking to the agreement on responsible fiscal policies. Responding to these calls, German Finance Minister Waigel proposed a stability pact for Europe. This pact would include automatic sanctions (including fines) for MS that did not stick to the "3% deficit limit" and would most likely be adopted as

[464] See Chapter 3.1.
[465] Heipertz & Verdun (2010), 26-27.
[466] 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; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure; European Council Resolution, 17 June 1997, on the Stability and Growth Pact.
[467] For extensive legal descriptions see Amtenbrink, F., et al. (1997), 'Stability and Growth Pact: Placebo or Panacea? (I)', 8 *European Business Law Review*; Hahn (1998); Goebel, R.J. (2007), 'Economic Governance in the European Union: Should Fiscal Stability Outweigh Economic Growth in the Stability and Growth Pact?', 31 *Fordham International Law Journal*.

international treaty. Amongst others, France and the Commission opposed the move to go outside the framework of EMU as negotiated in Maastricht, but – in recognition that EMU depended on "Germany's willingness to continue the project" – agreed to negotiate a stability pact inside the EU legal order. Negotiating inside the EU Treaty organized the topics to be discussed, guaranteed the participation of the Commission and the Monetary Committee and defined the procedures by which the regulations would be adopted. Moving from the inter-governmental negotiations and high-politics to bureaucratic procedures dominated by technical issues allowed the negotiations to move forward and narrowed down the issues over which deep differences of opinion persisted. A final agreement was then hammered out that took account of the broader political context (for example, the inclusion of a chapter on Employment in the Amsterdam Treaty), that distributed topics between the legal and non-legal sources so as to give different parties different elements to emphasize at home and that split some differences in the middle.

The work by Heipertz and Verdun explains how the Stability & Growth Pact came about. It does not extensively discuss the relevance of the SGP in relation to the rules that were already in the Treaty. This risks confusing the political relevance of the SGP with its legal relevance. Whereas the SGP undoubtedly had political relevance, its legal relevance is another matter.

As discussed in the previous chapter, the rules on the excessive deficit procedure served, amongst other things, the constitutional role of protecting the MS from Union interference. It is obvious then that the original German plans directly went against this goal. This section therefore sees the debates over the stability pact as the first test for the integrity and stability of EMU as laid down in the Maastricht Treaty. The following paragraphs will focus on two aspects of this episode. Firstly, mirroring the methods used in Chapter 2, the emphasis is on the alternative legal bases for the SGP and why they were discarded. Secondly, it must be examined whether the SGP challenged the rules of the Treaty. Was the SGP an ambitious piece of legislation or did it neatly conform to the limits set in the Treaty by just providing some details on the implementation? The focus is on the so-called corrective part of the SGP, which relates to the excessive deficit procedure. The preventive part of the SGP, relating to the

multilateral surveillance procedure, poses fewer problems in relation to the restriction of MS discretion.[468]

4.1.1.1 The Legal Basis of the Stability Pact

There were four possible ways to adopt a stability pact, meaning here stricter legal rules on the discretion of MS to conduct their fiscal and economic policies: a revision of the EC Treaty, an ordinary international treaty, a replacement of the protocol and lastly secondary legislation.

The first option, that of a new EC treaty, would not have been out of the question, as Article N of the Maastricht Treaty required that an intergovernmental conference be called in 1996. As observed by Segers and Van Esch, the planned inter-governmental conference was seen by some in Germany as a 'follow-up' conference to the Maastricht Treaty.[469] Waigel had even claimed that the Maastricht Treaty itself was only acceptable because of this 'revision clause'.[470] Moreover, the agenda for the pre-Amsterdam IGC was not set in stone, with several topics being added at different moments.[471] As both the preparation for, and the IGC itself, covered a particularly long stretch of time, there had been several opportunities to include the functioning of the excessive deficit procedure, or even the emptiness of economic union as whole, on the agenda. In fact, the group of 'wise men and women' assigned to lay the groundwork for the IGC had the express task to examine the functioning of the Maastricht Treaty.[472] That EMU was nonetheless kept off the agenda is relevant here, because it shows that high hurdles towards Treaty change had already been taken.[473] Getting the train of European politics moving towards an IGC can require significant political effort; all that was required here was to get the topic on the agenda. What this therefore shows is the importance of the EMU rules as a package of constitutional rules.[474] The rules on economic governance could effectively set the boundaries on EU integration, not just because these rules on their

[468] Nevertheless, see for some concerns on the legality of Regulation 1466/97, see Amtenbrink & De Haan (2003), 1084-1085.
[469] Segers & Van Esch (2007), 1101.
[470] Segers & Van Esch (2007), 1101.
[471] See Laursen, F. (2002), *Introduction: Overview of the 1996-97 Inter-governmental Conference (IGC) and the Treaty of Amsterdam*, in: The Amsterdam Treaty (F. Laursen ed.), 2-5.
[472] Laursen (2002), 5. Even though the report by the Westendorp Group (presented to the European Council in December 1995) was filled with disagreement amongst its members it concluded unanimously that "the provisions on the single currency which were agreed at Maastricht and ratified by our parliaments must remain unchanged". Reflection Group, 5 December 1995, *Reflection Group's Report*, available at http://aei.pitt.edu/49155/.
[473] Tuytschaever (2000), 180, fn 16.
[474] Stark (2001), 85.

own were so difficult to amend, but because they were connected to other rules that were also constitutionalized.

Having missed the train of EU Treaty amendment, Waigel entertained the idea of a 'fiscal policy Schengen agreement', meaning an international treaty *outside* the EU/EC legal framework to complement the rules *inside* that framework. More specifically Waigel noted:

> "In order to permanently ensure budgetary discipline in the final stage as well against all conceivable dangers, the stability criteria and the institutional arrangements should be precisely stated and operationally defined for practical application. The previsions of the Treaty will not be called into question either economically or legally. Renegotiating the Treaty of Maastricht is not intended."[475]

This clearly shows the scaled-back ambitions, even though this part of the proposal is somewhat of an understatement. Overall, the proposal oscillated between implementing, specifying and reforming the rules on fiscal policy. [476] Several authors expressed doubts as to the legality of a 'fiscal Schengen'. [477] There were furthermore still concerns about breaking up the package of EMU deals.[478]

The third option would have been to replace the Protocol on the excessive deficit procedure, which, amongst other things, contains the reference values for the start of the EDP: the deficit of 3% of GDP deficit and debt of 60% of GDP. As explained in Chapter 3, this Protocol can be replaced without formally amending the Treaty (as is normally the case for protocols), but by unanimous Council decision. The benefit of this option would be that it would allow for the argument to be put forward that replacement of the protocol would not amount to a renegotiation of the package of EMU as agreed in Maastricht. In fact, the Maastricht Treaty even required that the protocol be replaced.[479] The benefit of replacing the protocol would have been that future amendments, namely those after the entry into force of the third stage of EMU, would have required unanimity. Moreover, the replacement Protocol would have had the status

[475] Agence Europe, No 1962, 24 November 1995.
[476] See Hahn (1998), 80-81.
[477] Hahn (1998), 82-83; Smits (1997), 86-87.
[478] Heipertz & Verdun (2010), 27.
[479] Art 104c(14) second paragraph EC. Amtenbrink, De Haan and Sleijpen argue that this legal obligation leaves some discretion to the Council. Amtenbrink, F., et al. (1997), 'Stability and Growth Pact: Placebo or Panacea? (II)', 8 *European Business Law Review*, 234.

of primary law. [480] The downside of replacing the protocol would have been the lack of clarity as to the extent to which the new rules could impose other obligations on the MS than those already found in the Treaty.[481] Moreover, opening the debate on the protocol risked bringing the criteria themselves into the debate.[482]

Heipertz and Verdun argue that the move away from treaties (and the protocol) towards secondary EU legislation is indicative of the importance of the shifts in the balance of power in intergovernmental bargaining in the negotiations of the SGP.[483] This makes sense if one takes account of the purpose of their book, namely to explain the coming into force of the SGP. For the purpose of this section, the shift towards the use of secondary legislation can also be seen as a rather straightforward application of EMU constitutional law. The success of those opposing a stability pact mainly consisted of bringing the pact within the Treaty, thereby using law as a means to structure the negotiations.

4.1.1.2 The Contents of the SGP

The following paragraphs discuss the SGP in relation to the Treaty. Does the SGP go beyond the procedures set out in Maastricht? Does it impose new obligations on the MS or does the Pact merely contain specifications? Is the SGP an ambitious set of legislation? This is the impression the literature imparts.[484] Herdegen, for example, asserted that the SGP "considerably reduces the flexibility of the Maastricht Treaty".[485] However, his discussion on the "deficit criterion"[486] does not even mention any provision of the SGP. His discussion of the sanctions regime ends with the observation that "[t]he system confers a political discretion on the Council the ambit of which remains rather unclear".[487] A different point of view comes from Segers and Van Esch, who observed the following:

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[480] In the crisis, discussion on the protocol did take place. See Peers, S. (2012), 'The Stability Treaty: Permanent Austerity or Gesture Politics?', 8 *European Constitutional Law Review*, 406.
[481] See Chapter 3.
[482] Amtenbrink, et al. (1997), 234.
[483] Heipertz & Verdun (2010), 32.
[484] One of many examples is Hodson, D. (2011), *Governing the Euro Area in Good Times and Bad*, Oxford University Press, ch 4. A welcome exception is Maher, who describes the corrective arm of the SGP as "providing a time limit for the EDP". Maher, I. (2004), 'Economic policy coordination and the European Court: excessive deficits and ECOFIN discretion', 29 *European Law Review*, 833. Also see Amtenbrink, et al. (1997), 208.
[485] Herdegen (1998), 13.
[486] Herdegen (1998), 27-28. At the same time, Herdegen holds that: "The essential objective of this Regulation is to reduce the flexibility inherent in the Treaty regime, i.e. to curtail the Council's discretion and to establish deterrent predictability." (p 29).
[487] Herdegen (1998), 31. Also see Stark (2001), 104.

> "A coalition of Italy, France and the Commission had managed to strip the original German Stability Pact skillfully of its essential characteristics (strict quantification, automatic penalties and the *Stabilitätsrat).* In essence, the European Council of Dublin kept the excessive deficit procedure of Article 104c in place"[488]

Their argument that the SGP ultimately did not include some of the key proposals from Waigel is correct. However, their observation that the EDP as found in the treaty was kept in place 'in essence', betrays the existence of exceptions and ambiguities upon which the authors do not dwell further, but which are vital for a proper assessment of how the SGP relates to the Treaty.[489]

A first observation about the corrective part of the SGP is that it does not contain any obligations for the MS. In accordance with article 104c(2)-(12) EC, Regulation 1467/97 only addresses the institutions. The sentence 'MS violated the Stability and Growth Pact' (an often-heard phrase), can therefore only refer to the promises contained in the Resolution.[490]

One of the key questions in the EDP is: what is an excessive deficit? To briefly recapitulate the previous chapter, the Treaty firmly puts the Council in charge of deciding this question. The Council can only act upon recommendation from the Commission, which is instructed to start the Excessive Deficit Procedure for a MS if one of two criteria is fulfilled. One of these criteria is the government deficit, with the reference value being 3% of GDP. Nevertheless, the Commission does not have to start the EDP procedure if one of two exceptions applies. What article 2 sections 1 and 2 of Regulation 1467/97 do is further define these exceptions. By explicit reference to article 104c(2) EC, article 2(1) of Regulation 1467/97 specifies the instruction to the Commission for its investigation of the budgetary position of the MS. Article 2(2) then instructs the Commission to consider in its Report, *as a rule*, a deficit higher than 3% as *exceptional* only when the recession that struck that MS has led to a fall in GDP of at least 2%. Nevertheless, this is only a minor limitation on the discretion of the Commission, which still has to take into account *all other relevant factors* (article 104c(3) EC). Moreover, the

[488] Segers & Van Esch (2007), 1103-1104. Also see Goebel (2007), 1282.
[489] They do note that "according to article 104c of the Maastricht Treaty, the Council at all times had the final decision in determining an excessive deficit." Segers & Van Esch (2007), 1102.
[490] Or the preventive arm of the SGP, which contains the obligation that MS submit a stability or convergence plan.

Regulation does not oblige the Commission to take this argument into account when deciding whether an excessive deficit exists under article 104c(5) EC.

The third section of article 2 of the Regulation then addresses the Council and proscribes that it shall take into account the observations of the MS concerned that show that an annual fall of GDP of less than 2% is nevertheless exceptional.[491] Two things are implied in this provision. First, that an annual fall of GDP higher than 2% is in any case exceptional, and second, that an exceptional fall in GDP is relevant for the assessment whether there is an excessive deficit. What is not excluded by the provision is that the Council, on its own accord, finds a lower fall in GDP than 2% to be exceptional. As the Council is in any case obliged to take into account the observations of the MS the effect of the provision is little more than an encouragement for the Council to take a specific sort of argument into consideration. It cannot be concluded from this that the Regulation introduces a "3% rule". This would have been the case if every deficit higher than 3% would have been seen as an excessive deficit, with a limited amount of exceptions. Instead, the SGP regulates the conditions under which specific arguments can be used in the procedure. It does not determine the weight of these arguments, nor make the EDP revolve solely around these arguments.

A large part of the SGP was dedicated to setting time-limits within which institutions must act in the EDP.[492] Setting these limits fell squarely within the mandate of the Council under article 104c(14) EC. Another gap that is filled by the SGP concerns the situation where the MS acts in accordance with the recommendation of the Council, but where that has not led to a situation where there is no longer an excessive deficit. Whereas the Treaty deals with negative situations only (a MS has *not* taken appropriate actions), the SGP allows for a more positive approach by introducing the possibility of holding the procedure in abeyance under certain circumstances (article 9 Regulation 1467/97).

The more controversial aspects of the SGP then relate to the much debated 'automaticity' of sanctions. There are two provisions of the SGP that limited the discretion of the Council in ways that were not fully in accordance with the Treaty. The first is that article 6 Regulation

[491] Whereas the provision thus invites MS to convince the Council that a decline of smaller than 2% of GDP nevertheless is a 'severe recession', the European Council Resolution adds to this that MS commit themselves "as a rule" not to invoke article 2(3) of the Regulation if the recession is smaller than 0,75% of GDP.
[492] Maher (2004), 833.

1467/97 stated that when the conditions to apply article 104c(11) EC are met, the Council *shall* impose sanctions, whereas article 104c(11) EC explicitly states that the Council *may* impose measures.[493] The second is that article 12 Regulation 1467/97 fixed the height of the deposit made by the MS when the excessive deficit was the result of the non-compliance with the deficit criterion found in article 104c(2) EC. Article 104c(11) EC specifies merely that the deposit would be of an appropriate size. In both cases, there is a small limitation on the discretion of the Council, but the effects of these limitations are easily exaggerated. As the EDP consists of a long list of steps to be taken by various bodies, the removal of discretion at these two points then only serves to emphasize the discretion at other points of the procedure.

The conclusion then must be that the SGP was not an ambitious piece of legislation, in the sense that it hardly challenged what was permissible under the Treaty. Rather, it mostly implements the EDP as found in the Treaty. Legislation can sometimes take the lead in challenging the dominant understanding of Treaty provisions. The SGP does not take on such a role.

4.1.2 The Eurogroup

At the time when the finishing touches on the SGP were discussed, at the Amsterdam European Council meeting in June 1997, the negotiations for the new Eurogroup were gaining traction. The conclusions from that meeting included a request to the Commission and Council to examine how in stage 3 the process of economic coordination could be improved.[494] This was a somewhat cryptic request, as at the same meeting the Resolution of the SGP was adopted, also with the purpose of improving the process of economic coordination. This request concerned a different topic, namely the negotiations on the creation of a forum in which the finance ministers of the euro could meet. These negotiations ran until the European Council meeting in Luxembourg at the end of 1997, with the first meeting of the Eurogroup taking place in June 1998. The overlap in vocabulary on the SGP and the Eurogroup in the Conclusions from June 1997 is nonetheless relevant because it shows the difficulty in describing what exactly the Eurogroup would do.

[493] Goebel (2007), 1315.
[494] European Council Conclusions, 16-17 June 1997, Amsterdam.

What exactly the Eurogroup was and what it was supposed to do, is especially difficult to describe from a legal point of view. At first sight, it would appear that any legal description of the Eurogroup would begin and end with the fact that it was an informal group. As an informal group, it does not fulfill any tasks under the Treaty and cannot take (legally binding) decisions. In this sense, the Eurogroup is reminiscent of the European Council, which in its early stages also was nothing but an informal forum for deliberation. Despite its informality the European Council nevertheless had a significant influence over the process of European integration.[495] As described by Van Middelaar, the European Council represents the intermediate sphere of European politics, between the inner sphere of the Community and the outer sphere of bi-lateral and diplomatic relations.[496] The European Council systematically organizes the involvement of the highest political leaders of the MS[497], without critically disrupting the balance of institutions within the Community. The trick of the European Council was to streamline the functioning of the Community, without directly being part of it (and thereby overshadowing it). As both Weiler and Van Middelaar hold, the strict policy and institutional confines of the Community needed to be accompanied by political control of the MS collectively.[498] Especially at its inception, this balancing act of the European Council could only be accomplished by informality, leaving intact the delicate structures of the Community – at least in name.[499] Over time, as the routines and practices had firmly established the role of the European Council, it was no longer problematic to acknowledge the European Council within the Community, but for its inception the informality was vital.

The relevance of the Eurogroup can thus not solely be determined by pointing to its informal nature. This leaves open the question of how to assess the Eurogroup: did its creation revolutionize EMU, or was it just a forum for finance ministers to be important together?[500] More attuned to the purpose of this chapter: did the creation of the Eurogroup signal a departure from the governing framework as laid down in the Maastricht Treaty?

[495] Weiler (1991), 2423 and 2428.
[496] Van Middelaar (2009), 46.
[497] Van Middelaar (2009), 158.
[498] Weiler (1991), 2428-2429; Van Middelaar (2009).
[499] Van Middelaar (2009), 46.
[500] Also see Louis (2002), 362. "It is difficult to judge whether the Euro-group has emerged as an important instrument of economic co-ordination, or if it has to be considered as a talk shop."

That this is not an easy question can be seen in the work by Puetter, who has produced by far the most extensive study on the Eurogroup.[501] Take the tension between the following of his observations: "EMU's constitutional framework became in itself the most important source of informal governance"[502] and later "[o]bviously, the negotiated arrangements constitutes, or comes at least very close to constituting, an amendment of EMU's constitutional framework."[503] How can the constitutional framework be the source of informal governance and then be transformed when the informal governance is actually created?

The first source of informal governance in EMU is, according to Puetter, the reliance within Economic Union on policy coordination.[504] Besides the formal structures of articles 103 and 104c EC, policy coordination would benefit from the "continuous and confidential exchange of views and information".[505] The second source of informal governance in EMU is the isolated position of the ECB. As discussed in Chapters 1 and 2, national central bankers in the MS were in close contact with their respective finance ministries. Even when – or especially when – the central bank was in a position of autonomy or independence, informal meetings were paramount to exchange information, coordinate strategies (for example in relation to international affairs) and resolve conflicts. Whereas in the MS the finance minister and central bank governor could informally meet and talk one-on-one, such matters would require some more organized format in Europe – given the multitude of finance ministers in the Eurozone. For the ECB's independence it was paramount that such meetings would not take place in a formal setting.[506] The third source is the differentiated nature of monetary integration. By 1997, it was clear that at least the UK, Denmark and Sweden would not join the Eurozone for at least the next few years. There thus emerged a split between the ins and the outs and the interests of the two groups would not necessarily align. As the French Finance Minister and later head of the IMF Strauss-Kahn put it, "married couples don't want anybody else in their bedroom".[507] The Eurozone MS therefore wanted a forum of their own, but the procedural rules of the

[501] Puetter, U. (2006), *The Eurogroup: how a secretive circle of finance ministers share European economic governance*, Manchester University Press.
[502] Puetter (2006), 38.
[503] Puetter (2006), 64.
[504] His argument is somewhat simplified here. The full argument revolves around "EMU's evolving policies and institutions", noting that "economic governance has an evolutionary element and requires a considerable degree of flexibility with regard to the development and adaptation of policy objectives, instruments and procedures". Puetter (2006), 42.
[505] Puetter (2006), 46.
[506] Louis (2004), 582.
[507] Puetter (2006), 61.

Council did not foresee such meetings with limited participation. Moreover, the outs were unwilling to be excluded from Council meetings, so the creation of an informal forum was the only viable option.

The Maastricht Treaty thus invites the creation of informal governance in three ways; or put differently, informality was the only acceptable form in which the group could be organized. Whereas the German demands for a transformative Stability Pact were ultimately reduced to simple implementing legislation, the equally radical demands by France for a 'gouvernement economique' only led to an informal forum. The informality of the Eurogroup was a requirement for its coming into existence. As an interviewee of Puetter held: "[t]he French readiness to agree on an informal body was the key to a compromise."[508]

The fact that a body cannot take binding decisions under EU law does not necessarily mean it is irrelevant for the study of EU constitutional law. However, in the context of EMU there were good reasons why the Eurogroup did not acquire prominence in its first decade of existence. The first reason is that the Eurogroup did not significantly change the balance of power between the institutions responsible for fiscal policy and for monetary policy, in the sense that there was still one center of power for monetary policy executing a single, unified approach to monetary policy in the Eurozone and a large number of fiscal policy centers in the MS. As described in the previous chapter, this 'one vs. many' dynamic has the potential of keeping the institutions responsible for monetary policy and fiscal policy at a distance. To coordinate fiscal policies, the Eurogroup could only rely on the procedures already found in the Treaty and in the SGP.[509] There were no other legally binding tools it could rely on. As long as the ECB would execute a single, unified monetary policy and the MS would individually decide on fiscal and economic policies, neither could use their policy tools as an effective negotiating tool vis-à-vis each other.[510]

This leads to the second point; it was unclear which further political responsibilities the Eurogroup would take on. In this sense, the Eurogroup was fundamentally different from the European Council. Whereas the latter was an external driver for changing the Community as a

[508] Puetter (2006), 59.
[509] Puetter (2006), 54.
[510] Louis (2002), 360; Howarth, D. & P. Loedel (2004), 'The ECB and the Stability Pact: policeman and judge?', 11 *Journal of European Public Policy*, 850-851.

whole, the former was a participant deeply embedded *inside* the Community. It is vital to remember here that Maastricht Treaty did not include an open-ended transfer of powers in the field of economic policy. Economic union is restricted to the procedures found in the Treaty. There was no further process of integration envisioned over which the Eurogroup would take control. In fact, when the Eurogroup came into existence, it had already missed the opportunity to shape the negotiations over the two significant developments in EMU, namely the negotiations over the SGP and the creation of the Eurogroup itself.

Despite these reservations about the immediate relevance of the Eurogroup, the coming into existence of this new forum was – of course – not without political meaning. This could be sensed most clearly in the French hopes for the Eurogroup.[511] In its highest ambition, the Eurogroup would take control over the future of the euro, which would include setting the parameters within which the ECB would (independently) conduct monetary policy. Undeniably, the creation of the Eurogroup was an attempt to reinsert the intermediate political sphere of a collection of MS into EMU. The Eurogroup was too much infused with political ambition for it to be reduced to just another informal body. Attempts to make this ambition explicit were strongly opposed, although the Eurogroup did start showing signs of institutionalization.[512] For example, the Lisbon Treaty does explicitly recognize the Eurogroup, but also stresses its informal nature.[513]

4.2 A Slowly Growing Eurozone In a Rapidly Growing Union

Between 1993 and 2009, membership of the EU grew from 12 to 27 Member States. This enlargement of the EU affected the role of EU constitutional law on EMU in two ways. Firstly, for new MS the legal rule to join EMU was just that: one amongst many legal obligations. The older MS had signaled their willingness to join the Eurozone by ratifying the Maastricht Treaty, whereas the new MS accepted the Union as a package of legal obligations. Secondly, it increased the number of veto-players for treaty-change, thereby making the legal framework

[511] See the overview by Howarth and Loedel on the possible meanings of the term 'economic government' and the role for the Eurogroup therein. Howarth & Loedel (2003), 74-77.
[512] Hodson argues that, contrary to what a lawyer might expect, the decline of the Eurogroup is the result of the decline of its informality. Hodson (2011), 39.
[513] Article 137 TFEU and article 1 Protocol No. 14 to the Treaty of Lisbon. See on the position of the Eurogroup in the Constitutional Treaty Louis (2004), 584. For discussion on the relation between the ECB and the Eurogroup, see section 4.3.2 below.

of EMU more difficult to amend. In response, two treaty changes were adopted specifically to accommodate a wider membership of the EU and the Eurozone. The first concerns the voting arrangements in the Governing Council (Treaty of Nice), the second the introduction of an enabling clause for Eurozone measures in economic governance (Treaty of Lisbon).

4.2.1 Enlargement

In 1995, Sweden, Finland and Austria joined the EU. The accession treaty was a high point in European bureaucracy as it regulates in detail the obligations and rights for both the EU and the acceding countries, ranging from the allocation of seats in the European Parliament, to use the specific Austrian words in the German language (*Erdäpfel* instead of *Kartoffeln*).[514] Notably missing in the Treaty were provisions on the very recently negotiated monetary union. This did not mean that the new MS were disjoined from EMU. It is clear that the legal provisions on membership of the Eurozone would not be affected or amended by the accession: the three new MS would join the pool of possible members of the Eurozone without any special provision.[515]

That the Accession Treaty did not mention EMU should not give the impression that EMU played no role in the negotiations on accession.[516] In fact, the Maastricht Treaty determined the timing of the negotiations. Austria had applied to join in 1989, Sweden applied two years later and Finland in 1992, right in the middle of the debates on deepening monetary integration.[517] Instead of speeding up the process of accession in order make the jump to European *Union* together with 15 members, the process stalled. By contrast, Spain and Portugal had acceded right *before* the Single European Act was signed.[518] Even as the (informal) negotiations on accession ran whilst the tumultuous ratification process of the Maastricht Treaty was still

[514] Treaty concerning the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, Protocol 10 On the use of specific Austrian terms of the German language in the framework of the European Union. See Goebel, R.J. (1995), 'The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden', 18 *Fordham International Law Journal*, sections II and III.
[515] Amtenbrink (2012), 23; Beukers & Van der Sluis (2015), 2-3.
[516] But see the Declaration 41 by the Republic of Austria on Article 109g of the EC Treaty to the Accession Treaty. It notes that Austria will maintain the stability of its Schilling and thereby contribute to the realization of the Economic and Monetary Union.
[517] Goebel (1995), 1109.
[518] Bermann (1989), 534. Bermann noted that Spain and Portugal joined in the IGC, even though they were not yet MS. Also see Goebel (1995), 1149-1150.

ongoing, the impression had to be avoided that the new MS could join before 'Maastricht' would come into force.[519]

In its opinion on enlargement in 1992, the Commission found it unacceptable for new MS to acquire permanent derogations from the acquis.[520] That opinion was shared by the European Council and the ECB.[521] It was thus obvious to the three acceding countries that it would have been imprudent to try to obtain a similar protocol as Denmark or the UK on EMU, regardless of what their opinion on (joining) EMU was. As a result, there was a discrepancy between the positions of the Swedish government in the negotiations on accession and in relation to the Swedish electorate as to how Sweden would honour its EMU obligations.[522] In 1997, Sweden decided not to join EMU from the start of EMU in 1999.[523] This decision was confirmed in 2003, when the Swedes decided in a referendum not to adopt the euro. The entry point for lawyers to discuss the current situation is the refusal by Sweden to participate in ERMII.[524] Thereby, Sweden does not fulfil the convergence criteria, thus giving legal cover for the Council to retain the Swedish derogation. According to Louis, Sweden's attitude in this matter is "obviously contrary to the Treaty" because the convergence criteria do not mean that a MS has the freedom "to create its own incapacity to participate by deliberately refraining from adopting the necessary policies".[525]

More interesting than the legality or illegality of the Swedish approach is that the admission of three new members to the Union under the condition that they accept the whole of union as a single package disregarded the assumptions underlying the rules on membership of the Eurozone. At Maastricht, objectors to (joining) monetary union were asked not to block its creation, in exchange for an opt out. All other MS signaled through the ratification that they wanted to join monetary union. The ratification of the Accession Treaty in the three new MS did not have the same meaning, as the question put before them was radically different. For the three new MS, the questions on membership of the Union and of monetary union came wrapped in a single package. Political support for Union membership did not mean automatically

[519] Goebel (1995), 1113-1114.
[520] Commission (1992), *Europe and the challenge of enlargement*, Bulletin of the European Communities, supplement 3/92, 11.
[521] Louis (2001), 45.
[522] Bernitz, U. (2003), *Sweden and the EMU*, in: The Euro: law, politics, economics (J.V. Louis ed.), 507.
[523] Technically, it was the Council that decided not to admit Sweden into the third stage of EMU.
[524] Bernitz (2003), 511.
[525] Louis (2004), 605; Bernitz (2003), 515-516.

political support for monetary union. The costs and benefits of Union Membership would be calculated as a whole: what are the legal obligations, political ramifications and societal demands concerning Union membership? The legal obligation to join EMU was only one of many considerations that would have to be taken into account.

Given this change in dynamic and the obvious difficulty in enforcing the legal obligation to join the Eurozone, why did the MS and the Commission not design a mechanism that would more effectively pull the new MS into the Eurozone? The timing is of vital importance here, as the third stage of monetary union was not yet established and the EMS crisis of 1992-1993 had shown how fragile the balance between political aspirations and economic forces had been.[526] It was in December 1995 that the MS (old and new) declared their commitment to continue on the path towards the third stage of EMU. It was thus impossible in 1994 for the old MS to ask anything more of new MS than to simply join the pool of possible candidates for the Eurozone. And that is something the new MS had no problem in doing. It should also be remembered here that at this stage of monetary integration there was much debate about the convergence criteria and the strictness with which these should be applied. In the negotiations of the SGP, it was emphasized that it did not impose any new requirements for entry into the Eurozone. In this context it would have been highly problematic from a political perspective to impose stricter requirements on any new members.

The relevance of this change lies mainly in the trend it started. Of the three new members admitted in 1995, two joined the Eurozone immediately at the start of the third stage. Instead of two willful outsiders there would now be three. That, by itself, hardly altered the balance between insiders and outsiders. Nor did it make it significantly harder to amend the Treaties: from 12 to 15 members. This changed with the Eastern enlargement of the EU in 2004. With 10 new members that would not immediately become part of the Eurozone, the balance between the ins and the outs shifted.[527]

The accession of 10 new members in 2004 was different in three ways from the accessions in 1995, but followed the trend. Firstly, by then it was clear that a MS could stay outside the Eurozone if it wanted to, even if it was under a legal obligation. Secondly, the Act to the

[526] Marsh (2009), 191-192; Eichengreen & Wyplosz (1993).
[527] De Witte, B. (2003), *The Impact of Enlargement on the Constitution of the European Union*, in: The Enlargement of the European Union (M. Cremona ed.), 246.

Accession Treaty of 2004 specifically stated that each new MS would participate in EMU as a member with a derogation. Although the article adds nothing to the legal situation – also without the provision the new MS would have become MS with a derogation – it is interesting to note that this provision is placed rather prominently at the start of the Act, namely in article 4. Thirdly, the Commission and ECB now considered national central bank independence as part of the acquis, and thus to be implemented prior to accession.[528] As the Commission wrote concerning Poland in 1997:

> "By the time of Poland's accession, the third stage of EMU will have commenced. (…) Member states not participating in the Eurozone will be able to conduct an autonomous monetary policy and participate in the European System of Central Banks (ESCB) on a restricted basis. Their central banks have to be independent and have price stability as their primary objective. (…) As membership of the European Union implies acceptance of the goal of EMU, the convergence criteria will have to be fulfilled by Poland, although not necessarily on accession."[529]

The approach is puzzling from a legal point of view. Central bank independence is one of the convergence criteria; it is not in any other form an obligation of EU law for MS with a derogation.[530] Articles 107 EC requires that the national central banks are independent "when exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB". As the provision which outlines the tasks and objectives of the ESCB, article 105(1)-(3) EC, was not applicable to MS with a derogation (article 109K(3) EC), they were not captured by article 107 EC. So, when the Commission noted that fulfillment of the convergence criteria is not a requirement for accession, it is unclear on what basis the Commission then required that the national central banks be independent.[531] The lack of a clear legal rationale shows that the requirement was first and foremost based on political

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[528] Noyer, C. (2001), *Some ECB views on the accession process*, speech delivered at The Central and Eastern European Issuers and Investors Forum, Vienna, 17 January 2001, available at www.ecb.europa.eu.
[529] Commission (1997), *Commission Opinion on Poland's Application for Membership of the European Union*, COM(97)2000, DOC/97/16, 59.
[530] This is not the mainstream interpretation of these legal provisions. See for example Bini Smaghi, L. (2008), 'Central Bank Independence in the EU: From Theory to Practice', 14 *European Law Journal*, 449; Vranes, E. (2000), 'The "Internal" External Relations of EMU: On the Legal Framework of the Relationship of "In" and "Out" States', 6 *Columbia Journal of European Law*.
[531] A slightly dissimilar situation exists for the objectives of NCB's of the 'outs', because of some discrepancy between the Treaty and the Protocol. Smits, R. (2005), 'The European Constitution and EMU: An Appraisal', 42 *Common Market Law Review*, 466, fn 145. Other aspects are the term of office of the Governor of a NCB and the grounds for dismissal for a Governor (art 14.2 ESCB/ECB Statute). This provision is fully applicable also to the NCB's of the out's. This can be explained by the fact that the Governors of the out's sit on the General Council.

considerations requiring a closer proximity of the new MS to the Eurozone. Nevertheless, the requirement does not fundamentally alter the dynamic described above, where for new MS EMU was just one amongst many of the legal obligations arising from Union membership.

To conclude, when the Maastricht Treaty was adopted, it was considered 'the price of doing business' to give opt-outs to the UK and Denmark, with the hope or expectation that they would nevertheless join quickly.[532] The convergence criteria require some effort from the MS, but are not outside the realm of the possible. Monetary Union and European Union were supposed to coincide. First with the accession of three, and later with ten, it was emphasized that there would be no new opt-outs. Membership of the Union was an all-or-nothing deal. At the start of the euro-crisis in 2009, the Union had expanded to 27 MS, with the Eurozone only covering 16 MS. The 11 non-Eurozone MS were *de facto* free to pursue entry into the Eurozone or not and with varying levels of interest in doing so. The interesting legal question is thus not whether there is or was a legal obligation for MS with a derogation to join the euro. What is more relevant from a constitutional perspective is how a situation could arise that obviously did not conform to the original understanding of EMU/EU membership. The conclusion must be that the existence of a legal obligation acted as a guise under which the transformation could take place. By reference to the legal obligations the fiction could be maintained that over time all MS with a derogation would become part of the Eurozone.[533]

4.2.2 Adapting to Growth

With the number of MS rising from 12 in 1992 to 25 in 2009, the legal framework of EMU became more rigid, meaning here an increase in number of veto players for treaty reform. Moreover, enlargement would impact the institutions and bodies of the Union, as many of them are based on some form of equal representation of MS. A discussion then commenced in anticipation of the enlargement of the Union with Eastern European states on how to prepare the Union.[534] This discussion included some radical ideas on the simplification and/or

[532] Marsh (2009), preface.
[533] Since differentiated integration has not been of primary importance during the euro-crisis, the topic is not analyzed further in this thesis. See for an historical-institutionalist account of differentiation during the crisis Schimmelfennig, F. (2014), *Differentiated Integration Before and After the Crisis*, in: Democratic Politics in a European Union Under Stress (O. Cramme & S. Hobolt eds.).
[534] European Convention, *Final report of Working Group VI on Economic Governance*, CONV 357/02, 1.

reorganization of the Treaties[535], but the changes adopted first in the Treaty of Nice and then in the Lisbon Treaty have been minimal.[536] Two changes with regard to EMU stand out, concerning the voting modalities in the Governing Council and the new provision on economic governance for Eurozone MS.

The first issue was dealt with in the Treaty of Nice through an amendment to the ESCB/ECB Statute that was designed to allow the Council (meeting in the composition of Heads of State or Government) to unanimously amend article 10.2 of the ESCB/ECB Statute on the voting modalities of the Governing Council. That decision of the Council would also have to be ratified by the MS.[537] In March 2003, the Council decided to upend the 'one person, one vote' rule in the Governing Council and introduce a system of rotation whereby the governors of the national central banks would be divided in two (or three) groups depending on the economic size of their country.[538] Voting rights in these groups would rotate, where the bigger MS in the first group would be less often excluded from voting than the smaller MS in the second (and third) group. In other words, 'one person, one vote' would become 'one person, most of the time one vote'.[539] Members of the Executive Board would not participate in this rotating system and would always retain their vote. This new procedure would apply as of the date when the number of members of the Governing Council would be 16 (dividing the governors in two groups), and then 22 members (dividing the governors in three groups. The Governing Council was given the authority to postpone the start of the system of rotation, until the number of governors on the Governing Council exceeded 18. The Governing Council indeed decided to

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[535] An overview of these proposals is found in De Witte, B. (2002), 'Simplification and Reorganization of the European Treaties', 39 *Common Market Law Review*. A suggestion to remove the non-basic provisions from the Treaty is found in Kapteyn (2005), 129. Also see Smits (2003), 38.

[536] See for extensive discussions of the Constitutional Treaty Smits (2005); Louis, J.-V. (2005), *Monetary policy and central banking in the Constitution*, in: Legal aspects of the European System of Central Banks (ECB ed.). Servais, D. & R. Ruggeri (2005), *The EU Constitution: its impact on Economic and Monetary Union and economic governance*, in: Legal aspects of the European System of Central Banks (ECB ed.).

[537] Article 5 Treaty of Nice added the following section 6 to article 10 of the ESCB/ECB Statute: "Article 10.2 may be amended by the Council meeting in the composition of the Heads of State or Government, acting unanimously either on a recommendation from the ECB and after consulting the European Parliament and the Commission, or on a recommendation from the Commission and after consulting the European Parliament and the ECB. The Council shall recommend such amendments to the Member States for adoption. These amendments shall enter into force after having been ratified by all the Member States in accordance with their respective constitutional requirements. A recommendation made by the ECB under this paragraph shall require a decision by the Governing Council acting unanimously." Treaty of Nice (2001/C 80/01) amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, O.J. C 80/1.

[538] Council Decision (2003/223/EC) of 21 March 2003, meeting in the composition of the Heads of State or Government, on an amendment to Article 10.2 of the Statute of the European System of Central Banks and of the European Central Bank, O.J. L 83/66.

[539] Mersch, Y. (2003), *The reform of the Governing Council of the ECB*, statement at the European Banking & Financial Forum, Prague, 25 March 2003 available at http://www.bis.org/review/r030331c.pdf.

do so in 2008.[540] When Lithuania became part of the Eurozone on 1 January 2015 there were 19 governors on the Governing Council and the rotation system therefore took effect.

This change in voting modalities obviously affects the principle of equality of the members of the Governing Council, but with limited further consequences. This is mostly due to the fact that the change only affects the voting, not the participation in the discussions.[541] Most interesting about this change is the cumbersome procedure for this relatively straightforward amendment, with the only effect of the amendment introduced by the Treaty of Nice being that another amendment would not require an intergovernmental conference.[542] Instead of de-constitutionalising this issue and greatly simplifying the procedure, it was thought to be paramount for even this small change to keep the MS collectively in control.

The other amendment discussed here is the introduction of what would become article 136 TFEU.[543] It is part of the new Chapter 4 (Provisions Specific to Member States whose Currency Is the Euro) of Title VIII of the Treaty on the Functioning of the European Union. Article 136 TFEU allows the Council to adopt measures for Eurozone MS in order to "strengthen the coordination and surveillance of their budgetary discipline" and to "set out economic policy guidelines for them". In doing so, the Council may act only in accordance with the procedures as referred to in articles 121 and 126 TFEU, with the exception of article 126(14) TFEU.

The meaning of article 136 TFEU is far from clear, mainly because what is given by the one hand (a widening of the Council's discretion to adopt specific measures in the field of economic governance) is taken by the other hand (the requirement that the procedures of articles 121 and 126 TFEU are respected).[544] As discussed in Chapter 3, the procedures referred to in those two articles are already extensively regulated. They offer strict paths for the order in which institutions must or may act and circumscribe the possible actions of the institutions at each

[540] ECB Decision (2009/5/EC) of 18 December 2008 to postpone the start of the rotation system in the Governing Council of the European Central Bank, O.J. L 3/4.
[541] Wagner, T. & G. Crum (2005), *Adjusting ECB Decision-Making to an Enlarged Union*, in: Legal Aspects of the European System of Central Banks: Liber Amicorum Paolo Zamboni Garavelli (ECB ed.), 79. Smits (2005), 460.
[542] Wagner & Crum (2005), 78; De Witte, B. (2002), 'Anticipating the Institutional Consequences of Expanded Membership of the European Union', 23 *International Political Science Review*, 244.
[543] Introduced in the Constitutional Treaty as art III-194.
[544] Louis (2004), 583; Bribosia, H. (2007), *La politique économique et monétaire*, in: Genèse et destinée de la Constitution européenne: commentaire du Traité établissant une Constitution pour l'Europe à la lumiére des travaux préparatoires et perspectives d'avenir (G. Amato, et al. eds.), 679. Servais and Ruggeri also have some difficulty explaining the exact boundaries of the article. Servais & Ruggeri (2005), 57-58.

step. The concluding sections of both articles then offer the possibility to lay down more detailed rules, as for example the Stability and Growth Pact had already done in 1997 by specifying time limits within which institutions ought to act. The question then is how the phrase 'in accordance with the procedure' must be interpreted. If it is interpreted strictly, article 136 TFEU only allows for implementing legislation, similar to what was already allowed under the Treaty, but then only applying to Eurozone MS. This is the line professed by Bieber in 2014: "No measures other than those provided for in Articles 121 and 126 TFEU can therefore be adopted on the basis of Article 136 TFEU".[545] If "in accordance with the relevant provisions of the Treaties" is interpreted broadly, say as meaning that it must not *contradict* the Treaty, it would allow the Council a wide margin of discretion in shaping economic governance for the Eurozone. Both interpretations are unattractive. The strict interpretation fails to give a convincing account of the purpose of the article. If it does not allow the Council to do anything new in substance, why does the article use such aspirational language?[546] If the aim was merely to apply EU economic governance to Eurozone MS, more sober language would have been appropriate. The broad interpretation is unconvincing because it fails to provide any limits as to what the Council may enact. Regardless of what is the most persuasive or correct interpretation, article 136 TFEU contrasts with the approach of articles 121 and 126 TFEU as introduced in the Treaty of Maastricht. These two articles aimed to strictly delimit how far integration was allowed to proceed in this area by describing economic governance both in terms of procedure and substance. Any ambiguity in articles 121 and 126 TFEU would still be embedded in relatively clear set of provisions.[547] Article 136 TFEU, however, is an ambiguous enabling clause, the limits of which are largely dependent on the interpretation of a single phrase.

The reasons why the article was introduced are far from clear.[548] Most likely, the emphasis during the Constitutional Convention was on the capacity of the Eurozone area to act autonomously, i.e. to act without interference of non-Eurozone MS.[549] The other articles in Chapter 4 concern the Eurogroup and the international relations of the Eurozone. The lack of

[545] Bieber, R. (2014), *The Allocation of Economic Policy Competences in the European Union*, in: The Question of Competence in the European Union (L. Azoulai ed.), 93.
[546] See Piris, J.-C. (2012), *The future of Europe: towards a two-speed EU?*, Cambridge University Press, 107.
[547] Art 136 TFEU is somewhat similar to the provisions that allows for a Council decision to replace the Excessive Deficit Protocol, in the sense that it is also unclear to what extent a replacement of the protocol can impose new obligations on the MS. The difference is the ambitious language of art 136 TFEU.
[548] Bribosia (2007), 670.
[549] Bribosia (2007), 679-681.

resistance against the ambiguity of the article can moreover be explained by the drastic change in political climate since the Treaty of Maastricht and the adoption of the Stability and Growth Pact. Especially in Germany the economy had taken a turn for the worse, as a result of which the government deficit had risen. As will be discussed below, the emphasis was on creating *more flexibility* within the SGP.[550] Hence, there was no expectation that stricter rules would be adopted anytime soon. So, paradoxically, only when there was no immediate demand for it could an ambiguous enabling clause be introduced in the field of economic governance.

4.3 The Institutional Relations of the ECB

In 1998, the ECB was created amid conflicting expectations from the MS about its monetary policy and during a profound discussion on the future of the European Union. As discussed in the previous section, the Union was simultaneously involved in a process of enlargement. Economically, the MS had taken steps to improve convergence on several indicators, but it was doubted whether the political will to continue with harsh measures would endure once a MS was included in the Eurozone. The Union into which the ECB was born, was heavily in flux. Nevertheless, the ECB would quickly become a highly regarded institution of the Union.[551]

Within the limits of this thesis, it is impossible to examine all developments concerning the ECB between 1998 and 2009. Hence, only a few topics are selected for discussion, but implied in this selection is that they provide some relevant insights that apply to the ECB as a whole. Firstly, this section will deal with a rather quixotic topic: the exact status of the ECB within the EU. This was the subject of a fierce academic debate, an CJEU ruling *and* changes under the Lisbon Treaty. One would therefore assume that the position of the ECB would have changed significantly, but this was not the case. The reason why these developments are nonetheless discussed here at length is that they illustrate some interesting dynamics regarding the legal framework of the ECB. Secondly, this section will deal with the independence of the ECB in relation to other institutions. The emphasis will be on assessing the relevance of (political) events on the capacity of the ECB to independently set monetary policy.

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[550] Heipertz & Verdun (2010), 169-171.
[551] Zilioli, C. & M. Selmayr (2007), 'The Constitutional Status of the European Central Bank', 44 *Common Market Law Review*, 355.

4.3.1 Whose Central Bank Is It Anyway?

As described in the previous chapter, the rules on the competences and the organization of the ECB have been described in detail in the Treaty. Naturally, the Treaty did not answer all questions on the exact relations between the ECB and the institutions of the Community. One thing the Treaty failed to define was the nature of the ECB in relation to the Community, although it was clear that the ECB was not an *institution* of the Community. Was the ECB the central bank of the Community?[552] Common sense would certainly answer that question in the affirmative.[553] However, soon after the ECB came into existence a controversial article appeared by Zilioli and Selmayr that argued that the ECB was "an independent specialized organization of Community law".[554] The article celebrated the far-reaching independence of the ECB and opined that the MS had transferred their monetary sovereignty to the ECB (and not to the Community).[555] The point was that the ECB was *not* part of the Community, even though it was part of Community law. The ECB was created by the EC Treaty and constituted another 'Community', next to the other three Communities, *within* the first pillar of the EU. The arguments in favor of this vision were the fact that the ECB has its own decision making bodies, that it has legal personality, that it is not entwined with Community institutions in the exercise of its tasks and that its finances are kept separate from the Community budget. In other words, many of the features of the independence of the ECB were presented as arguments in favor of the status of an independent organization separate from the Community. The article found considerable opposition. Torrent listed the numerous provisions in the EC Treaty that showed the intricate connections between the ECB and the other parts of the Community and downplayed the importance of the separate legal personality of the ECB.[556] Amtenbrink & De Haan argued that the interpretation was undesirable from a normative perspective.[557] Smits rejected the view based on a "constitutional legal view" of the ECB .[558]

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[552] Krauskopf and Steven find that it is better to speak here of the ESCB than the ECB. Krauskopf, B. & C. Steven (2009), 'The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of Its Existence', 46 *Common Market Law Review*, 1143-1144.
[553] Torrent, R. (1999), 'Whom is the European Central Bank the Central Bank Of?: Reaction to Zilioli and Selmayr', 36 *Common Market Law Review*, 1230.
[554] Zilioli & Selmayr (2001), 29.
[555] Zilioli & Selmayr (2001), 19. See also Zilioli & Selmayr (2007), 361-362.
[556] Torrent (1999), 1231 and 1233.
[557] Amtenbrink, F. & J. De Haan (2002), 'The European Central Bank: An Independent Specialized Organization of Community Law - A Comment', 39 *Common Market Law Review*. The legal approach of Amtenbrink and De Haan is then equated with a political attack on the independence of the ECB by Zilioli and Selmayr. Zilioli & Selmayr (2007), 362.
[558] Smits (2003), 23-24.

At least one of the reasons the article received much attention, was that one of its authors was Deputy General Counsel at the ECB. The article thus appeared to foreshadow the aggressiveness with which the ECB would defend its independence.[559] And indeed, a conflict between the Commission (supported by the Council and the European Parliament) and the ECB soon landed before the CJEU. The conflict concerned the applicability of an anti-fraud regulation to the ECB. At the time, fraud was an extremely sensitive topic in the EU, as the Commission, led by President Santer, had just been forced to resign following allegations of fraud. The European Anti-Fraud Office (OLAF), was given the task in May 1999 in the OLAF-Regulation of conducting anti-fraud investigations "[w]ithin the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties".[560] Soon thereafter, the ECB adopted a decision strengthening its own rules on fraud prevention. The Commission sought to annul the ECB decision, as the decision would conflict with the OLAF-Regulation. The main question before the Court was whether the OLAF-Regulation was applicable to the ECB and if so, if that would endanger the independence of the ECB. The OLAF-Regulation was based on article 280 EC (Amsterdam), which authorized anti-fraud measures to protect "the financial interests of the Community". If the arguments of Zilioli & Selmayr were followed, the OLAF-Regulation could not be applicable to the ECB, as it would not be part of the Community and therefore have no direct connection to the financial interests of the Community.[561] Secondly, it could be argued that OLAF investigations in the ECB would harm the ECB's independence, as protected in the Treaty.

Advocate-General Jacobs was unequivocal: the ECB is "part of the Community"[562] and "may be described as the central bank *of the European Community"*, and the ECB "failed to explain how the exercise of the powers of OLAF (…) could in practice affect the decision-making process of the ECB."[563] The Court did annul the ECB decision because it found that the OLAF Regulation was applicable, but the Court did not pick sides as obviously as the AG in how it

[559] Goebel, R.J. (2006), 'Court of Justice Oversight Over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the OLAF Judgment', 29 *Fordham International Law Journal*, 625 and 633.
[560] Article 1(3) of Regulation (1073/1999/EC) of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJ L 136/1.
[561] Louis noted that the position of the ECB did not fully conform to the position of Zilioli & Selmayr. Louis (2005), 32.
[562] Opinion of Advocate General Jacobs, Case C-11/00, *OLAF*, EU:C:2002:556, para 60. To be precise, AG Jacobs argued that special position of the ECB in the framework of the Community "cannot (…) lead to the conclusion that the ECB is not a body forming part of the Community".
[563] Id. at para 160.

came to that conclusion: the ECB "falls squarely within the Community framework".[564] This then lead to the question whether there was a difference between the *Community* and the *Community framework.* The Court was more resolute concerning the independence of the ECB: it is "comparable in a number of respects" to the independence of other EU institutions and not absolute, but functional.[565]

Whilst the conflict over the OLAF-Regulation was coming to a close in 2003, the debate over the (constitutional) future of Europe was in full swing. A week after the decision by the CJEU, the Convention on the Future of Europe produced its Draft Treaty establishing a Constitution for Europe. As is well known, this draft Treaty later became the 'Constitutional Treaty', which was rejected in referendums in France and the Netherlands in 2005, but adopted with minimal substantive changes in a different form in 2009 in the Lisbon Treaty. The Draft Constitutional Treaty, and later the Lisbon Treaty, hardly changed the rules on EMU. One of the most important elements of the Lisbon Treaty in this regard, the introduction of special provisions concerning Eurozone MS, was discussed above. Concerning the ECB, the Draft Treaty proposed it would become one of the Union's institutions. Where the CJEU thus refused to settle the question of the exact constitutional status of the ECB, the Convention – and later the MS collectively – settled the matter unambiguously.

Given this background, it might have been expected that the proposal from the Convention would draw heavy criticism from the ECB and others wanting to protect its position. Instead, in its Opinion on the Constitutional Treaty, the ECB observed regarding its own position:

> "Article I-29 preserves the ECB's substantive features, in particular its independence, including financial independence, legal personality and regulatory capacity, specifically the power to issue legally binding acts. The ECB therefore understands that the framework created by the draft Constitution does not imply, and is not meant to imply, any change to the substance of the current institutional status of either the ECB or the ESCB."[566]

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[564] CJEU, Case C-11/00, *OLAF*, EU:C:2003:395, para 92. Elderson, F. & H. Weenink (2003), 'The European Central Bank redefined? A landmark judgement of the European Court of Justice', 2003/2 *Euredia*, 282. Odudu found the opposite, namely that the judgement determines "the position of the ECB within the Community institutional system in a clear and unequivocal manner." Odudu, O. (2004), 'Case note on Case C-11/00, Commission of the European Communities v. European Central Bank', 41 *Common Market Law Review*, 1081.
[565] *OLAF, p*ara 134.
[566] ECB Opinion (CON/2003/20) of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe, OJ C 229/7.

In other words, the ECB did not resist the changeover to becoming an institution, as it believed that there would be no effects for its fundamental characteristics. This is, of course, a far cry from the intense (academic) debate over the nature of the ECB. [567] In 2009, when the Lisbon Treaty entered into force, Krauskopf and Stevens examined the issues affected by this institutional transformation.[568] The main changes concerned the rules on the use of languages and access to documents. On both topics, the ECB now falls under the general regime, although these general rules still take account of the specific situation of the ECB.[569]

The relatively uncontroversial transition by the ECB to a Union institution raises questions about the meaning of the academic debate on the status of the ECB and the subsequent judicial involvement. What was the debate really about, and how high were the stakes? Three related questions need to be answered before we can return to this problem: firstly, was the process by which the constitutional question arrived before the Court merely an (unfortunate) sequence of events, or was it inevitable that the CJEU would rule on the constitutional status of the ECB? Secondly, what exactly did the Court do in the OLAF-case, and – more importantly – what were the reasons for the Court to do so? Thirdly, what is the relation between the decision in OLAF and the constitutional change?

The first question asks to what extent the conflict over the constitutional status of the ECB was at the heart of the dispute before the Court. Was the conflict over OLAF just a vehicle to get the constitutional question before the Court, or was the constitutional question merely a by-product in the OLAF conflict? On the one hand, the topic of fraud prevention was particularly sensitive in the late '90s. This was not a hospitable climate in which to negotiate exceptions for the ECB and to find an agreeable solution for both sides.[570] Under different circumstances, a solution might have been found that would have made the involvement of the CJEU less likely. Moreover, it is difficult to envision another conflict between the ECB and the other institutions that would have had the same political importance.[571] This suggests that the speed with which the first case on the ECB landed before the Court is at least partially the result of

[567] Hodson observed that the ECB was initially skeptical of the change. Hodson (2011), 26-28.
[568] Krauskopf & Steven (2009). Also see Sainz de Vicuna, A. (2008), *The Status of the ECB*, in: The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? (S. Griller & J. Ziller eds.).
[569] Krauskopf & Steven (2009), 1149-1150. Also see Smits (2003), 36-43.
[570] Simultaneously with the decision on the, the CJEU also rendered judgement in a case of the Commission versus the European Investment Bank concerning an almost identical legal dispute.
[571] Smits discusses several areas of Community law where the applicability to the ECB could raise questions. In none of them a conflict appeared imminent. Smits (2003), 33; Elderson & Weenink (2003), 287-291.

circumstances unrelated to the particular setup of EMU. On the other hand, it must be noted that the ECB took an aggressive approach that appears to have made a conflict inevitable.[572] The ECB could have argued to restrict the scope of the OLAF-Regulation *during* the negotiations. The adoption of a parallel set of anti-fraud measures by the ECB thus seems to have been a shot across the bow of the political institutions of the Union. In other words, the ECB seemed eager to pick a (legal) fight. As discussed in the previous chapter, the institutional position of the ECB was such that the legal arrangements of the independence of the ECB were of particular importance. Escalating the conflict so as to invite the Commission to bring the conflict to the CJEU had the benefit for the ECB of showing that the CJEU could be used to enforce the legal regime governing the ECB institutional relations. Even if the ECB lost the argument over the application of the OLAF-Regulation, it would still be in the interest of the ECB to have the CJEU explicitly get involved in monitoring ECB independence.

The second question asks what the main conclusion of the OLAF-case was. As stated above, the Court did not specify explicitly its position in relation to the debate about the constitutional position of the ECB. It is argued here that there were good reasons for the Court not to take an explicit position, as long as the main consequence of the approach of Zilioli & Selmayr was rejected: in principle, Community secondary legislation *could* apply to the ECB.[573] The main reason why the Court would not endorse a vision of the ECB as another Community is that the Court itself would gain very little from placing itself at the center of the debate on the exact nature of the ECB. Other than the question whether secondary legislation of the Community could in principle apply to the ECB, the consequences of the absolutist approach to ECB independence are wholly unclear. Few other conflicts lay in the wait that required an explicit response from the Court on this point. Or rather, the ordinary approaches of EU law offered enough methodological support for the Court. Rather than endorsing a specific theory on the ECB as a helpful tool in answering a range of legal question (the normal function of a legal theories), the approach suggested by Zilioli and Selmayr raised more questions than it helped answer. For other parts of EU law, such as EU fundamental rights and EU citizenship, the CJEU has been more than willing to slowly develop a set of legal doctrines by inviting new cases to be brought before it. Those cases gave the Court the opportunity to present itself as a champion of individual rights and promote topics normally associated with constitutional law.

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[572] Torrent (1999), 1240.
[573] Elderson & Weenink (2003), 282.

In the case of EMU, that attraction was lacking. Moreover, the Court could not look towards other jurisdictions for (positive) examples on how to develop the field of monetary constitutional law. Lastly, it also should also be kept in mind that the Court was most certainly aware of the developments in the Convention and the proposals made there. This created another reason for the Court to remain elusive, as it would potentially be damaging to the Court's reputation to see its decision overturned by a Treaty.[574]

By contrast, leaving the status of the ECB relatively un-specified perfectly fits the overall approach of the CJEU towards institutional relations under the banner of 'institutional balance'. Although hailed by some as the European equivalent of the theory of balance of powers as applied by the US Supreme Court, the use of the term of institutional balance in the EU is characterized by a lack of theoretical foundations.[575] The CJEU has not developed a theory on the proper functions of the different institutions of the EU and has instead, relied on a case-by-case approach to define the boundaries between (the competences of) the institutions.[576] Within this approach, the numerous and elaborate provisions in the Treaties take priority over any theoretical considerations as the basis for adjudication.

In this light, the key aspect of the OLAF-decision is the rejection of the 'absolutist' theory of independence of the ECB that formed the foundation of the ideas of Zilioli and Selmayr on the particular status of the ECB, by way of rejecting the conclusion that Community secondary legislation could not be applicable to the ECB.[577] The rejection meant that the CJEU would apply its usual set of tools to future conflicts between the ECB and the political institutions of the Union. The ECB was treated by the CJEU as an ordinary subject of Community law in the sense that there are no *a priori* reasons to treat it differently from other institutions and bodies of the Union. Ambiguities over the limits of the independence of the ECB or over the competences of the other institutions in relation to the ECB would be dealt with on a case-by-case basis. In effect, the Court disinvited future cases to be brought before it, as it would just do a plain reading of E(M)U law.[578]

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[574] Zilioli & Selmayr (2007), 368. Krauskopf and Steven find this an "overinterpretation". Krauskopf & Steven (2009), 1147.
[575] See recently Chamon, M. (2015), 'The Institutional Balance, an Ill-Fated Principle of EU Law?', 21 *European Public Law*.
[576] A notable exception is the *Chernobyl*-case. Chamon (2015), 376, fn 21.
[577] Louis (2005), 35.
[578] Amtenbrink explains the scarcity of cases on EMU by pointing to the discretion of the Council in economic policy coordination, the exclusion of the infringement procedure in the EDP and the limited standing of individual

Thirdly, the interpretation given above of the decision of the Court also explains the subsequent events. With the Court rejecting the grandiose claims of independence the focus shifted back to the specific aspects of the institutional position of the ECB. On these issues, the financial independence, the personal independence and so on, the Draft Constitutional Treaty made no changes.[579] Hence, it was only possible for the ECB to accept the Draft Constitutional Treaty after the decision of the CJEU.[580] Had the CJEU accepted the position of Zilioli & Selmayr or something similar, it would have been extremely difficult for the ECB to accept the suggestion to become an institution. In that case, becoming an ordinary institution would mean taking a step backwards, at least in the eyes of the ECB.

Looking back at the debate on the nature of the ECB, it appears that the claims by Zilioli and Selmayr were somewhat out of proportion to the issue they were addressing. For example, they claimed that the ECB had (the potential for) international legal personality "as a consequence of the new constitutional balance".[581] Following this line of reasoning the ECB would then have lost its international legal personality upon the entry into force of the Lisbon Treaty, where the ECB became an institution of the Union.[582] This surely cannot have been the intention of the authors. By framing the ECB as an 'independent specialized organization of Community law', the authors attempted to solve a legal problem that did not need solving, namely what exactly the ECB was. This does not mean there were no legal issues worth addressing, but that the Treaty already provided the legal tools to deal with these questions one at a time. In the OLAF-case, the CJEU therefore wisely did not try to settle the debate over the nature of the ECB, thus leaving room for the Convention to do exactly that.

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in relation to the actions of the Council and the ECB. Amtenbrink, F. (2014), *New Economic Governance in the European Union: Another Constitutional Battleground?*, in: Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz (K. Purnhagen & P. Roth eds.), 10 (online edition).

[579] Krauskopf and Steven are of the opinion that making the ECB an institution was inconsistent with the intention to leave the legal framework of the euro unaffected. Krauskopf & Steven (2009), 1149. Looking at the impact of the change, it is not difficult to defend the position that making the ECB an institution hardly affected the legal framework of the euro. In 2010, the ECB concluded in its Monthly Bulletin that the change to institutions was important for its external perception, but that "in practice, little is expected to change for the ECB, as it retains all its special institutional features such as its independence, regulatory powers and legal personality. The firm anchoring of these features in the new Treaty is essential to the successful performance of the ECB's tasks." ECB (2010), 83.

[580] Initially the ECB and the NCB's, in particular the Bundesbank, were skeptical. See Hodson (2011), 27.

[581] Zilioli & Selmayr (2000), 638.

[582] The same difficulty applies to the argument that monetary sovereignty was transferred to the ECB. Zilioli & Selmayr (2000), 611. Chirico (2004), 16.

The conclusion from these developments is not that they were irrelevant. The outcome of the debate over the status of the ECB was not a given. More specifically, the fact that the debate was settled so quickly was at least partially the result of circumstances unrelated to the matter at hand. What can be observed here is how the constitutional environment of the ECB shaped its own actions and the actions of other institutions as they collectively dealt with the particular developments facing the Union. The process by which the ECB became an institution is as interesting as the observation that this change ultimately had little substantive effects, because both show the ECB as a product of EU constitutional law.

4.3.2 Some comments on the institutional relations of the ECB

The OLAF-case and the Lisbon Treaty emphasized the individual Treaty provisions as the starting point to organize the institutional relations of the ECB. Overall, the conclusion must be that the ECB succeeded in establishing relations with the institutions that respected its independence.[583] As the ECB itself argued in 2010: "the institutional setting put in place by the Maastricht Treaty is fundamentally sound. The ECB's relations with EU institutions and bodies have evolved over the past decade within the existing framework, without there being any urgent need for a fundamental overhaul of the system."[584] The academic consensus and the conclusion of the ECB are not disputed here, but some comments can be made with regard to a few specific topics.

The ECB and the Eurogroup

The ECB participates in Eurogroup meetings based on an invitation; it is not obliged to send a representative. With the informality of the Eurogroup being a condition for its coming into existence, the Eurogroup has no formal tools to threaten the independence of the ECB through any formal route. This does not restrict the Eurogroup or its members to individually try to influence ECB decisions by making public statements on (the economic grounds of) the necessity to change interest rates. Analysis of the Eurogroup has so far not led to any surprising conclusions. Puetter noted: "The initial fear that a setting such as the Eurogroup would undermine the independence of the ECB (…) has not been confirmed. On the contrary, the current situation gives reason for concern because ministers do not critically review the ECB's

[583] Amtenbrink (2012), 28.
[584] ECB (2010), 83.

policy."[585] Over the years, the organization of the meetings of the Eurogroup has taken on a more formal character, for example through the election of president of the Eurogroup for a term of two years. Hodson argues that, contrary to what a lawyer might expect, this development has undermined the role of the Eurogroup as an informal forum where policy makers could candidly exchange opinions because it politicized the debate. It apparently made the ECB more reserved in its approach towards the Eurogroup.[586]

Beyond the organized interaction through the Eurogroup, politicians can of course also still act on their own. Smits has provided several examples where high-ranking politicians (strongly) suggested that the ECB change its policy and concludes that in most cases these attempts to influence the decision makers of the ECB do not constitute a breach of the independence of the ECB.[587] The prohibition on MS governments to attempt to influence ECB decision makers must not be taken too literally, according to Smits. Economic policy makers should have an opportunity to express their opinion on the current state of economic affairs in relation to the best possible course of monetary policy. However, Smits also concludes that in some instances, the statements from politicians have gone too far and violated the Treaty. Smits particularly took issue with a statement on the desired monetary policy that was coupled with a threat to amend the mandate of the ECB.[588] Smits' opinion on this statement should not be followed. Doing so would amount to protecting ECB independence from the pressures of Treaty-change. There is no indication that the Treaty ought to be read in that way.

External representation

The area where the cooperation between the ECB and the other institutions has been rather difficult has been the external representation of the euro. Article 109(4) EC specified that the Council *should* decide by qualified majority on the position of the Community at the international level and decide unanimously on the representation. A Commission proposal to this effect stranded in the Council in 1998 and instead a European Council Resolution was adopted that mainly confirmed the respective roles awarded to the institutions by the Treaty,

[585] Puetter (2006), 99. Howarth & Loedel (2003), 130.
[586] Hodson (2011), 44-46.
[587] Smits (2007).
[588] Smits (2007), 1634, fn 71.

which is to say that it clarified little.[589] Although the Nice Treaty removed the requirement of unanimity for the decision on the representation, no decision has been taken.

The resulting situation, with pragmatic solutions being found on the international level to accommodate the presence of the ECB as a non-state actor but without an overall strategy, has been heavily criticized for leaving the Eurozone without a strong voice on the international scene.[590] For example, in the IMF the ECB has an observer status and the individual members of the Eurozone are full members of the IMF, leading to a "cacophony of voices".[591]

The effects of the failure to fulfill this legal obligation in this field should not be exaggerated, as the problems concerning the external representation of the Eurozone have other causes as well. Firstly, on the international plane, the participation of the ECB is significantly hindered by the fact that it is a central bank of a group of states, without itself being part of a state. For international organizations based on the membership of states, this is of course problematic.[592] Secondly, the differentiated nature of monetary integration in the EU makes it difficult for institutions other than the ECB (which is organized to reflect the split between the in's and the out's), to represent the Eurozone and the out's at the same time.[593] Moreover, the lack of a decision does not stand in the way of the ECB partaking in international monetary institutions and in other forms of international cooperation on the basis of article 6 of the ESCB/ECB Statute. Some argue that the presence of Eurozone MS instead of EU institutions in the IMF actually leads to an overrepresentation of the Eurozone.[594] Although a Council decision could certainly clarify matters, it would not be able to overcome the problems that originate on the international level.

Appointments

A crucial moment in the relations between the ECB and its institutional environment is the appointment of new members to the Governing Council. In constitutional law, appointments

[589] Smits, R. (2009), 'International Representation of Europe in the Area of Economic and Monetary Union: Legal Issues and Practice in the First Ten Years of the Euro', 2 *Euredia*, 309-310.
[590] Chirico (2004), 285. See for an overview of ECB participation in different international fora ECB (2011), 'The External Representation of the EU and EMU', May 2011 *ECB Monthly Bulletin*, 93-94.
[591] McNamara, K.R. & S. Meunier (2002), 'Between national sovereignty and international power: what external voice for the euro?', 78 *International Affairs*, 850.
[592] Lopez-Escudero, M. (2016), 'New Perspectives on EU-IMF Relations: A Step To Strengthen the EMU External Governance', 1 *European Papers*, 474.
[593] Lopez-Escudero (2016), 473.
[594] Smits (2009), 308-309.

to (constitutionally) independent public bodies can fulfill an important function by alleviating some tension from the democratic deficit these institutions are sometimes claimed to have. In the US, for example, appointments to the Supreme Court are deeply politicized events. At the opposite end, heavily politicized appointment processes can endanger the independence of institutions, as it undermines the argument that their legitimacy arises from the technocratic expertise of their decision-makers.[595]

Appointments to the Governing Council come in two forms: firstly, through appointments to the Executive Board by the European Council, and secondly through national appointments of governors of the NCB.[596] Firstly, concerning the appointments of NCB Governors, this is the prerogative of the individual MS, with no direct involvement of European actors. The ECB does advise upon (changes to) the legislation concerning the national central banks and therefore can criticize, in abstracto, the process of appointments. In 2008, Executive Board member Bini Smaghi reviewed the national procedures and criticized the political background of some appointees: "There are several examples of political affiliation of central bank Governors or Board members being used by other institutions or political parties as an excuse to put pressure on the central bank, especially after a change in government."[597] Athanassiou, also employed by the ECB, went a step further and warned that European interests would not be well served by "allowing the appointment of the NCB governors to fall victim to the vagaries of the national political process."[598]Insofar as these criticisms aim to show that there is a problem with the appointment processes undermining the independence of the ECB, their effect is the opposite. Athanassiou provides no concrete examples of such problems and Bini Smaghi was only able to cite problems in Poland (a non-euro MS). Moreover, the long term of office, combined with the fact that national appointments are staggered, makes it difficult for any political group or organization to politicize appointments of governors of national central banks across several MS.[599] So even if problems could be found in a single MS, the effect on the functioning of the ECB would be limited.

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[595] Pisani-Ferry, J. (2006), 'There is room for improvement in the appointment of ECB executive board members', issue 2, May 2006 *Bruegel Policy Contribution*, 2.
[596] The appointment of members of the EB was originally by common accord. That has changed to qualified majority in art 283 TFEU.
[597] Bini Smaghi (2008), 451-452.
[598] Athanassiou, P. (2014), 'Reflections on the modalities for the appointment of national central bank governors', 39 *European Law Review*, 42.
[599] A similar effect can be seen for the appointments to the CJEU. For both institutions, the result is that appointments are quite 'under-politicized', relative to the importance of the appointments. Dumbrovský, T., et al.

The dynamics are different for the Executive Board, but the result is largely the same. It is the European Council that appoints all members of the Executive Board. What so far has played a large role in appointments here is nationality, not political ideology or favoritism.[600] This was immediately visible in the appointment of Duisenberg as the first president of the ECB. He could only be appointed after he had promised to resign halfway through his term (and be replaced by a Frenchman). [601] The importance of nationality in the EB was also visible in 2011 when the appointment of Draghi earlier that year meant there were two Italians, and no French, on the Executive Board. As a result, Bini Smaghi resigned after intense pressure. The importance of these episodes is easily overstated. Although the focus on nationality might distract from the technocratic qualities of the appointees, the balancing has the result of favoring the larger MS, which are otherwise underrepresented in the ECB. Although members of the Executive Board do not directly represent a MS, the Treaty also does not exclude considerations of nationality from the appointment-process.

The ECB and the EP

Lastly, there is the relationship between the ECB and the European Parliament (EP). The Treaty requires the ECB to present an annual report to the EP. The EP can also request a hearing with the President of the ECB and other members of the EB. On the basis of these rules, a practice has developed in which the President of the ECB appears before the EP around four times per year to explain ECB policies and answer questions. To improve these exchanges the EP cooperates with central banking experts. Moreover, the ECB responds to written questions submitted by members of the EP. The interactions between the two institutions are sometimes called the 'monetary dialogue'.

The effects of this 'monetary dialogue' have been the subject of some research, with varying conclusions as to the impact of the EP on ECB actions. Eiffinger and Mujagic concluded in

(2014), 'Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States', 51 *Common Market Law Review*, 456.

[600] Pisani-Ferry (2006), 1. Moretti measured the length of appointment per nationality (in months) as compared to the relative weight of the MS's NCB contribution to the capital of the ECB. Using these variables, she found an under-representation of the larger countries. Moretti, L. (2012), 'Nationality and the ECB's Executive Board', August 2012 *House of Finance Policy Platform*.

[601] Howarth & Loedel (2003), 48-49. Zilioli and Selmayr found that Duisenberg had voluntarily decided to retire, "in view of his age". Zilioli, C. & M. Selmayr (2006), 'Recent Developments in the Law of the European Central Bank', 25 *Yearbook of European Law*, 3.

2004 that requests from the EP to the ECB regarding changes in procedures often led to action by the ECB. Amtenbrink and Van Duin found that, over time, the focus of the questions of the EP shifted from the monetary policy decisions of the ECB to more general questions concerning economic affairs. They questioned whether the monetary dialogue comprised an "effective review of the ECB's performance".[602]

Beyond this criticism by Amtenbrink and Van Duin, it can be questioned whether any supposed gains from the monetary dialogue, for example with regard to transparency, can truly be attributed to the monetary dialogue. Within the dialogue, it is clear the ECB cannot be sanctioned by the EP.[603] The argument can therefore be made that the main reason that the ECB president is willing to discuss its policies with the EP is because of the 'aura of legitimacy' that it lends to its policies.[604] The monetary dialogue is then a fig leaf for the democratic deficit of the ECB. In any case, the monetary dialogue cannot be said to have limited the independence of the ECB.[605]

4.4 The functioning of the Excessive Deficit Procedure

In its first two years, the Eurozone enjoyed moderate economic growth.[606] As a result, government finances across the Eurozone were mostly in order, meaning here small deficits of up to two percent of GDP or even small surpluses.[607] Hence, no excessive deficit procedures were initiated. This changed when economic conditions turned less favorable after the so-called 'dot-com bubble' burst in 2001. With deficits (expectedly) running higher than 3%, the Commission filed its first reports and recommendations in the context of the excessive deficit procedure.

There was a different political wind blowing in Europe however, most notably in Germany. Support for the prohibition on excessive deficits dwindled. First Germany, and later France,

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[602] Amtenbrink, F. & K. Van Duin (2009), 'The European Central Bank before the European Parliament: theory and practice after ten years of monetary dialogue', 34 *European Law Review*, 563.
[603] Amtenbrink & Van Duin (2009), 563.
[604] Van der Sluis (2014), 116.
[605] Eijffinger, S.C.W. & E. Mujagic (2004), 'An Assessment of the Effectiveness of the Monetary Dialogue on the ECB's Accountability and Transparency: A Qualitative Approach', 2004 *Intereconomics*, 203.
[606] Goebel (2007), 1318.
[607] Heipertz & Verdun (2010), 116. After a correction of the numbers in 2004, it was discovered that Greece was the exception.

were deemed in 2003 by the Council to have an excessive deficit.[608] As the Commission haggled with these countries over their plans and economic predictions and prepared the subsequent steps in the EDP, a blocking minority was forming in the Council. In November 2003, the Council failed to take a decision on the recommendations from the Commission concerning France and Germany. Instead the Council adopted conclusions that proclaimed to hold the procedures in abeyance whilst the MS involved were asked to implement the measures described in the same conclusions. In January 2004, the Commission asked the CJEU to annul not only the conclusions but also the "decisions not to adopt … the formal instruments contained in Commission recommendations pursuant to Article 104(8) and 104(9) EC".[609] Using the expedited procedure, the CJEU pronounced its decision in July 2004, almost a year after the *OLAF* decision.

After Portugal, France and Germany were the first countries with an excessive deficit, as determined by the Council.[610] That the first round of findings of excessive deficits immediately led to a dispute before the CJEU is significant. But just as for the dispute over the application of the OLAF-regulation to the ECB, the question must be asked, was this dispute inevitable, or was it the result of highly particular circumstances? And why was there only one case concerning the SGP?

The questions before the Court concerned the two actions of the Council, firstly, in failing to adopt a decision after the recommendation of the Commission, and secondly, in adopting alternative 'conclusions'. On the first question, the Court found the action of the Commission inadmissible, as the Council had not (yet) taken an actionable decision.[611] In an *obiter dictum*, the Court stated that the Commission could have recourse to the procedure concerning the failure of an institution to act, although it is difficult to envision how the conditions of that procedure could be met here.[612] This is mainly because the Court throughout its judgement

[608] Council Decision (2003/89/EC) of 21 January 2003 on the existence of an excessive deficit in Germany, OJ L 34/16 and Council Decision (2003/487/EC) of 3 June 2003 on the existence of an excessive deficit in France, OJ L 165/29.
[609] CJEU, Case C-27/04, *Commission* v. *Council*, EU:C:2004:436, para 1.
[610] Heipertz & Verdun (2010), 128.
[611] *Commission* v. *Council*, para 36.
[612] *Commission* v. *Council*, para 35 and 90. Doukas, D. (2005), 'The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado about Nothing?', 32 *Legal Issues of Economic Integration*, 307. Dutzler and Halbe observe that the Court through this *obiter dictum* satisfy the requirement for legal protection. Dutzler, B. & A. Hable (2005), 'The European Court of Justice and the Stability and Growth Pact: Just the Beginning?', 9 *European Integration online Papers*, 7.

emphasized the discretion of the Council in applying the steps of the procedure and found that the deadlines contained in the SGP did not preclude the Council from acting once the deadlines had passed. On the second question, the Court stated that it followed 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 in Article 104 EC and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure".[613] The Court acknowledged the Council's wide margin of discretion *in* the excessive deficit procedure, not *over* the procedure.[614]

Although the Court stressed that the rules must be interpreted in such a way as to ensure their effectiveness, what is missing is an analysis of what effectiveness entails here.[615] Lacking an independent set of ideas on what constitutes an effective excessive deficit procedure, the approach of the Court mainly serves to stress the need for procedural integrity. Hence, the Court avoided assessing whether the procedure as envisioned by the Treaty and the SGP can actually be considered to be effective to achieve non-excessive budget deficits in the MS and whether the conclusions of the Council actually improved or eroded the effectiveness of the EDP. The Court also shied away from discussing the economic goal to be achieved by the procedures and the specific qualities of the institutions as employed by the EDP in different steps of the procedure. The economic judgements are made by the Commission and the Council *within* the procedure. As a result, effectiveness of the rules was equated with the integrity of the procedure.

The focus on procedures was mostly restricted to a reading of the Treaty, without going into detail to what extent the SGP had complemented or amended the Treaty.[616] In contrast to what most analyses claim, the decision is therefore not primarily about the Stability and Growth Pact, but about the EDP.[617] Only when the Court analyzes the holding in abeyance of the procedure through the adoption of the Conclusions, is the SGP the main legal source. Here, the Court accepts the limitation of the discretion of the Council through secondary legislation to give a positive spin on a failure to adopt a decision.

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[613] *Commission* v. *Council*, para 81.
[614] *Commission* v. *Council*, para 80. Doukas (2005), 307.
[615] *Commission* v. *Council*, para 74. Dutzler & Hable (2005), 8; Doukas (2005), 301.
[616] The one exception being the role of deadlines imposed by the SGP. The Court held that the expiration of these deadlines did not incapacitate the Council to act. Maher (2004), 836-837.
[617] Goebel (2007), 1332.

The judgment of the Court was hailed as 'solomonic' by commentators.[618] The Commission and the Council both found their positions prevailing in different parts of the judgment. At least in hindsight the resolution of the conflict appears to be obvious, raising the question why parties could not solve this conflict amongst themselves. Two reasons explain why the dispute ended up before the Court. Firstly, the emphasis by the Court on the procedural aspects of the SGP and the EDP was unusual at the time. It was widely, but wrongly, believed that the SGP had substantially tightened the rules on deficits, that there existed a 3% rule and that the discretion of the Council was encapsulated in a form of semi-automaticity. This was the rhetoric surrounding the SGP. The hope or expectation that the Court might develop a 'thick' theory of EMU then follows this rhetoric. Especially the position of the Commission on the decision of the Council not to adopt the measures proposed by the Commission was an invitation to the Court to construct a vision on what effectiveness in the excessive deficit procedure entails.[619] Secondly, the Council should not be seen as a unitary actor here. The Council did not seek confrontation with the Commission out of strategic or ideological motivation. The actions by the Council were reactionary, which was largely a result of its internal conflict. It was obvious that the Council's actions were not guided by a comprehensive view on the excessive deficit procedure, nor by a sense of strategy in relation to the Commission. Instead, its decisions were mainly aimed at resolving internal conflict, whereby the adoption of conclusions was part of a compromise not to adopt the measures proposed by the Commission, which would have stepped up the EDP and would have exerted greater pressure on France and Germany.[620] Even though France and Germany were able to rally a blocking minority in the Council, the necessity was still felt to adopt some kind of measure. Hence the conclusions were adopted. In contrast to the *OLAF* case, where unrelated circumstances at least could be seen as a cause of the legal conflict, the conflict between the Commission and the Council regarding the excessive deficit procedure arose primarily because of the dynamics and institutional relations created by the Treaty. The only non-systemic argument could be that the Commission misjudged the balance of power in the Council by making France and Germany the first MS subject to the EDP.[621]

[618] Maher (2004), 831; Dutzler & Hable (2005), 6.
[619] Goebel (2007), 1331.
[620] Heipertz & Verdun (2010), 151.
[621] Heipertz & Verdun (2010), 152.

After the decision in July 2004, no other cases concerning economic governance arrived at the Court, at least until the crisis. This is in part due to the reasoning of the Court and in part to the reform of the SGP in 2005.[622] The decision in *Commission* v. *Council* was the second case concerning EMU, after *OLAF*, and the second time the Court declined the invitation to develop a substantive theory underlying the legal framework of EMU. It was therefore clear that the Court did not want to become an active actor in this policy field and would not promote a specific set of values or a specific institutional framework.

The second reason is the reform of the SGP in 2005, which was the result of a political consensus on the need for broader discretion in assessing the economic circumstances in MS. As noted above, the SGP and the EDP only regulated the use of certain types of arguments in the assessment of an excessive deficit. The reform brought in a wider array of economic arguments: "providing in-built political legitimacy to the Council when it avails itself of the flexibility enshrined in the rules".[623] Before further discussion of the substance of reform however, it is relevant to note that the reasoning of the Court hardly featured in the discussions leading up to the reform, only the outcome.[624] The decision was neither seen as precluding, nor demanding, specific reforms. Crucially, the discussion on the reform also did not take into account the upcoming amendments to the Treaty framework on economic governance. The focus on the minutiae of the Stability and Growth Pact, instead of on the wider legal context regulating economic governance, already showed that the reform would be minimal.

The reform of the SGP left its structure intact.[625] Even more than the original SGP, the specific provisions of the reform can be explained by reference to the requirements of the Treaties. The best example of this is the introduction of a list of specific circumstances that either can or cannot be taken into account at different moments throughout the procedure. The list includes "cyclical conditions", "the implementation of policies in the context of the Lisbon agenda", "budgetary efforts … to achieve European policy goals" and "public investment".[626] Under the new article 2(3) of Regulation 1467/97, these factors *must* be taken into account when the Commission starts the excessive deficit procedure with its Report under article 104c(3) EC.

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[622] Goebel (2007), 1340.
[623] Heipertz & Verdun (2010), 170.
[624] Louis, J.-V. (2006), 'The Review of the Stability and Growth Pact', 43 *Common Market Law Review*, 87.
[625] Louis (2006), 90.
[626] Council Regulation 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 174/5.

The list of specific factors also plays a role in the next steps of the procedure leading up to the decision of the Council on the existence of an excessive deficit, although only under the condition that the "double condition of the overarching principle … is fully met", meaning that the deficit remains close to the reference value and is temporary (article 2(4)). This condition applies when the Economic and Financial Committee prepares its opinion, when the Commission submits its opinion to the Council and for MS submitting their observations to the Council. The double condition does *not* apply when the Council actually decides on the existence of an excessive deficit under 104c(6) EC: "the balanced overall assessment to be made by the Council shall encompass all these factors". The list of factors should then also be taken into account in the next steps of the excessive deficit procedure, without having to test for the 'double condition of the overarching principle'. However, when the Council decides on abrogating the EDP where it considers that there no longer exists an excessive deficit under 104c(12) EC, the list of factors shall *not* be taken into account.

The resulting situation where the Commission *must* take into account the list of factors when it prepares a report, but *may* only take into account that same list of factors only under certain conditions at a later stage, clearly reflects the fact that under article 104c(3) EC the Commission must take into account "all other relevant factors". Hence, for that step during the procedure, the discretion of the Commission could not be restricted through secondary legislation. For the Council the situation is even more confusing. Where for the decision on the existence of an excessive deficit under 104c(6) EC the factors *must* be taken into account, for the decision on whether the excessive deficit has been corrected under 104c(12) EC the factors *may not* be taken into account. This difference clearly reflects the difference between paragraphs 6 and 12 of article 104c EC, where the former explicitly demands an "overall assessment" and the latter does not. For the decision under article 104c(12), the legislator thus used its prerogative to restrict the discretion of the Council.

The reform thus employed a similar strategy as the original SGP in the sense that it regulated the use of specific economic arguments at specific moments of the procedure. This does not mean the institutions are obliged to use only those arguments. Especially where the Treaty requires that institutions take into account 'all relevant factors' or make an 'overall assessment' (article 104c(3) and (6) EC), the reformed SGP leaves plenty of discretion for the institution. For example, where the Council may under the new article 2(2) find a deficit higher than 3% *exceptional* if it is the result of negative growth, this only regulates the use of the argument of

exceptionality. In its assessment of a government deficit, the Council is not obliged to have recourse to this argument, nor is the use of any other argument excluded. Similar to the original SGP, the reformed SGP does not establish a 3% rule and leaves intact the division of responsibilities between the MS and the Community.[627]

Conclusion

If in 2009 someone wanted to describe the legal framework of the euro, the Maastricht Treaty still provided a neat overview. This was despite the EMS-crisis of 1992-1993, the close outcome of the referendum on ratification in France, the continuous hesitation towards monetary union in Germany, the enlargement of the Union from 11 to 27 MS, the growth of the Eurozone from 11 to 16 MS, three successfully ratified Union treaties and a failed one, two politically sensitive judgements from the CJEU, and the transformation of the ECB into an institution of the Union. Between 1993 and 2009 there was for EMU no equivalent of a Luxembourg Compromise, a *Costa/ENEL* judgement or a *Dassonville.* From a distance, EMU indeed looked rather boring. Only from up-close is it possible to see the balance of forces that kept EMU in the same place. EMU's stability was not the result of the lack of activity or interest, but of the ability of those opposed to change to invoke EMU primary law either as a package or as individual constitutional rules.

The involvement of the CJEU in this period is particularly noteworthy. Cases from both the economic and monetary branches of EMU landed before the Court early on. This can be explained in part by the inherent tensions in EMU. But it is not sufficient to explain how and why two cases came before the Court; any explanation of the judicialization of EMU should also explain why there were *only* two cases. What the two cases have in common is that the CJEU employed a rather plain reading of the text of the Treaty and refused to set out the broader principles of EMU, thereby effectively disinviting future cases. The CJEU was there if anybody needed it, but because it was there, nobody needed it anymore. The CJEU did not want to become the motor of economic and monetary integration.

There are several instances where EMU law was not followed to the letter. For example, the SGP unduly restricted the discretion of the Council, Sweden disregarded its obligation to try

[627] Goebel (2007), 1338; Louis (2006), 101.

to join the euro and the Council failed to adopt a position on the external relations of the euro. What these violations have in common is that they occurred quite openly and with the (silent) approval of the greater part of the political actors in the Union. A different matter is the case of Greece, where the problem first was that it did not allow the Commission and the Council a proper assessment of the deficit due to irregularities or falsification of statistical information and where the (corrected) deficit numbers for the last years prior to the crisis are difficult to classify as anything but excessive. Nevertheless, these violations were only possible because on an earlier occasion the Treaty had been successful in opposing the German proposal for a Stability Pact.

Chapter 5
EMU Constitutional Law in the Crisis

Introduction

In 2009, the law of EMU was not considerably different from the law of EMU in 1993. For 2017, that is not the case anymore. From 2010 onwards, the euro-crisis has been met with a stream of legal measures, jointly called euro-crisis law, that has resulted in a substantially altered legal framework of the euro. Euro-crisis law encompasses international treaties, secondary legislation (including ECB decisions), judicial decisions and (quasi-)informal agreements. Aside from a small amendment to article 136 TFEU, the text of EMU primary law has remained unchanged. So it is understandable that much of the legal literature has focused on three questions, namely whether the actions taken during the crisis were legal[628], what the current orientation of EMU law is[629], and what the impact of euro-crisis law is on EU constitutional law as a whole.[630]

The emphasis in this chapter is on the way EU constitutional law, and EMU constitutional law in particular, influenced the way euro-crisis law took shape.[631] Euro-crisis law built on the laws already in place, (ab)used ambiguities in the text and, most importantly, was created through the bodies and institutions of the Union. Euro-crisis law was not exogenous to E(M)U

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[628] Overviews of the debates are available in: Tuori & Tuori (2014); Hinarejos (2015); Lastra & Louis (2013); Smits, R. (2015), 'The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments', 38 *Fordham International Law Journal*; Ruffert, M. (2011), 'The European Debt Crisis and European Union Law', 48 *Common Market Law Review*; De Gregorio Merino, A. (2012), 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review*; Adamski, D. (2012), 'National Power Games and Structural Failures in the European Macroeconomic Governance', 49 *Common Market Law Review*; Kilpatrick (2015).

[629] De Streel (2013); Baroncelli, S. (2014), *The Independence of the ECB after the Economic Crisis*; Ioannidis, M. (2014), 'EU Financial Assistance Conditionality after "Two Pack"', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*; Fabbrini, F. (2016), *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges*, OUP.

[630] Amtenbrink (2014); Dawson, M. & F. de Witte (2013), 'Constitutional Balance in the EU after the Euro-Crisis', 76 *The Modern Law Review*; Chiti, E. & P.G. Teixeira (2013), 'The constitutional implications of the European responses to the financial and public debt crisis', 50 *Common Market Law Review*; Joerges (2015); Scicluna, N. (2014), 'Politicization without democratization: How the Eurozone crisis is transforming EU law and politics', 12 *International Journal of Constitutional Law*.

[631] In a recent article, Ioannidis has undertaken a similar exercise as the one proposed here, focusing on the process of transformation. He also finds that the question of legality/illegality offers "a poor analytical instrument for constructing a narrative of the Eurozone crisis." Ioannidis (2016), 1248.

constitutional law. Even though the rules have substantially changed during the crisis, this does not mean that EMU constitutional law was irrelevant during the crisis. As seen in the previous chapter, the constitutional framework of the euro was quite resistant to change. It took a crisis to overcome the conservative nature of EMU constitutional law. But rather than seeing the euro-crisis as the process by which the *body politic* was freed from (or escaped from) the straightjacket of EU constitutional law, euro-crisis law was a means to re-fit the straightjacket. The transformation of EMU law depended on the application of EU constitutional law processes creating new rules for the euro.

Two aspects of (the response to) the crisis make the historical-institutionalist approach to constitutional law specifically appropriate here.[632] The first is that change did not occur through a single, large event, such as a new EU Treaty, or a Maastricht 2.0. Change occurred in small steps, with institutions reacting to the (legal) conditions set by other institutions.[633] The second is that change occurred over a lengthy period of time. The starting point of the euro-crisis is late 2009, early 2010 and at the moment of writing (2017) several legal developments are still unfolding. The long timespan of the euro-crisis had the effect that moments of (planned) crisis were followed by longer periods of relative calm.[634]

What is of special interest in this chapter is the development of legal narratives that can justify the different parts of euro-crisis law in relation to the *old* framework of EMU primary law.[635] These narratives involve a specific interpretation of the adopted measures, as well as interpretations of the EU Treaties. They are often formulated in a rather crude or bare-bones fashion at first. As the crisis develops, these narratives can either be reinforced, discarded or amended. The point is that the development of these legal narratives is often a response to specific legal needs or opportunities. Whereas a narrative might serve to legitimize a measure early on in the crisis, it might have unintended consequences later, as for example the Court

[632] Other historical-institutionalist approaches are found in Gocaj & Meunier (2013); Verdun, A. (2015), 'A historical institutionalist explanation of the EU's responses to the euro area financial crisis', 22 *Journal of European Public Policy*.
[633] Adamski (2012), 1319. "Because a reconstruction of the EMU's fundamentals – the only adequate response to the crisis – is a long, uncertain and politically inconvenient process, the Union has instead chosen a strategy of tinkering."
[634] This pace was a result of a strategy of brinkmanship. Schimmelfennig, F. (2014), 'European Integration in the Euro Crisis: The Limits of Postfunctionalism', 36 *Journal of European Integration*, 329.
[635] Ortiz speaks of the process of redetermination of the meaning of a provision. Ortiz (2016).

takes on such a narrative and it becomes the dominant interpretation of a clause. This entrenchment might then stand in the way of a further re-interpretation of a provision.

This brings to light another aspect of euro-crisis law, namely the involvement of the CJEU.[636] At several moments during the crisis the Court was asked to rule about various aspects of euro-crisis law. Procedurally, this raises several issues. Firstly, at what time during the crisis did the CJEU get involved? As was discussed in the previous chapter particularly in relation to the *OLAF* judgment, how coincidental was it that the Court got involved? Moreover, did the manner through which an issue reached the Court impact the manner with in which the issue was framed?

By necessity, the proposed analysis requires assessing the extent to which the adopted measures and legal narratives diverge from previous understandings of EMU primary law. For this, it builds on extensive legal literature discussing the legality/illegality of euro-crisis law. It should be emphasized, however, that the goal of the analysis is not to challenge these assessments. Instead, the debates on legality/illegality are more useful here if they are reinterpreted as being about the plausibility of legal narratives.[637]

As in previous chapters, this chapter will analyze a limited set of developments, rather than provide an overview of all developments. Euro-crisis law is discussed in three sections on, firstly, the bail-outs; secondly, the mandate of the ECB; and lastly, the legislative discretion in EU economic governance.[638]

5.1 The Bailouts in Light of the No Bailout Clause

The most visible manifestations of euro-crisis law have been the financial assistance packages for several Eurozone MS. In each case, the negotiation and implementation of these bailout packages have led to questions about the blame for the crisis, the distribution of the costs, the appropriate policy conditionality, the democratic deficit of the European interventions, the responsibility for human rights violations and alternative economic solutions. This section

[636] Fabbrini (2016), ch 2.
[637] Ioannidis (2016), 1248.
[638] See for a similar division of topics, Tuori & Tuori (2014), ch 5.

focuses merely on one aspects of the bailouts: namely their relation to article 125 TFEU, the infamous 'no bailout clause'. For some, the bailouts and the subsequent approval by the CJEU represent a low point for the rule of law in Europe.[639] At the least, it should be acknowledged that the interpretation of article 125 TFEU has undergone a transformation.[640] Prior to the crisis, there were no interpretations of the clause that would permit financial assistance only if it was complemented by strict conditionality and necessary for the financial stability of the euro-area as a whole.[641] Nevertheless, during the crisis these two conditions became central to the new interpretation of article 125 TFEU. At the same time, it is not immediately obvious that something nefarious happened. As discussed in chapter 3, both the ambiguity and the name of article 125 TFEU were essential characteristics of the provision. The clause was designed to allow for a change in interpretation. The central question here is *how* a new interpretation of article 125 TFEU was established.

5.1.1 Picking a Legal Battle

After the Greek government presented in late 2009 corrected deficit numbers that showed a double-digit deficit, the MS spent the early months of 2010 bickering over the proper response to an ever-growing crisis.[642] During this time, the no bailout clause was either invoked as reason to reject financial assistance to Greece, or dismissed because it does not provide "a blanket ban on aid".[643] A first agreement for financial support was reached on 2 May 2010 called the Greek Loan Facility (GLF). It consisted of pooled bilateral loans, managed by the Commission. Although the GLF was of little influence for how the crisis developed further, it nevertheless confirmed a number of assumptions about economic power in Europe, namely that the funds for assistance are most easily generated at the MS level, that the MS would therefore decide on (the conditions of) financial assistance with technical support offered by the Commission and, lastly, that the no bailout clause could, at least for a short period of time, be ignored.

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[639] See for example Vaubel, R. (2014), *The Breakdown of the Rule of Law in the Euro-Crisis: Implications for the Reform of the Court of Justice of the European Union*, Travemünde Symposium on the Economic Analysis of Law: "International Law and the Rule of Law under Extreme Conditions". Less dramatic is Ruffert (2011), 1785.
[640] Two recent articles take seriously the process of transformation of article 125 TFEU.
Ioannidis (2016); Ortiz (2016). A problem afflicting both articles is the central role they award to the CJEU.
[641] See for a short overview of how the clause was interpreted before the crisis Ortiz (2016), 12.
[642] See for a timeline of events Wearden, G. (5 May 2010), *Greece debt crisis: timeline*, The Guardian.
[643] (28 January 2010), 'A Greek bailout, and soon?', *The Economist*. See for further news coverage on the clause: Amann, S. (11 February 2010), 'Germany and France Take on the Euro Speculators', *Der Spiegel*; Peel, Q. (22 March 2010), ''No bail-out does not mean no help'', *Financial Times*.

As the crisis deepened over the next week, on May 7 the Commission was asked to submit a proposal on a "European stabilization mechanism to preserve financial stability in Europe" by May 9.[644] This became Regulation 407/2010 establishing a European Financial Stabilization Mechanism (the EFSM).[645] The EFSM is based on article 122(2) TFEU and thus emphasizes the exceptional circumstances of the financial crisis.[646] The Commission proposal foresaw a limitation on the loans extended as covered by the EU budget (article 2), but above that ceiling, loans could be granted against joint and pro-rata guarantees from the Eurozone MS (article 3).[647]

The proposal by the Commission would have created one big legal problem, whilst partially solving another. The Commission proposal had two rather innovative aspects, firstly, that MS would lose their veto over the size of their financial obligations towards the EU and secondly, that large-scale financial assistance would be organized through the EU.[648] Under the proposal of the Commission, the Council could decide by qualified majority on loans to a Eurozone MS. These loans would be guaranteed jointly and pro-rata by the other Eurozone MS. In other words, the Council could increase the financial obligations of a Eurozone MS towards the Union without the consent of that MS. This would of course have been revolutionary for the EU. But this part of the proposal could also have been amended, so as to reduce its revolutionary nature.[649]

Under the Commission's proposal, financial assistance would be an issue of EU law, with the Council making decisions by qualified majority. The unlimited size of the financial assistance that could be provided on the basis of the regulation would make any further instrument for

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[644] Commission proposal for a Council Regulation establishing a European financial stabilization mechanism, 9.5.2010, COM(2010)2010 Final.
[645] Council Regulation 407/2010 of 11 may 2010 establishing a European financial stabilisation mechanism, OJ L 118/1.
[646] Recital 2-5 Regulation 407/2010.
[647] A sensitive topic for the EFSM is the relation between the ins and the outs. In August 2015 the EFSM was amended to eliminate the risks for non-Eurozone MS in bailouts. Council Regulation 2015/1360 of 4 August 2015 amending Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism, OJ L 210/1.
[648] For the political background of this proposal, see Schlosser, P. (2017), *Resisting a European Fiscal Union: The Centralized Fragmentation of Fiscal Powers During the Euro Crisis*, EUI Doctoral Thesis; Gocaj & Meunier (2013), 243.
[649] For example, the Regulation could have included a system comparable to balance of payments assistance, where decisions on assistance are also made by qualified majority but where credit-lines granted by MS require their agreement. The Regulation also could have included upper limits on contributions from the MS, without extending a veto to MS over how and when assistance is provided. But also in these two scenarios it is obvious that the manner in which MS contribute to the financial affairs of the Union is radically overhauled.

financial assistance superfluous.[650] That would also settle the question of how decisions would be taken on the organization of future financial assistance programs, as the EFSM regulation would be adopted and amended by qualified majority. Thus, even if the MS individually would keep control over their contributions in the EFSM in some way or another, they would individually lose control over the equally fundamental question of how financial assistance would be organized. Financial assistance would be a matter of the EU, rather than the collective of MS.

The proposal raised legal issues concerning the contributions from the MS to the EU. This is the big legal problem. The financial framework of the EU is extensively regulated in the Treaties. Article 311 TFEU states explicitly that the Council decision on the system of the own resources of the EU must be approved by the MS in accordance with their constitutional requirements.[651] In other words, the Commission proposal for the EFSM should have been accompanied by a proposal to change the Council decision on own resources. In practice, this would have been similar to amending the treaty and thus politically impossible. The Commission proposal thus was an attempt to create a legal revolution.

Nevertheless, the proposal would have avoided further problems with article 125 TFEU. Using article 122(2) TFEU offered, at least at that point, the most credible exception to article 125 TFEU (understood as prohibiting bailouts) in that it explicitly allowed for financial assistance under certain conditions. Organizing financial assistance within the EU Treaties by way of a regulation based on article 122(2) TFEU thus had the benefit of offering the language and argumentative structure to defend the legality of large-scale financial assistance.[652] To be sure, it was unclear whether the conditions for article 122(2) TFEU were fulfilled, but at least it offered a set of arguments that could be immediately employed.

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[650] A well-developed Union financial assistance mechanism would also strengthen the argument of pre-emption. On pre-emption see Tuori & Tuori (2014), 155.

[651] Maduro, De Witte and Kumm suggest how the position of non-participating states can be respected under article 311 TFEU for an EU tax. It is unlikely that their proposal would work for a financial assistance mechanism. Maduro, M.P., et al. (2012), *The Euro Crisis and the Democratic Governance of the Euro: Legal and Political Issues of a Fiscal Crisis*, in: The Democratic Governance of the Euro (RSCAS Policy Papers 2012/08) (M.P. Maduro, et al. eds.), 6.

[652] See Tuori & Tuori (2014), 138-145; Ruffert (2011), 1787.

The rejection of the Commission proposal of the EFSM is thus more than the simple rejection of a proposal based on legal grounds.[653] In the context of that weekend in May 2010, it was the choice to confront a certain set of legal challenges over another. This does not mean that the legal challenges were equally difficult to overcome. As the GLF had shown, there were no *immediate* consequences for ignoring the traditional understanding of article 125 TFEU. Silence on the topic was sufficient – at least for a while. The rejection of the Commission proposal should therefore be seen as a political choice to reject the internal EU political sphere as the proper venue for the organizing financial assistance, but a decision encouraged by legal context.

The EFSM regulation was nonetheless adopted, but only with very limited funds (60 billion euro). Hence another entity was created, the European Financial Stability Framework (EFSF), that could borrow funds against the guarantees of the MS up to 440 billion euro. The EFSF is a *société anonyme* under Luxembourgian law with the Eurozone MS as the shareholders. It would provide the financial means for the assistance packages for Ireland, Portugal and the second Greek program.

The choice to create the EFSF meant that the legal obstacles for financial assistance would mainly be those of article 125 TFEU[654], although it was clear that at the beginning there was no legal argumentation available to justify the GLF and the EFSF under article 125 TFEU. There was no legal narrative that could distinguish between forms of support that would, and those which would not, violate article 125 TFEU, other than that the MS could not become directly liable for or assume the debt of another MS.[655] For example, a few days after that tumultuous weekend the Commission stated on "[l]ending to a euro-area Member State – as opposed to assuming its debt - is not in contradiction with Article 125 TFEU."[656] In 2012, Director of the Legal Service of the Council Middleton gave an explanation of how the assistance measures kept intact the market conditions on government debt and were therefore in line with the objectives of article 125 TFEU. He then goes on by stating that: "It was against

[653] Gocaj & Meunier (2013), 243.
[654] Although the EFSFM would still have to conform to the requirements of article 122(2) TFEU, its contributions to combat the crisis were of relatively little importance.
[655] Middleton, T. (2012), *Not bailing out... Legal aspects of the 2010 sovereign debt crisis*, in: A man for all treaties: liber amicorum en l'honneur de Jean-Claude Piris (J.-P. Jacque ed.).
[656] Commission Communication, *Reinforcing economic policy coordination*, 12 May 2010, COM(2010) 250 final, 10.

the background of this interpretation of article 125 TFEU that … the euro area MS agreed on support to Greece". The problem, however, is that this appears to be an *ex post* justification of the support. The Eurogroup statement to which Middleton refers, does not contain any defence of the legality of financial assistance to Greece.[657]

The different components that would later be used for the re-interpretation of article 125 TFEU did appear in these measures, but they were not yet formulated as legal preconditions for granting financial assistance. For example, the idea that financial assistance is granted in order to preserve the financial stability of the Eurozone, is repeatedly mentioned in the Eurogroup declarations of early 2010.[658] It also appears, for different legal reasons, in the EFSM Regulation. For the EFSM, the financial stability of the Union is part of the explanation why the exceptional circumstances are beyond the control of a MS. In the EFSF, the financial stability of the Eurozone as a whole is the aim of the financial assistance. That statement follows the observation that the EFSF should provide support to MS "in difficulties caused by exceptional circumstances beyond such euro-area Member States' control". A more controversial aspect of financial assistance is that it comes with conditions. This is already a requirement in article 122(2) TFEU and became more specific in the EFSM regulation ("strong economic policy conditions").[659] The use of conditions was already part of the discussions in the previous months and also in the EFSF "appropriate policy conditionality" is a precondition for assistance. It is, however, not framed as a legal precondition in relation to article 125 TFEU. To the contrary, the EFSF states that the conditions attached to assistance should not violate EU law. The transformation of these conditions for assistance into legal preconditions only comes with the change from the EFSF to the ESM and the accompanying amendment to article 136 TFEU.

5.1.2 Discovering a New Interpretation of Article 125 TFEU

The EFSF turned out to be a halfway-house, which is now slowly being phased out by the European Stability Mechanism (ESM). The idea to create another, permanent mechanism arose soon after the EFSF was created (the EFSF itself was prevented from providing loans after July

[657] Eurogroup statement, 2 may 2010.
[658] Middleton (2012), 423.
[659] Recital 7 EFSM Regulation. The aim of these conditions would be "preserving [sic] the sustainability of the public finances of the beneficiary Member State and restoring its capacity to finance itself on the financial markets."

2013).[660] The widely shared narrative is that the guarantees granted by the Eurozone to the EFSF would not be big enough to give it enough 'firepower' to provide sufficient assistance to larger Eurozone states, such as Italy or Spain.[661] Moreover, the way in which the EFSF was financed was perceived as problematic, because the ability of the EFSF to raise funds was dependent on the creditworthiness of the participating states. Troubles in the bigger MS would reduce the 'firepower' of the EFSF. [662] However, these problems do not answer the question why it was necessary to replace, instead of modify, the EFSF. As was demonstrated later, the upper limit on financial assistance provided by the EFSF could be raised, and there were also no obstacles to reforming the manner in which the EFSF financed itself.[663] The main reason to start the negotiations for the replacement of the EFSF, it appears, was the belief in some MS that the speed with which the EFSF came into existence had disadvantaged their negotiating position: "Germany was adamantly opposed to expanding the EFSF's powers but supported a Treaty change to set up a permanent rescue mechanism that would allow a method for orderly default."[664] In other words, a new treaty would allow Germany to strengthen its demands for changes to how financial assistance was disbursed.

The change from the EFSF to the ESM highlights the difference between the proposed EFSM and the EFSF. The proposed EFSM would have seen financial assistance be organized within the Treaty and questions about how that assistance would be structured be answered through the EU political process. Instead, the EFSF and ESM showed the benefits and obstacles of going outside the EU legal framework. The EFSF was created with in a very short amount of time and its founding documents did not need ratification by the participating states. The ESM, by contrast, faced considerable difficulties in the negotiation and ratification as an instrument of the collective of MS.

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[660] Gocaj & Meunier (2013), 247-248.
[661] The problems of the EFSF have been well analyzed by the Financial Times over a series of articles. Alloway, T. (17 May 2010), 'The EU's very own AAA SPV', *Financial Times*; Alloway, T. (8 June 2010), 'SPVery complicated in Europe', *Financial Times*; Alloway, T. (27 September 2010), 'Europe's EFSF really is not saving anything', *Financial Times*; Alloway, T. (17 January 2011), 'Fix the EFSF – lose the triple-A?', *Financial Times*.
[662] Gocaj & Meunier (2013), 249.
[663] But see Sester, P. (2012), 'The ECB's Controversial Securities Market Programme (SMP) and its role in relation to the modified EFSF and the future ESM', 9 *European Company and Financial Law Review*.
[664] Gocaj & Meunier (2013), 247. Also see Sester (2012), 160; Verdun (2015), 227.

Replacing the EFSF also opened the door to reviving the discussion on article 125 TFEU.[665] For the new financial assistance mechanism, the European Council in October 2010 clearly linked the creation of a new mechanism to an EU Treaty amendment complementing the no bailout clause. The reappearance of the no bailout clause in the discussion in the European Council is no coincidence. Firstly, by stressing the need for an amendment to the EU Treaties that would outline the requirements under which financial assistance would be legal, the MS providing assistance strengthened their demand for strong conditionality. Conditionality would no longer be just a political demand, but also a legal requirement. Secondly, whereas the EFSF had been adopted without significant problems in the MS that would not be the case for the new ESM. Asserting – with the necessary political authority – a plausible re-interpretation of the no bailout clause could help to avoid legal problems during the ratification process. Moreover, in Germany several constitutional complaints had already been filed concerning the illegality of the Greek bailout.[666] The complaints were based, amongst other things, on the supposed violation of article 125 TFEU. By arguing in favor of a Treaty amendment, the German government signaled that it took those concerns seriously.

The European Council in December 2010 then officially started the process for the simplified treaty amendment, based on article 48(6) TEU. The Conclusion of that meeting already includes the text for the amendment:

> "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."[667]

The amendment confirms the choice for staying outside the EU legal framework. As such, it is a rather odd provision. Most provisions of EU primary law regulate what can be done *inside* the EU legal order. Any restrictions on what MS can do outside the EU legal order then follow logically from these provisions. The question then is what the effects of the amendment are.

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[665] From the point of view of the EU institutions there appears to have been little interest in dealing with article 125 TFEU. For example, the Van Rompuy Report from mid-October 2010 does not mention the no bailout clause. Report of the Task Force to the European Council, *Strengthening Economic Governance in the EU*, 21 October 2010.

[666] Scicluna (2014), 560.

[667] European Council Conclusions, 17 December 2010. The text was later adopted in European Council Decision (2011/199/EU) of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91/1.

According to De Witte, "the effect of the bail-out prohibition of Article 125 TFEU would be neutralized by a complementary norm with the same treaty rank". Gregorio de Merino found the amendment to have merely a "declaratory value" and argued that the amendment "is not a legal basis or an authorization for Member States to establish mechanisms of financial assistance among themselves."[668] Instead it merely recognizes an already existing power of the MS.

This raises the question what exactly the relation is between the amendment and article 125 TFEU. If the amendment would neutralize article 125 TFEU, then why not delete it? The key is that doing so would have meant an implicit recognition of the illegality of the previous bailouts. By leaving intact article 125 TFEU and having both rules in the Treaty, the implication is that the provision allowing the MS to set up a mechanism was not in conflict with article 125 TFEU. Hence, the conclusion would have to be that article 125 TFE already allowed such a mechanism to be created.[669] The paradox of article 136(3) TFEU is that imposes an interpretation upon article 125 TFEU as a result of which the amendment itself appears superfluous.

This is perhaps most obvious when it comes to the conditions for financial assistance set in article 136(3) TFEU. If the amendment would be a recognition of an already existing legal basis to create a stability mechanism outside the EU legal framework, then the amendment should be seen as a *restriction* of the powers of the MS because of the two conditions the amendment poses. If the amendment is declaratory, that means that the two conditions to financial assistance must already be present in EU law, here article 125 TFEU. Accepting the amendment as declaratory means *a priori* accepting a very specific interpretation of article 125 TFEU.

As the main purpose of the amendment was to affect the interpretation of article 125 TFEU, it did not matter that the amendment entered into force only after the ESM Treaty. What mattered

[668] De Gregorio Merino (2012), 1629; Tuori & Tuori (2014), 149.
[669] See the Opinion of the ECB on the Draft Decision of the European Council. ECB Opinion (CON/2011/45) of 17 March 2011 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, OJ C 140/8, para 5. "In addition, and even before its entry into force, the text of the new Article 136(3) TFEU helps to explain, and thereby confirms, the scope of Article 125 TFEU with respect to safeguarding the financial stability of the euro area as a whole".

was the political force with which the new interpretation was posited. The key point of the discussion of the no bailout clause in Chapter 3 was that the ambiguity of the provision was introduced in the provision on purpose, in order to allow the interpretation of the provision to shift during the crisis. What was left open was the procedure through which this reinterpretation could be established.

A reasonable expectation would be that the European Council decision that would suggest a new interpretation for article 125 TFEU would be heavily contested, but the introduction of the amendment in December 2010 was politically anti-climactic. The reason is that the contestation had taken place much earlier, in the run up to the GLF and the EFSM. The conclusion of that period was that a strictly textual approach to article 125 TFEU would suffice. The introduction of other requirements for article 125 TFEU into the discussion was mainly the result of political strategy, not legal necessity. The emphasis moreover lay on the ongoing negotiations for the ESM, the new 700 billion euro rescue mechanism. In other words, article 136(3) TFEU presented a new solution to a problem that had already been solved and with its main components being derived from practice. Hence, the European Council Decision was adopted without much opposition and with the support of the ECB, the EP and the Commission.

5.1.3 The CJEU Approves the New Interpretation

That there was a political consensus on the European level on a new interpretation of article 125 TFEU of course did not automatically mean that the public was convinced. Contrary to the EFSF, the negotiations on the ESM took several months and often reached the headlines of the news. The ratification of the ESM (and often in conjunction the article 136(3) amendment) was heavily contested in many MS.[670] In Austria, Belgium, Estonia, France, Germany, Ireland and the Netherlands the judiciary became involved. By comparison, the EFSF was only challenged before a court in Belgium, Germany and Slovenia.[671] Given this large number of judicial challenges, it is not surprising that a request for a preliminary reference on the ESM landed before the CJEU.

[670] See the country reports of the project 'Constitutional Change through Euro Crisis Law: A Multi-level Legal Analysis of Economic and Monetary Union' as found on www.eurocrisislaw.eu. See especially the country reports on France, Germany, Ireland, Finland and the Netherlands.
[671] See the reports on www.eurocrisislaw.eu.

In its interpretation of article 125 TFEU, the Court follows in *Pringle* the conditions for financial assistance as provided by the amendment.[672] The Court does not set any other conditions than those found in the text of article 125 TFEU and the decision to amend article 136. Nevertheless, the *Pringle* judgment does provide a more explicit rationale for those conditions by connecting them to the broader framework of EMU. For example, regarding the "strict conditions" the Court finds that these must "prompt that Member State to implement a sound budgetary policy."[673] This ties the ESM to the economic policy provisions of articles 121 and 126 TFEU, but it is also reminiscent of the EFSM.[674] The Court also refers to the negotiating history of article 125 TFEU, albeit with considering the nuances and strategy found in the negotiation history as discussed in chapter 3.[675]

The reasoning of the Court in *Pringle* contrasts with the *OLAF* and *Commission* v. *Council* cases. There the Court had shied away from developing the theoretical foundations of EMU, but that was not an option here. The political consensus on the new interpretation of article 125 TFEU needed to be embedded in a broader justificatory narrative.

A considerable group of legal scholars disagreed with the conclusion that the assistance measures did not violate the no bailout clause.[676] For the purposes of this chapter, their criticism is not particularly relevant, except where they argue that the requirements of article 125 TFEU as interpreted by the CJEU are hardly effective limits on politics.[677] In effect, they argue that the hard boundaries of article 125 TFEU have been replaced by soft boundaries that are easily circumvented. Two different scenarios must be considered. The first is with regard to individual assistance measures. Here, it appears indeed difficult to imagine the requirements for assistance as effective (justiciable) limits. Whether the imposed conditions are indeed 'strong' will in the first place be a political assessment. Also, the assessment whether assistance is indispensable for the Eurozone as a whole, is firstly in the hands of political actors. On both

[672] CJEU, Case C-370/12, *Pringle*, EU:C:2012:756
[673] *Pringle*, para 137.
[674] *Pringle*, paras, 135 and 143 respectively. See De Witte, B. & T. Beukers (2013), 'The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle', 50 *Common Market Law Review*, 839.
[675] Borger (2016), 190.
[676] See for example Beck (2013).
[677] Vaubel (2014), 3.

requirements, courts will be hesitant to second-guess those political assessments.[678] However, those are not the only circumstances under which the requirements of article 125 TFEU are relevant.

The second way in which article 125 TFEU is relevant is for future reforms of EMU. Since the start of the euro-crisis, several plans have been proposed to 'complete' EMU by way of mutualizing debt obligations of the MS in one way or another. Belgian Prime Minister Yves Leterme proposed a European Debt Agency[679]; the German Council of Economic Experts recommended creating a temporary European Redemption Fund[680]; and several scholars suggested variations on a European Monetary Fund or Eurobonds.[681] The big question for many of these plans is: do they require an amendment of the Treaties in light of article 125 TFEU? For eurobills (jointly issued government securities) and a 'debt redemption fund' (mutualizing government debt through a jointly and severally guaranteed fund), Sandberg concludes that they are "widely considered incompatible with Article 125 TFEU".[682] The report of the Expert Group on Debt Redemption Fund and Eurobills noted that prior to the *Pringle* judgment several (radical) interpretations were floated of the no bailout clause, but that they were discarded by the judgment.[683] Talking specifically about the structure of any (emergency) fund, the Expert Group finds that *Pringle* allows participation by MS in an assistance mechanism on a *pro rata* basis (like in the ESM), whilst prohibiting participation based on joint and several liability.[684] Hence, institutional innovation or replacement of the ESM must necessarily be limited in scope.

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[678] For example, it is doubtful whether the assistance to Cyprus was necessary for the stability of the Eurozone as a whole. Vaubel (2014), 3. But see De Witte & Beukers, who come to the conclusion that it was. De Witte & Beukers (2013), 843.
[679] (5 March 2010), 'Belgian PM Leterme proposes European Debt Agency', *Reuters*.
[680] German Council of Economic Experts, *Annual Economic Report 2011/2012*, 9 November 2011.
[681] See for overviews De La Dehesa, G. (2011), *Eurobonds: Concepts and Implications*, in: Compilation of Notes for the Monetary Dialogue of March 2011 (EP ed.); Leino Sandberg, P. (2015), 'An Overview of Legal Aspects of Risk Sharing', WP 2016/037 *ADEMU Working Paper Series*. Also see the report by the Expert Group on Debt Redemption Fund and Eurobills. Expert Group on Debt Redemption Fund and Eurobills, *Final Report*, 31 March 2014.
[682] Leino Sandberg (2015).
[683] Expert Group on Debt Redemption Fund and Eurobills (2014), 59-60
[684] Expert Group on Debt Redemption Fund and Eurobills (2014), 60-61. Also see Athanassiou, P. (2011), 'Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible and What Not', 36 *European Law Review*, 572.

5.2 The Monetary Policy Mandate of the ECB

The supposed transformation of the ECB in the euro-crisis is often illustrated by reference to one part of a speech that ECB President Draghi gave in July 2012: "within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough".[685] From this, observers concluded that the ECB was willing to intervene in the markets on government bonds in order to guarantee the irreversibility of the euro.[686] The program of Outright Monetary Transactions (OMT) that was adopted by the ECB in September 2012 to give further substance to Draghi's announcement has been credited with saving the euro, even though the program has not been activated.[687]

Based on the actions (and promises) of the ECB during the crisis, a rather straightforward argument can be made that the ECB as a central bank has changed, because the economic reasoning behind its policies has supposedly changed. But that argument is not immediately convincing in a constitutional context. In his speech, Draghi asserted to stay within the mandate of the ECB. The fact that the ECB enacted new policies does not necessarily mean that the ECB is transformed in a constitutionally relevant manner. In contrast to the previous section, where the creation of new bodies and institutions, the use of international treaties and the adoption of an EU Treaty amendment led to the unavoidable conclusion that at least 'something' constitutionally relevant happened, it is still very much in dispute whether the actions of the ECB must be seen in the same light.

The focus in this section is on two aspects of the mandate of the ECB, namely the definition of the primary objective of the ECB and the scope of its monetary policy task. The first concerns the programs for government bond purchases, the second the division of labor between the ECB and the NCB's in providing liquidity assistance. The point of discussing these two aspects of the mandate of the ECB is to show the difficulty of applying the legal standards that are supposed to restrict the discretion of the ECB. The main reasons for this, it is found, lies in the institutional design of the ECB in combination with the sober description of the mandate in the

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[685] Draghi, M. (2012), Speech at the Global Investment Conference in London on 26 July 2012, available at www.ecb.europa.eu.
[686] See for examples Khan, M. (26 July 2016), 'Happy Mario Draghi day: four charts after 'whatever it takes'', *Financial Times*.
[687] De Grauwe, P. & Y. Ji (2015), 'Correcting for the Eurozone Design Failures: The Role of the ECB', 37 *Journal of European Integration*, 743.

Treaty. Although the CJEU's *OMT*-decision is exceptional in the sense that the Court became involved in a constitutional conflict on the question what exactly monetary policy is, the case failed to provide a comprehensive interpretation of the relevant Treaty articles in the same way the *Pringle* judgement had done.

The argument presented here builds on the distinction made in Chapter 3 between the rules governing the institutional relations of the ECB and the rules governing the mandate. To recapitulate, the argument is that the rules on the institutional relations of the ECB are well-defined in the Treaty and that the lack of a single institution responsible for fiscal/economic policy further stresses the legal rules in the actual organization of the institutional relations of the ECB. Although the strict mandate of the ECB serves as the justification of its independence, it is far less developed as a legal tool to apply as an effective restriction on the powers of the ECB. Chapter 4 discussed the institutional relations and the independence of the ECB[688], the focus here is on the mandate.[689]

5.2.1 The Singleness of Monetary Policy

At first glance, the manner in which the actions of the ECB developed during the crisis resembles that of the bailouts, described in the previous section. A first measure, the Securities Markets Program (SMP), was hastily constructed to react to the immediate needs of the crisis. The SMP entailed purchases on the secondary markets of government bonds of Eurozone MS. As the crisis developed, SMP was found to have some defects. The replacement of SMP, the OMT program, formulated stricter conditions for its application. A serious legal challenge to the OMT program ended up before the CJEU, which found it to be in conformity with EU law. However, a key difference with the previous section is that the conditions introduced in the second wave of measures are not framed as flowing directly from the Treaty. OMT does not aim to reinterpret the mandate of the ECB in terms of any legal limits on its own scope of action. As a result, the subsequent judicial process has difficulty coming to a comprehensive new interpretation of the mandate of the ECB. The judicial decision therefore also does not

[688] For the developments on the institutional relations of the ECB during the crisis, see the work of Beukers. Beukers (2013).
[689] The argument in this chapter has a slightly broader than the one presented in Chapter 3. There, the argument concerned only the objective of monetary policy, here the 'mandate' of the ECB covers both the objective of monetary policy and the task of monetary policy.

'freeze' the development of the interpretation of EMU primary law, as can be witnessed by of the adoption of the Public Sector Purchases Program (PSPP).

5.2.1.1 SMP

Adopted on 14 May 2010, the SMP allowed the Eurosystem to buy on the secondary market debt instruments of Eurozone MS.[690] The SMP decision was short on detail, as vital aspects of the program were not disclosed, such as the overall size of the program and the duration.[691] The program was used to buy bonds of Greece, Ireland, Portugal, Spain and Italy up until September 2012. Purchases totaled 200 billion euro, almost half of which consisted of Italian bonds.[692]

The official objective of the program was "to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism".[693] This raises questions about the legality of SMP. The measure is commonly regarded as an 'unconventional monetary policy' and as an open market operation, the measure falls under article 18 ESCB/ECB Statute. Because the bonds were not bought directly the program also did not appear to violate article 123 TFEU. This article prohibits, amongst other things, the ECB and the national central banks from directly purchasing debt instruments from the institutions, national governments and other public authorities. It thus expressly leaves open the possibility of purchases of such debt instruments on the secondary market. The main question concerning the legality of the SMP is its objective. Aside from the serious doubts that can be raised about the veracity of the stated purpose of SMP (the creation of the programme coincided with the decision by MS on bilateral loans to Greece), 'restoring the transmission mechanism' is an intermediate objective in light of the ultimate objective of ensuring price stability. The key question then is what limits there are on the ECB setting its own intermediate objectives.[694] Surely, not everything that disrupts the monetary policy transmission mechanism falls within the remit of the ECB.

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[690] ECB Decision (ECB/2010/5) of 14 May 2010 establishing a securities markets programme, OJ L 124/8.
[691] Eser, F. & B. Schwaab (2013), 'Assessing Asses Purchases Within the ECB's Securities Markets Programme', No. 1587, September 2013 *ECB Working Paper Series*, 1.
[692] ECB (21 February 2013), *Press release: Details on securities holdings acquired under the Securities Markets Programme*, availabele at www.ecb.europa.eu.
[693] Decision of the ECB, recital 3. Wilsher (2013), 515.
[694] Sester (2012), 166; Borger (2016), 174.

There were no policy conditions attached to the purchases of government bonds on the secondary market. Upon establishing SMP, the ECB merely took note of the statement of the Eurozone MS promising to meet their fiscal targets.[695] Nevertheless, the purchase of bonds of specific MS changed the relation between the ECB and those MS, especially for the countries that were not in a bailout program. The 'one v. many' dynamics that usually separated the ECB from the MS did not work here. For example, when the ECB – after a four-month hiatus – started buying Italian bonds again in August 2011, it also sent a letter to the Italian government suggesting that certain economic policy measures be adopted.[696] Although the change in the interactions with the MS allows the ECB to exercise a greater influence in the MS (the 'suggestions' to the Italians were duly implemented), it also opens up the ECB to pressure from those MS.

Adopting and executing SMP proved controversial. Opposition within the ECB came from the German members of the Governing Council. Axel Weber, head of the German Bundesbank, had resigned in February 2011, apparently believing that the German view stood in isolation and that he should not become – as was expected at the time – the next ECB president.[697] Jürgen Stark resigned from the ECB Executive Board in September 2011, after SMP had re-started a month earlier.[698] For the further development of the SMP (and the transition to the OMT) it is relevant how these two opponents to SMP were replaced. Whereas the new head of the Bundesbank, Jens Weidmann, was a vocal opponent of SMP[699], the new German member of the Executive Board, Jörg Asmussen, defended (the legality of) SMP.[700] The appointment of the former was a German affair; appointments to the Executive Board are a European affair, with the final decision made by the European Council. In combination with national political considerations within Germany leading up to the appointments, this difference in appointment procedures thus further isolated – but not eradicated – the opposition to SMP.

Opposition also came in the form of judicial challenges. Along with a number of other crisis measures, SMP was challenged before the Bundesverfassungsgericht on the ground that the

[695] Recital 5 of the SMP Decision
[696] Beukers (2013), 1598.
[697] Reiermann, C. & M. Sauga (2011), "Enormous Damage': Weber's Exit Highlights Merkel's Euro Problem', *Der Spiegel*; Meiers, F.-J. (2015), *Germany's role in the Euro crisis: Berlin's quest for a more perfect monetary union*, Springer, 41.
[698] Amtenbrink, F. (2011), 'Naar een effectievere economische governance in de Europese Unie?', 2011 *SEW*, 436.
[699] Meiers (2015), 41.
[700] Spiegel, P. (15 May 2014), ''If the euro falls, Europe falls'', *Financial Times*.

ECB violated article 123 TFEU, thus acted *ultra vires* and thereby violated article 38.1 of the German Constitution. In September 2011, the complaint was rejected without much discussion.[701] SMP was not directly challenged before the CJEU, but a related measure of the ECB was, thus signaling a heightened willingness to challenge monetary policy measures. The challenge was rejected by the CJEU on procedural grounds.[702]

Notwithstanding this opposition, the broader context in which SMP functioned changed throughout 2011 and 2012 in a way that can be seen as supportive of the actions of the ECB, or at least it allowed the ECB to reconsider the way it used the tool of government bond purchases. Firstly, financial assistance was no longer provided on an ad-hoc basis as with the Greek Loan Facility, but through the EFSM/EFSF. This meant that the negotiations on the assistance and the conditionality took a structured form. Moreover, the involvement of the ECB in the 'Troika' (the Commission, the IMF and the ECB) meant that it was continuously involved in the administration of the bailouts. Secondly, the adoption of the Six Pack meant that MS had committed to stronger surveillance of their fiscal policies. Lastly, in the early months of 2012, political agreement had been reached on banking union, thus showing the commitment of the MS to deeper integration.[703] Especially this latter development has been credited with giving the ECB the political cover to re-launch its bond buying program.[704]

5.2.1.2 OMT

When the ECB presented OMT and discontinued SMP in September 2012, it redefined the manner in which the ECB bought government purchases of MS in financial difficulties (that is, where the monetary policy transmission mechanism was blocked). The main changes from SMP to OMT are that the latter was presented as a commitment of the ECB to the integrity of the Eurozone, and that purchases are only made after agreement has been reached between the MS (in the EFSF/ESM) on the conditions for financial assistance.[705]

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[701] Bundesverfassungsgericht, 7 September 2011, 2 BvR 987/10, para 129.
[702] CJEU, Case C‑102/12 P, *Städter* v. *ECB*, EU:C:2012:723.
[703] Banking union in the context of European integration has three pillars: centralized banking supervision, a mechanism for the resolution of banks and lastly a European deposit insurance scheme. The first two pillars are now in place. On 29 June 2012, political agreement was reached in the Euro Area Summit (a meeting of the heads of states or government of the Euro Area) on the single supervisory mechanism. See the Euro Area Summit Statement of 29 June 2012, SN 2999/12, available on: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf.
[704] Véron, N. (2015), 'Europe's radical banking union', *Bruegel Essay and Lecture Series*, 14.
[705] ECB (6 September 2012), *Technical features of Outright Monetary Transactions*, available at www.ecb.europa.eu. "A necessary condition for Outright Monetary Transactions is strict and effective

As discussed in the previous section, when the MS wanted to renegotiate the manner in which bailouts were organized, this provided an opportunity to settle on a new interpretation of article 125 TFEU. For the ECB, there were few reasons to adopt a similar strategy with regard to its mandate, that is, to define (new) limits to its own discretion as flowing from articles 123 and 127 TFEU. The conditions under which OMT would be provided helped to rally political support *and* were useful in arguing for the legality of the program, but the key is that the conditions are not presented as requirements flowing directly from the Treaty.[706]

Nevertheless, the ECB did provide a more detailed explanation of its policy, especially as it related to the problems of the monetary policy transmission mechanism. According to the ECB, markets had unduly taken into account a risk of a MS leaving the Eurozone, driving up the spreads between government bonds.[707] As the irreversibility of the euro is a keystone of EMU, it fell within the mandate of the ECB.[708] The risk premiums attached by markets to government bonds were split into a part based on fundamentals and a part based on the risk of convertibility (in case of a MS exiting the Eurozone).[709] That latter part stood in direct conflict with the legal notion of the irreversibility of the euro. Markets were thus ignoring the legal foundations of the euro. Of course, it was by no means certain that this legal truth would be sustainable. From a factual point of view, the markets might have been correct to assume that a MS might leave the Eurozone. By claiming that the risk premiums were not based on 'fundamentals', the ECB in effect did not say that the markets were wrong, but that they should be proven wrong *by the*

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conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme." OMT is furthermore only executed "as long as programme conditionality is fully respected." According to Viterbo, this is a shift to *explicit* conditionality. Viterbo, A. (2016), 'Legal and Accountability Issues Arising from the ECB's Conditionality', 1 *European Papers*, 505.

[706] Wilsher (2013), 529.

[707] Draghi, M. (6 September 2012), *Introductory statement to the press conference (with Q&A)*, available at www.ecb.europa.eu. Smits (2015), 1165.

[708] Draghi (6 September 2012). Particularly instructive is the following exchange at the Q&A: "Question: Mr Draghi, you repeated that the euro is irreversible. What gives you the democratic legitimation, the authority to say that? Because I have looked it up in the Treaty. It does not say anywhere that it is the role of the ECB to decide what kind of currency the European countries have. Thank you.
Draghi: What I said exactly is that – and I repeat what I said in London the first time – we will do whatever it takes within our mandate – within our mandate – to have a single monetary policy in the euro area, to maintain price stability in the euro area and to preserve the euro. And we say that the euro is irreversible. So unfounded fears of reversibility are just what they are: unfounded fears. And we think this falls squarely within our mandate."

[709] Asmussen, J. (11 June 2013), *Introductory statement by the ECB in the proceedings before the Federal Constitutional Court*, available at www.ecb.europa.eu.

ECB.[710] Within its objective of maintaining price stability, the ECB thus also found room to act as a guarantor of the integrity of the Eurozone.

The Bundesverfassungsgericht was not convinced by the interpretative moves of the ECB and made, in a highly dramatic turn of events, its first preliminary reference to the CJEU. In its reference, it argued that since the MS are responsible for who is let into the Eurozone, the issue of membership of the Eurozone should not be of any concern to the ECB.[711] However, the Bundesverfassungsgericht focused mostly on the question whether the conditions included in the OMT decision make OMT a measure of economic, instead of monetary, policy. The Bundesverfassungsgericht reasoning in this case seems to be largely based on the discussion in *Pringle* on the difference between monetary and economic policy.[712] This has the rather odd effect that the preliminary reference appears to be more concerned with the specific conditions under which OMT would be implemented, than with the interpretation of the mandate of the ECB.

The CJEU also spends remarkably little time discussing the objective of safeguarding the singleness of the Eurozone.[713] It merely remarked that article 119(2) TFEU requires that monetary policy must indeed be 'single'.[714] Whereas the Bundesverfassungsgericht saw the requirement that OMT must be preceded by an agreement on conditionality in the EFSF/ESM as proof of its nature of economic policy, the CJEU saw it the other way around; the requirement helps monetary policy from unduly interfering with economic policy.[715] The CJEU also discusses the conditions under which purchases of government bonds on the secondary market might nevertheless violate the prohibition of monetary financing. Here, the CJEU highlights several aspects of OMT that help it stay clear of this prohibition, such as the announcement of the ECB to not buy bonds too soon after they are issued so as to leave time for a market-price to develop, but does not discuss which parts were necessary.

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[710] Yowell, P. (2014), *Why the ECB Cannot Save the Euro*, in: Legal Challenges in the Global Financial Crisis: Bail-Outs, the Euro and Regulation (W.-G. Ringe & P.M. Huber eds.), 102.
[711] *BVerfG*, decision of 14 January 2014, 2 BvR 2728/13, paras 72 and 95-98.
[712] Beukers, T. (2014), 'The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"', 15 *German Law Journal*, 345; Borger (2016), section 5.3.
[713] CJEU, Case C-62/14, *OMT,* EU:C:2015:400.
[714] *OMT,* para 48.
[715] *OMT*, para 57-60.

The effects of the judgment of the CJEU are twofold. Firstly, it accepts without much discussion the broadened mandate of the ECB by allowing it to pursue the objective of eliminating the fears of a euro break-up.[716] Secondly, by signaling that there is a possibility of purchases of government bonds on the secondary markets might violate the prohibition of monetary financing, but without specifying exactly under which conditions that might be, it invites further litigation.[717]

5.2.1.3 PSPP

Despite vigorously defending its broadened mandate on the singleness of monetary policy, the adoption of PSPP undermines the arguments of the ECB. Even before the CJEU had announced its decision on OMT, the ECB had launched another program that involved the large-scale purchase of sovereign debts.[718] In contrast to the SMP and the OMT, where the purchases of sovereign bonds would be sterilized so as to not to expand liquidity, the purpose of the PSPP was to ease monetary conditions in the Eurozone, with the intention to bring back inflation to 2%. In contrast to previous operations, the risks culminating from these purchases would not be carried by the NCB's collectively.[719] Although the ECB has quite some discretion in deciding on the allocation of risk, the justification given here to reject risk-sharing contradicts the unity of the Eurozone.[720]

The main reason why risks are not shared under PSPP, it appears, is the internal resistance in the ECB. Whereas the US Federal Reserve and the Bank of England had started programs of quantitative easing some time earlier, the ECB was hesitant. Especially the members of the Governing Council from Northern European MS opposed the buying of government bonds on the secondary market, for fears that it would reduce the pressure on (especially Southern

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[716] Also see Louis, J.-V. (2016), 'The EMU after the Gauweiler Judgment and the Juncker Report', 23 *Maastricht Journal of European and Comparative Law*, 61.
[717] For an opposite conclusion, see Louis (2016), 61.
[718] The PSPP is part of the Extended Assets Purchases Program, which also includes a third covered bond purchase program. Purchases under the PSPP also cover bonds of international and supranational bodies.
[719] For the risk distribution under SMP, see ECB Decision (2010/24) of 25 November 2010 on the interim distribution of the income of the European Central Bank on euro banknotes in circulation and arising from securities purchased under the securities markets programme, OJ L 6/35 (repealed).
[720] Article 32 ESCB/ECB Statute. Louis (2016), 66. In the *OMT*-case, the CJEU had found that the lack of risk-sharing was acceptable because open-market operation "inevitably expose it to a risk of losses and that Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated". *OMT*, para 125.

European) MS to implement economic reforms.[721] On top of this, it was feared that an expansion of the ECB balance sheet through the purchase of government bonds would increase the redistribution risks, meaning that if a MS would default, the taxpayers of the other Eurozone MS would carry the costs. Bond buying without risk-sharing would then at least assuage part of the fears. It appears that this is what convinced the Governor of the Nederlansche Bank, Klaas Knot, to support PSPP, leaving the German opposition isolated.[722] Moreover, the tone of the German opposition in the Governing Council was significantly milder in comparison from the opposition to OMT. Specifically, the objections to PSPP were based on economic considerations, not legal ones.[723]

As has been discussed in Chapter 3, the ESCB was created with a strong commitment to decentralization. It is therefore not uncommon that the specific tasks in relation to monetary policy or supportive tasks are assigned to specific national central banks.[724] There is also no requirement that monetary policy is executed in a uniform manner throughout the Eurozone, as was confirmed by the CJEU in the *OMT* case.[725] Given that there might be different circumstances in different MS, the implementation of monetary policy may differ. However, it is the specific reasoning employed to justify the lack of risk sharing that shows that what is at stake here is the mandate of the ECB. Executive Board member Benoît Cœuré explained the rationale for the lack of risk-sharing in the following way:

> "we have taken into account the specificities of the euro area, meaning that we operate in an environment of decentralised national fiscal authorities, and the ECB has no mandate to engage in large-scale pooling of fiscal risks."[726]

In other words, the decision was based on a specific understanding of the constitutional nature of the Eurozone, not on specific policy considerations relating to the effectiveness of monetary policy or the goal of price stability. Given the importance of the singleness of monetary policy

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[721] Bundesbank (2015), *press release: "Purchase of government bonds harbours risks"*, available at: www.bundesbank.de.
[722] Buell, T. (16 January 2015), *ECB's Knot Supports QE if National Banks Buy Country's Bonds*, The Wall Street Journal.
[723] Bundesbank (2015).
[724] Wellink, N., et al. (2002), 'The role of national central banks within the European System of Central Banks: The example of De Nederlandsche Bank', August 2002 *DNB Onderzoeksrapporten*.
[725] *OMT*, para 55 and 89.
[726] Cœuré, B. (2015), *Embarking on public sector asset purchases. Speech at the Second International Conference on Sovereign Bond Markets, Frankfurt, 10 March 2015*, available at www.ecb.europa.eu.Also see the statement of Draghi, as quoted by Louis (2016), 66. "The Governing Council has full control over all the design features of the programme. The specific risk-sharing agreement takes into account the unique institutional structure of the euro area, in which a single currency and a single monetary policy co-exist alongside 19 national fiscal policies".

for OMT, it is surprising – to say the least – that the decentralized nature of fiscal policy takes precedence here over the nature of monetary policy.[727] Moreover, it raises the question in what other circumstances the ECB *ought* to take the decentralized fiscal environment into account. What PSPP thus shows is the wide discretion of the ECB, not only in making and implementing monetary policy, but also in applying the principles of EU constitutional law.

5.2.2 The Responsibility for Providing ELA as Part of Monetary Policy?

The second topic discussed here is the definition of what monetary policy is in relation to the division of labor between the NCB's and the ECB. At introduction of the euro, the ECB had decided that Emergency Liquidity Assistance (ELA) – normally considered to be part of monetary policy – remained a responsibility of the NCB's. A principled application of the division of labor would then require that both the ECB and the NCB's check whether their actions stay within their respective fields. In practice, this is not the case. The aim of the analysis here is not to throw into doubt the legality of the actions of either the ECB or the NCB's, but rather to show that the failure to apply a specific legal test meant that the ECB could apply another legal test, as a result of which it gained a strategic advantage during the crisis.

During the euro-crisis, the ECB has provided liquidity support to European banks on an extraordinary scale. For example, in December 2011 the ECB announced two Long Term Refinancing Operations (LTRO).[728] Although the LTRO's are part of the normal tool-set of the ECB as open market operations (article 18 ESCB/ECB Statute), the size of these two LTRO's (over 1 trillion euro) and their duration (up to three years) made them extraordinary.[729] The adoption of these LTRO's must be seen in light of the troubled financial status of European banks at the time. According to the newly appointed ECB President Draghi, the trillion-euro intervention prevented "a major, major credit crunch". [730] The liquidity support to banks must however also be seen in the light of the financial situation of several MS at the time. The ECB

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[727] Louis (2016). Zilioli's counterargument is limited to observing that decentralization is the norm in the ESCB and that the centralization of risk not required. Zilioli, C. (2016), 'The ECB's Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union', 23 *Maastricht Journal of European and Comparative Law*, 176.
[728] Lastra & Louis (2013), 93.
[729] Praet, P. (2016), *The ECB and its role as lender of last resort during the crisis. Speech by Peter Praet, Member of the Executive Board of the ECB, at the Committee on Capital Markets Regulation conference on The lender of last resort – an international perspective, Washington DC, 10 February 2016*, available at www.ecb.europa.eu.
[730] Draghi, as quoted in Atkins, R. & P. Jenkins (27 January 2012), 'EU avoided 'major, major credit crunch'', *Financial Times*.

had paused SMP only a few months before and the interest-rates of several MS had been rising again. As the fate of banks and states was strongly intertwined, the intervention by the ECB had (not unexpected) positive effects for several troubled MS.[731] Overall, this was a strong contribution of the ECB to the overall financial stability of the Eurozone.[732] These actions of the ECB during the Euro-crisis aimed at providing sufficient liquidity to banks have been relatively uncontroversial. In fact, economists complain more about the inactivity of the ECB in this area, compared to other central banks, than about its activity.[733]

During the crisis, several NCB's also offered liquidity support to banks, albeit under their own responsibility and on a smaller scale than the ECB. In 1999, the ECB had decided that ELA did not fall under its own task of monetary policy, but remained a responsibility of the MS.[734] Under article 14 ESCB/ECB Statute, the NCB's may execute tasks other than those flowing from the treaty and on their own responsibility. The Governing Council may only intervene if the actions threaten the ESCB tasks and objectives under the Treaty. Hence, many MS had adopted legislation that allowed their NCB to offer ELA.[735] As the crises in the MS developed through problems in the banking-sector, the NCB's offered ELA to troubled banks at least in Ireland, Greece and Cyprus. In these MS, a credit crunch had already occurred and the support of the NCB's helped slow down the speed with which financial troubles spread. During the crisis, the manner in which ELA was distributed changed from a case-by-case assessment to a systems-wide approach.[736]

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[731] This liquidity creation should also be seen in the light of the amendments the ECB had made during the crisis concerning the requirements on the quality of collateral that banks would have to pledge. At several moments, the ECB had made it easier for banks to use government bonds as collateral. In combination with the liquidity creation, this led banks to invest (again) in government bonds of distressed Eurozone MS. See Tuori & Tuori (2014), 103; Pisani-Ferry (2014), 109; Wilsher (2013), 522.

[732] Adamski also describes how the two LTRO's reduced for some time the risk of sovereign default, but argues that the measures violate the spirit of the prohibition on monetary financing. Adamski (2012), 1336. Memorandum of Understanding on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability (2008), 30: "If there is a liquidity crisis, the home country Central Bank, in close cooperation with the Group Supervisor and the other relevant Financial Supervisory Authorities and other Central Banks concerned, will manage the situation, including a possible Emergency Liquidity Assistance (ELA) intervention." Also see Steinbach, A. (2016), 'The Lender of Last Resort in the Eurozone', 53 *Common Market Law Review*, 369.

[733] Bibow, J. (2015), 'The Euro's Savior? Assessing the ECB's Crisis Management Performance and Potential for Crisis Resolution', 2015 *Levy Economics Institute Working Paper*, 6.

[734] See ECB (1999), 'Annual Report 1999', 98.

[735] An overview of national legislation on ELA can be found in the doctoral thesis of Tupits. Tupits, A. (2010), *Legal Framework for the Eurosystem National Central Bank*, Dissertation, defended at University of London.

[736] Praet (2016).

From a legal point of view, it is not possible for the competences of the NCB's and the ECB to overlap, but in practice it is hard to distinguish between the actions of the ECB and the NCB's. What distinguishes the actions of the NCB's from the actions of the ECB are mostly a matter of degree and timing. The LTRO's aimed at preventing (another) credit crunch and alleviated the tensions in a number of MS, ELA was provided when the crisis hit a specific MS.[737] Although ELA has, currently, a slightly broader scope than the support provided by the ECB, for example with regard to eligible collateral, there appear to be no hard criteria that distinguish ELA from support by the ECB.[738]

This similarity can be seen as problematic from a legal point of view. The decision of the ECB in 1999 to see ELA as not being a part of monetary policy creates a separation between the tasks of the NCB (based on national law) and the ECB. Article 14.4 ESCB/ECB Statute allows tasks "other than those specified in this Statute" to be performed by the NCB's. Insofar a task is defined to be a competence of the NCB's, this automatically means it is considered not to be a competence of the ECB. What an NCB can do under article 14.4 of the Statute, may not be done by the Eurosystem and vice-versa.[739] Therefore, when the ECB determined that ELA was a task of the NCB's, it also defined its own monetary policy mandate in a negative sense.[740] The problem is that during the crisis the interventions by the NCB's and the ECB have been accepted *prima facie* as being performed on the right level, that is, without asserting that whatever the NCB's were doing was actually ELA or without checking that what the ECB was doing was not ELA. In other words, the ECB can, in cases of emergency, provide liquidity assistance as long as it avoids using capital letters.[741]

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[737] Similarly, see Steinbach (2016), 364-365.
[738] Praet (2016).
[739] Under article 127(5) TFEU "the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating (…) to the stability of the financial system". Steinbach finds that this gives the ECB a shared competence, next to the NCB's. Although article 127(5) TFEU indeed gives the ESCB a task with regard to financial stability, but it is also clear that ECB action is dependent on the policies pursued by the competent authorities. It is therefore implausible to defend the actions of the ECB on this basis.
[740] Lastra & Louis (2013), 90.
[741] This does not appear to be a consideration for Zilioli. She finds that "ELA is universally considered to be a function of a central bank - and there is no doubt that the ECB is a fully-fledged central bank. The ECB has been conferred the exclusive competence to conduct the monetary policy of the euro area. An implied power of such competence is the power to grant, at the discretion of the central bank, ELA support." Zilioli, C. (2015), *Introduction*, in: ECB Legal Conference 2015: From Monetary Union to Banking Union, on the way to Capital Markets Union: New opportunities for European integration (ECB ed.), 52.

In 2013 the ECB published the details of the procedure that had been in place since 1999 by which the Governing Council is to be informed on the provision of ELA. If the provision by an NCB of ELA for a group of financial institutions exceeds 2 billion euro, the Governing Council will consider whether "whether there is a risk that the ELA involved may interfere with the objectives and tasks of the Eurosystem".[742] So the ECB does perform a test on the relation between ELA and monetary policy, but the problem is that the test is incomplete. Prior to the test whether ELA interferes with monetary policy, the question should be whether ELA, as provided in the case at hand, should not already be seen as a form of monetary policy (and therefore a responsibility of the ECB).[743] This seems like a minor point, but is of great importance in the power-relations between the ECB and the NCB's. Under the current configuration, the ECB can let the NCB absorb the risks under ELA, even if it believes that the liquidity assistance was a matter of monetary policy. The test whether ELA interferes with monetary policy allows the ECB to use cutting off support at a politically appropriate time.

Especially after the announcement of OMT, when the ECB had lost its tool to effectively intervene in specific government bond markets, the threat of cutting of ELA was a vital tool during the negotiations in the run up to a bailout. Because ELA was a national competence and the risks were not shared throughout the ESCB, the ECB could not be accused of using monetary policy tools to prop up the financial situation in a MS. With the negotiations for the bailouts mainly taking place in the Eurogroup – to which the ECB is invited to participate – the ECB is moreover particularly well placed to assess the effectiveness of any threat to cut or limit ELA.[744]

5.3 Legislative Discretion in EU Economic Governance

The third part of euro-crisis law discussed here are the new pieces of legislation on economic governance. With each bailout, the call to prevent future crisis through stricter rules grew louder. [745] The development of EU economic governance was therefore not a reaction to the

[742] Gortsos, C.V. (2015), *Last resort lending to solvent credit institutions in the euro area before and after the establishment of the SSM*, in: ECB Legal Conference 2015: From Monetary Union to Banking Union, on the way to Capital Markets Union: New opportunities for European integration (ECB ed.), 58-63.
[743] Steinbach finds that ELA to significant banks should be considered a competence of the ECB. Steinbach (2016), 370-371.
[744] Beukers (2013), 1594. Also see Black, J., et al. (24 June 2015), 'How Draghi Shifted ECB Crisis Tactic Amid Greek Brinkmanship', *Bloomberg*.
[745] Hinarejos (2015), 29-34.

immediate economic circumstances of the crisis, such as the bailouts and the bond purchases by the ECB, but a response to the political need for a narrative that the necessary steps were being taking to prevent future crises.[746] As a result, the reforms of EU economic governance during the crisis took a different pace than the other measures. For example, the adoption of the first set of legislation, the Six Pack, was fast for EU law standards (under a year), but glacial compared to other euro-crisis measures. Another feature of the development of EU economic governance is that new measures were not based on the experiences with the previous euro-crisis measures. For example, the ink on the Six Pack had barely dried before a new round of reforms was proposed.[747]

This section focuses on the discretion of the EU legislator to set rules on economic governance. As argued in previous chapters, the constitutionalization of the rules on economic governance aimed at leaving little discretion for the legislator. The adopted legislation at the start of the euro, the SGP, conformed neatly with the limits set in the Treaty. Crucially, the SGP did not create a '3% rule'. The Lisbon Treaty, however, had introduced article 136 TFEU which left considerable room for interpretation as to the level of discretion for the legislator. The question for this section then is whether the reforms of economic governance have led to new interpretations of the Treaty limits, and then especially concerning article 136 TFEU.

5.3.1 Six Pack

The first set of measures to reform economic governance was adopted late 2011. The five regulations and one directive (also known as the Six Pack) are based on articles 121(6), 136, and 126(14) TFEU. In contrast to the SGP from 1997 and the reform thereof in 2005, the Six Pack goes beyond providing implementing rules on the procedures described in the Treaty and actually creates new steps (including sanctions) in the procedures.

The Six Pack consists of ordinary secondary legislation, but the manner in which it was proposed was quite unconventional. In March 2010, the European Council assigned the task of preparing the deepening of EU economic governance both to the Commission and to a special task force under the supervision of European Council President Van Rompuy. The Commission

[746] Laffan, B. & P. Schlosser (2015), 'The rise of a fiscal Europe? Negotiating Europe's new economic governance', *Florence School of Banking and Finance Research Report*.
[747] But see for an early assessment of the European Semester, which had been informally applied prior to the Six Pack, Hallerberg, M., et al. (2012), *An Assessment of the European Semester*, European Parliament.

was to come with proposals "making use of the new instruments for economic coordination offered by Article 136 of the Treaty (TFEU)" and the Van Rompuy Task Force would explore "all options to reinforce the legal framework".[748] As a result of the overlap in mandates, both the Commission and the Van Rompuy Task Force aimed to seize the initiative, each attempting to build on the momentum for reform to come to a realistic proposal. As Laffan and Schlosser observed, "the historic resistance" to reform of economic policy coordination had disappeared.[749] In the end, the Report of the Task Force and the proposals of the Commission closely aligned, both suggesting to adopt more or less the same far reaching proposals for reform. Crucially, both proposals were based on the existing legal bases in the Treaties.[750]

Following the suggestion of the European Council in the instruction to the Commission that article 136 TFEU apparently allows new instruments, the Six Pack indeed makes abundant use of this legal basis for economic governance.[751] It should be kept in mind however, that the different parts of the Six Pack rest on different legal foundations, that is, not all parts of the Six Pack invoke article 136 TFEU. Statements about the illegality of the Six Pack should thus carefully specify what legal basis is violated.[752]

Before discussing five points on which the Six Pack raises constitutional concern, a short overview of the Six Pack is necessary. Two of the five regulations provide further amendments to the preventive and corrective arm of the SGP, and are based on articles 121(6) and 126(14) TFEU respectively. The preventive arm creates the European Semester, which brings together

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[748] Chang, M. (2013), *Constructing the Commission's Six-Pack Proposals: Political Leadership Thwarted?* , in: The European Commission in the Post-Lisbon Era of Crisis (M. Chang & J. Monar eds.), 155. European Council Conclusions, march 2010, 6.
[749] Laffan & Schlosser (2015), 2.
[750] Amtenbrink (2011), 436-437.
[751] Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306/1; Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306/8; Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. OJ L 306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306/25; Council Regulation 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306/33; Council Directive 2011/85 of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 306/41.
[752] See for a counter-example Joerges (2015), 225. "[T]hrough the supervision and control of macroeconomic imbalances, it disregards the principle of enumerated powers and, by the same token, cannot respect the democratic legitimacy of national institutions, in particular the budgetary powers of the parliaments of the member states receiving assistance."

several forms of economic coordination in one procedure. The corrective arm now establishes a presumption that a deficit higher than 3% must be found excessive by the Council and allows the Commission to impose enhanced surveillance, including missions, on MS with the purpose of assessing the "actual economic situation" in a MS. A third regulation, based on articles 121(6) and 136 TFEU, further complements the preventive and corrective arms of SGP by creating more possibilities for sanctions. These sanctions relate to new steps in the procedures and are deemed to be adopted by the Council upon recommendation from the Commission, unless a qualified majority in the Council is opposed. This is called reverse qualified majority voting (R-QMV).[753] Two other regulations create a whole new procedure based on article 121 TFEU, with the sanctions connected to this procedure again also being based on article 136 TFEU and also using R-QMV. This new procedure is the macro-economic imbalances procedure and organizes a broad review of the economic performance of the MS.[754] Lastly, the directive regulates the budgetary rules that should be in place on the national level. This includes, amongst other things, the presence of numerical fiscal rules and an independent body responsible for monitoring compliance.

On five points the Six Pack reforms economic governance in ways that appear to contradict the Treaties, or at least presume a different interpretation of the relevant provisions than heretofore applied. The first and most prominent of the reforms in this regard is the creation of new steps in the multilateral surveillance procedure that lead to sanctions.[755] For example, Regulation 1175/2011 (amending the preventive part of the SGP, based on article 121(6) TFEU) adds an extra step to the multilateral surveillance procedure whereby the Council can take a decision finding that a MS has taken no effective action in response to a recommendation. Regulation 1173/2011 (based on both articles 136 and 121(6) TFEU) then determines that if such a decision is taken, the Council can oblige that MS to lodge an interest-bearing deposit.[756] Where the multilateral surveillance procedure under article 121 TFEU ends with a non-binding recommendation, the Six Pack introduced sanctions in this part of economic governance on the

[753] Sometimes referred to as reversed majority voting. See for an early analysis Van Aken, W. & L. Artige (2012), *Reverse Majority Voting in Comparative Perspective: Implications for Fiscal Governance in the EU*, in: The Euro Crisis and the State of European Democracy (B. De Witte, et al. eds.).
[754] Ruffert (2011), 1795.
[755] The original SGP already included a new step in the procedure, namely the decision to hold the EDP in abeyance (art 9 Regulation 1467/96). The Court in *Commission* v. *Council* accepted that the Regulation could impose on the Council the obligation to respect the conditions for the decision of holding the procedure in abeyance. The difference between that step in the procedure and the extra steps introduced by the Six Pack is that the latter awards the Council more opportunities to sanction the MS.
[756] A similar construction is also found with regard to sanctions in the macro-economic imbalances procedure.

basis of article 136 TFEU. This expansive reading of article 136 TFEU by the legislator is of course anathema to those following a strict interpretation, but it is also clear that the use of article 136 TFEU was at least connected to the procedures found in article 121 TFEU. This left open the possibility that a coherent narrative could be developed that gave a plausible interpretation of article 136 TFEU that at least took account of the formulation of limits as found in the text of that article.

A second issue is the use of article 136 TFEU in conjunction with article 121 TFEU to complement the EDP. It should be remembered that article 136 TFEU holds that the Council can adopt measures "in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14)". The latter part seems to prohibit the Council from adopting regulations on the EDP. Although Regulation 1173/2011 follows this instruction by not mentioning article 126(14) TFEU as a legal basis, it does provide for extra sanctions in the EDP. [757]Article 136 TFEU is interpreted as allowing the legislator to intervene in the EDP, as long as the relevant legislation does not refer to article 126(14) TFEU.

Thirdly, the introduction of R-QMV in the Six Pack has raised concern. R-QMV is found in eight places, namely in Regulations 1173/2011 (three times), 1174/2011 (twice), 1175/2011 (twice) and 1176/2011 (once).[758] Whereas the former two regulations are based both on article 136 TFEU and 121(6) TFEU, the latter two are based only on article 121(6) TFEU. Palmstorfer observes that the general treaty provisions on voting in the Council do not allow for the introduction of R-QMV.[759] Article 16(3) and (4) TEU state that the Council shall act by QMV, save where otherwise provided for *by the Treaties*. Such an exception cannot be found in article 121(6) TFEU. It "does not confer upon EP and Council the power to adopt a regulation providing for the adoption of decisions under R[Q]MV."[760] Hence, for Palmstorfer, 'Lisbon' does not allow R-QMV in the Six Pack.[761] However, he applies a restrictive interpretation of

[757] Tuori & Tuori (2014), 171.
[758] In Regulation 1175/2011 there is no requirement of a *qualified* majority to resist to a recommendation of the Commission. See Amtenbrink (2011), 439.
[759] Palmstorfer, R. (2013), 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union?', *European law Journal*, 10 (online edition).
[760] Palmstorfer (2013), 13 (online edition).
[761] Also see Oberndorfer, L. (2016), *A New Economic Governance through Secondary Legislation? Analysis and Constitutional Assessment: From New Constitutionalism, via Authoritarian Constitutionalism to Progressive Constitutionalism*, in: The Economic and Financial Crisis and Collective Labour Law in Europe (N. Bruun, et al. eds.), 41. "The 'introduction' of a reverse majority voting in the different regulations is manifestly illegal."

article 136 TFEU. The question is whether a less strict reading of article 136 TFEU could at least justify the use R-QMV in the Regulations based on this provision. It should then first be noted that R-QMV is only applied to new steps for the procedures, meaning that R-QMV at least does not violate the voting requirements of the steps of the procedure based on article 121 and 126 TFEU.[762] Nevertheless, it would still require reading into article 136 TFEU an exception to article 16 TEU. Given the resistance in the Council to use the possibilities under the multilateral surveillance procedure and the excessive deficit procedure to admonish MS for their economic policies prior to the crisis, it is not a big step to argue that a reversal of the voting procedure is necessary for "the proper functioning of economic and monetary union" and therefore permissible under article 136 TFEU.

Fourthly, Directive 2011/85 sets requirements for the budgetary process in the MS on the basis of article 126(14) TFEU. It should be recalled here that that provision refers to implementation of Protocol 12 On the Excessive Deficit Procedure. The Commission stated in its proposal for this Directive that it implements article 3 of the Protocol.[763] This provision states that MS shall be responsible for the deficits of the government, including regional and local governments and that they shall ensure that national procedures enable them to meet their obligations. This provisions contrasts with the overall purpose of the Protocol, which is to lay down "[f]urther provisions relating to the implementation of the [ED] procedure"[764] There is little indication that this provision, in conjunction with article 126(14) TFEU, aimed to award the EU legislator the power to regulate national budgetary procedures, or if anything, allowed it to do so only by replacing the protocol through a special legislative procedure.[765] Hence, it was thus quite a leap to interpret article 3 of the Protocol not as a statement on the responsibility of the MS, but as allowing the Council to enact secondary legislation on this matter.[766]

A final point concerning the Six Pack is the introduction of a "3% rule" in the corrective arm of the SGP (Regulation 1467/97, as amended by Regulation 1177/2011). That something has

[762] Amtenbrink (2011), 439.
[763] The regulation names as its legal basis article 126(14), but "the Directive aims in particular to specify 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." Commission proposal for a Council Directive on requirements for budgetary frameworks of the Member States, COM(2010) 523, 3.
[764] Article 126(14) TFEU. See Oberndorfer (2016), 42-43.
[765] No academic literature I am aware of discusses this possibility.
[766] Oberndorfer (2016), 42-43.

changed in this regard is immediately visible in the addition of a subordinate clause in article 1 of the Regulation:

> "The objective of the excessive deficit procedure is to deter excessive government deficits and, if they occur, to further prompt their correction, *where compliance with the budgetary discipline is examined on the basis of the government deficit and government debt criteria.*" [emphasis added]

The key question is then how the duty of the Council to take all relevant factors into account is interpreted. According to article 2(4), the Council must still use all relevant factor for its assessment, but "specifically, the extent to which they affect the assessment of compliance with the deficit and/or the debt criteria as aggravating or mitigating factors." In other words, the Council retains its discretion to take all factors into account, but is invited to weigh these factors against the 3% of GDP deficit criterion.

The overall picture that emerges is that the Six Pack takes an ambitious approach to economic governance and in doing so requires an expansive interpretation of articles 121(6), 126(14) and article 136 TFEU. What was not provided, and which can only be partly reconstructed from the measures themselves, is a coherent narrative on the limits of what is possible under the three Treaty provisions. The legislative proposals from the Commission are rather unhelpful on this point. As a result, it is also unclear where the legislator envisioned the boundaries of its own discretion. So, even if the reforms can be seen as legal under a broadened interpretation of the Treaties, it is unclear under what interpretation exactly.

5.3.2 Fiscal Compact

Even before the negotiations on the Six Pack were finalized, new plans for budgetary discipline were being drawn up. For example, a joint letter by the French President Sarkozy and the German Chancellor Merkel in August 2011 called for "ever closer coordination of national budgetary and economic policies".[767] This letter was addressed to European Council President Van Rompuy who was working on a new report on "Genuine Economic and Monetary

[767] Joint letter from Nicolas Sarkozy, President of the Republic, and Angela Merkel, Chancellor of Germany, *Letter to President Van Rompuy*, 17 August 2011.

Union".[768] Even though this letter still refers to implementation through secondary legislation, it does so in convoluted terms. The letter was seen as critical of the Commission and in favor of intergovernmental solutions.[769] In November 2011, the Commission then proposed the Two Pack (discussed below). This proposal thread similar grounds as the letter from Merkel and Sarkozy, including the call to adapt drafts of national budgets to the recommendations coming out of the European Semester.[770] Van Rompuy then presented an Interim Report in December 201, proposing to revise Protocol 12 on the excessive deficit procedure through unanimous Council decision or to amend the Treaties more fundamentally. Or, alternatively, it was suggested that progress in Economic Union could come through the use of Enhanced Cooperation (article 20 TEU and articles 326-334 TFEU). Several days later at the European Council, the route of Treaty change was considered unattainable, due to a veto from the UK.[771] Instead, 25 MS quickly agreed on an international treaty outside the EU legal framework: the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (better known for the name of its Title III: 'Fiscal Compact').

The failure to amend the Treaties in November 2011 is often attributed to British obstinacy.[772] This can only be part of the explanation. In plenty of other instances, the objections of a single party were easily bought off or otherwise overcome. The failure to introduce another treaty amendment, a year after the decision to amend article 136 TFEU, must be assessed both in terms of the forces blocking reform and those forces supporting reform. What the process above showed was the broadly shared consensus on the need for further reform of economic governance, even though the Six Pack had not even entered into force. What was lacking was a convincing analysis of why the – soon to be reformed – instruments of economic governance were defective and what was still possible under the Treaty. The expansive interpretation of articles 121, 126 and 136 TFEU had not led to consensus on what was impossible. Also, the proposal for the Two Pack by the Commission showed again the willingness to stretch the limits of the Treaty even further. As the idea for an amendment of the Treaty was mainly based

[768] A first report was submitted in June 2012, the final report in December 2012. The Report is commonly referred to as the Four Presidents Report, because of the involvement of the Presidents of the ECB, the Commission and the Eurogroup.
[769] Chang, M. (2013), 'Fiscal Policy Coordination and the Future of the Community Method', 35 *Journal of European Integration*, 264.
[770] Laffan & Schlosser (2015), 5.
[771] Craig, P. (2012), 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 *European Law Review*, 232.
[772] Craig (2012), 239.

on making the budgetary rules even stricter, it is unclear why exactly, from a legal point of view, a Treaty amendment was necessary. Without disregarding the sensitive political context of the debate, it should be obvious from the discussion above that the political forces for reform were missing a crucial argument: functional need.[773]

The treaty that was subsequently adopted by 25 MS indeed does not go much further than the Six Pack and the proposed Two Pack. The Fiscal Compact obliges the participating states to have a budgetary position that is balanced or in surplus, with the exceptions to this rule being quite narrowly defined. Participating states should moreover have in place a correction mechanism that is triggered automatically in case of significant deviation from the medium-term objective.[774] These rules could easily have been adopted under the Treaty, especially since Directive 2011/85 had already started to regulate the budgetary process in the MS. One part of the Fiscal Compact would have been difficult to implement through EU law, namely that the participatory states are required to support the proposals and recommendations of the Commission in the framework of the EDP unless a qualified majority in the Council opposes the proposal of the Commission. This would effectively make R-QMV applicable to all steps of the EDP. Under the Six Pack, R-QMV had only been applied to *new* steps in the procedure, respecting the voting arrangements for the existing steps.

The most controversial aspect of the Fiscal Compact was not the new rules on fiscal policy, but the manner in which the rules must be implemented in the national legal orders. Article 3(2) requires that the rules shall be adopted in the national laws of the participating states "through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes."[775] If this rule were implemented through EU law, the reference to implementation through constitutional law might clash with the requirement that the EU should respect the constitutional traditions of the MS, but it is clear that the rule as such can be implemented through other means than through MS constitutional law. Moreover, as Maduro noted, it is

[773] Peers (2012), 441. "e stability treaty is not necessary in any legal sense, given that it largely restates obligations that already apply pursuant to EU law or which could more easily have been adopted pursuant to further amendments of that law."
[774] Art 3(1)(e) Fiscal Compact.
[775] Art 3(2) Fiscal Compact.

anything but clear what it means that a rule has a 'permanent character'.[776] It is therefore difficult to distinguish this part of the Fiscal Compact from the obligation to implement a directive under EU law. Many MS indeed chose to implement the obligations under Directive 2011/85 in together with the obligations of the Fiscal Compact.[777]

The Fiscal Compact is of little help in establishing a coherent narrative on the limits on the discretion of the EU legislator in articles 121, 126 and 136 TFEU. In theory, a treaty like the Fiscal Compact can be of help in establishing such a narrative because it can be a clear statement of the participating states of what they believe is not possible under the EU Treaties. For the Fiscal Compact this is not the case because so many parts of the Treaty were in line with what was just adopted under the Six Pack. So, although the Fiscal Compact raises questions about whether the MS are allowed to move outside the EU legal order in order to replicate rules on the international level, it is of little help in interpreting the treaty rules.[778]

5.3.3 Two Pack

Even before the skirmish in the European Council on treaty reform and before the finalization of the negotiations on the Six Pack, the Commission had proposed in November 2011 two more regulations based on articles 136 and 121(6) TFEU. Adopted in 2013, this 'Two Pack' sets out procedures for the monitoring of draft budgetary plans and for the surveillance of MS in financial difficulties.[779]

The Two Pack complicates on two points the attempt to come to a coherent interpretation of the legal bases of economic governance. However, on one of the points discussed above the Two Pack offers consistency, namely on the use of R-QMV. The two pack introduces two more instances of R-QMV, both in relation to a new phase in economic governance called 'Post-Program Surveillance' (see below) and therefore unconstrained by the procedures already

[776] As found in Kocharov, A. (2012), 'Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty', 2012 *EUI Working Paper Law*.
[777] See the Country reports on www.eurocrisislaw.eui.eu.
[778] See Tuori & Tuori (2014), 177-180.
[779] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, OJ L 140/01; Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140/11.

found in article 121 TFEU.[780] It thus follows the line of the Six Pack whereby procedural steps described in the Treaty are not subject to R-QMV. It is also important to note that the Two Pack does not incorporate article 7 of the Fiscal Compact on R-QMV, despite the wish of the European Parliament to do so.[781] Hence, the tentative conclusion can be drawn that the legislator finds that R-QMV is only allowed for new procedural steps. Moreover, the fact that the Two Pack is also based on article 136 TFEU, might give credence to the narrative that R-QMV is *only* allowed on this basis (discarding the three instances in the Six Pack where R-QMV is based only on article 121(6) TFEU).

Other parts of the Two Pack are more difficult to align with the Six Pack. Firstly, there are renewed interferences with national budgetary procedures (articles 3 and 5 Regulation 473/2013). To a large extent, these rules are similar to those in Directive 2011/85. What is significant about these rules however, is that their interference with national budgetary procedures is not based on article 126(14), as Directive 2011/85, but based on articles 136 and 121(6) TFEU. It suggests that the legal bases of 121(6), 126(14) and 136 are interchangeable.[782] Moreover, using article 136 TFEU to impose requirements on national budgetary procedures can be seen as problematic, as the purpose of the measures based on this article must be to strengthen the coordination and surveillance of budgetary discipline. This implies that measures must relate to actions on the European level.

Secondly, on the issue of going beyond the procedures as found in the Treaties, the Two Pack is more ambitious than the Six Pack, especially with regard to the macroeconomic adjustment program (MAP) in Regulation 473/2013. The MAP aims to bring the negotiations on conditionality for a bailout based on the ESM into the sphere of the EU. In contrast to the earlier pieces of legislation, the MAP is not aimed at maintaining economic sustainability or improving economic conditions, it is aimed at *re-establishing* sound economic conditions and *restoring* the capacity of a MS to finance itself on the financial markets.[783] Logically, the

[780] Art 14(4) of Regulation 472/2013 concerns the adoption of recommendations by the Council, so therefore appears to follow art 121(4) TFEU. However, article 121(4) TFEU requires firstly that the Council find that MS economic policies are inconsistent with the broad guidelines as adopted by the Council under 121(2) TFEU.
[781] Despite a push from the European Parliament to do so. See De la Parra, S. (2013), 'The two pack on economic governance: an initial analysis', March 2013 *ETUI Background analysis*, 14.
[782] There is also the issue of the right legal form, namely regulation or directive. Whereas art 126(14) allows for directive or regulation, art 121(6) requires a regulation. The Six Pack properly distinguishes between the content for regulations and for the directive. The Two Pack, by reason of the legal basis, does not.
[783] Art 7(1) para 2 Regulation 472/2013. See Ioannidis (2014), 75.

procedure for establishing a MAP is interjected in the procedures for procuring financial assistance. The procedural steps for multilateral surveillances are not observed; the recommendations produced through other parts of EU economic governance ought merely to be 'taken into account' for the MAP.[784] The MAP thus stands outside the procedures for multilateral surveillance as found in article 121(3) and (4) TFEU. Insofar the MAP is based on 136 TFEU, it does not conform to the logic as previously employed in the Six Pack, where the connection to established procedures was a crucial element in all the legal innovations.

That there are problems with the legal basis of the MAP does not mean the program does not fulfil an important role in EMU. To the contrary, the Regulation, and the articles on the MAP in particular, brings together several EU law developments. Firstly, it provides a procedure for guaranteeing the policy consistency between the policy conditionality of the bailouts and EU economic governance.[785] Secondly, it provides a legal mechanism for ensuring that financial assistance is awarded under "strict conditionality".[786] Thirdly, it structures the involvement of EU institutions in the bailouts. And lastly, it provides an entry point for fundamental rights challenges to the bailouts.[787] Hence, the MAP appears to prioritize the first part of article 136 TFEU ("In order to ensure the proper functioning of economic and monetary union") over the other parts.

The Six Pack used article 136 TFEU to create extra procedural steps in economic governance that were not foreseen in article 121 and article 126 TFEU. Nevertheless, the extra steps created by the Six Pack were intertwined with the original procedures. The Two Pack used article 136 TFEU to create rules that are not directly connected to articles 121 and 126 TFEU. Nevertheless, the rules created by the Two Pack are closely related to other parts of EMU. The conclusion then is that the main limitation foreseen by the legislator on its own discretion in economic governance so far is, apparently, that the adopted measures must in some way relate to the current legal framework of EMU. Crucially, this does not mean that article 136 TFEU is an open-ended enabling clause. The common feature of all the new rules in economic governance is that they aim to restrict the national budgetary authorities from overspending. A

[784] Art 7(1) para 3 Regulation 472/2013.
[785] Ioannidis (2014).
[786] Article 136(3) TFEU.
[787] Kilpatrick, C. (2014), 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review*.

more fundamental reform of economic governance that moves away from this reliance on strict rules would therefore still require Treaty reform.

In contrast to the previous sections of this chapter, this section included little institutional interactions. So far, no case has landed before the CJEU on the reformed economic governance. The Fiscal Compact was the subject of several challenges on the national level, but this has not contributed to a better understanding of the Six Pack and Two Pack. The lack of contestation should not come as a surprise. Economic governance developed largely in the shadow of the bailouts, only making headlines when new measures were announced. Political attention was elsewhere.

That contestation has been lacking so far, of course does not mean that this will remain a permanent feature of the new economic governance. Given the speed with which the first case on economic governance landed before the Court, it seems likely that the current rules will be challenged before the Court, if sanctions are ever imposed on a MS. At that point, a new narrative on the legality of the measures will quickly sprout.

Conclusion

Euro-crisis law has not been exogenous to EU constitutional law. In this chapter, as in the previous ones, it was clear that there was no dichotomy between politics on the one hand, and 'constitutional law' on the other hand. New constitutional meanings were created through the application of constitutional processes. It is therefore inappropriate to state that the euro-crisis has seen the "return of politics" as the "pre-eminence of non-rule-based decisions".[788] The political events that played out during the crisis responded to the different opportunities and obstacles already in place in EU constitutional law. The emergence of new rules, new interpretations and new debates does not mean EU constitutional law was discarded. They emerged through EU constitutional law.

This chapter has looked at the development of legal narratives that underpin the different sets of measures of euro-crisis law. One conclusion is that these narratives are more or less refined, depending on the path through which the measures developed. The bailouts are accompanied

[788] van Middelaar, L. (2016), 'The Return of Politics: The European Union after the crises in the eurozone and Ukraine', 54 *Journal of Common Market Studies*, 496.

by an extensive narrative about their relation with article 125 TFEU, due to the involvement of the European Council and the CJEU. The bailouts have moreover led to a broader arrear of cases being brought before the Court regarding the legality of the actions of the institutions (and the Eurogroup). Although these cases have required the Court to review some aspects of the bailouts, they have (so far) not invited strict judicial supervision of the political process of the bailout negotiations.[789] For the mandate of the ECB there have been far fewer opportunities for organized opposition and interaction, as a result of which the CJEU could not build upon a broadly supported account of the legality of the measures. For economic governance, the narrative is fragmented and incomplete, mainly because there has been little political interest – so far – in opposing the measures on legal grounds.

In the three areas that were examined in this chapter, EU constitutional law remains a vital factor. In economic governance, the situation is paradoxical. The new rules impose new restrictions on MS economic and fiscal policies (and at last, there is a 3% rule), even though it appears to violate the rules of the Treaty. The new rules are not rules-based. Either in its application or in its further reform, it is likely that the debate over the Treaty limits will return. In the other two areas, the involvement of the CJEU has created different opportunities and obstacles for further evolution of EU law. In central banking, there suddenly is the emphasis placed by the Court on proportionality; for the no bailout clause it is now clear that plans for Eurobonds stumble over the hurdle of Treaty change.

It was argued in Chapter 2 that the choice for Maastricht was, in part, motivated by the political need to keep the MS collectively in control over the future. It should not come as a surprise then that at the moment firm decisions on the future of the euro needed to be made, it was the collective of MS that took control. But this control was only exercised in specific areas, mostly in relation to the bailouts. On the issue of central banking, the control of the ECB is still undisputed. For some time, the questions on the future of the euro, were extremely pressing, forcing the collective of MS to express itself. Insofar these questions have now somewhat subsided, politics takes place again *within* the EU institutions. Reflecting on the future of the euro, means reflecting on EMU constitutional law.

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[789] CJEU, Joined Cases C‑8/15 P to C‑10/15 P, *Ledra Advertising, EU:C:2016:701*; CJEU, Joined Cases C‑105/15 P to C‑109/15 P, *Mallis*, EU:C:2016:702.

Conclusion

The euro is a constitutional currency. Even after the euro-crisis, in which many of the rules of the euro have been re-interpreted or reformed, the legal foundations of the euro are a key factor in its functioning. Plans for further reforms of the euro are usually structured according to what can be done without changing the Treaties, and what requires amendments. This structure reveals the continued relevance of EU constitutional law. The idea that euro-crisis law has shown that 'everything is possible' under EU law betrays serious misunderstandings of the processes of change during the crisis.

Prior to the euro, the topics of constitutional law and monetary policy rarely overlapped. Money was regulated, on the national level, through ordinary legislative procedures. The institutional position of independent central banks was primarily the result of the dynamics between monetary policy and economic/fiscal policy makers. In the conflicts that arose, legal rules were of secondary importance. This also meant that conflicts over monetary policy rarely ended up in a (constitutional) court. On the European level, the different attempts at monetary cooperation after the collapse of the Bretton Woods regime did for the most part not rely on the Community legal framework, even though the Community institutions were involved in the creation and day-to-day administration of these forms of cooperation. In the early 1970's, the Werner Report had set out a plan for European monetary union that would not rely on constitutional law to restrict the competences of the institutions vis-à-vis each other or towards the MS. The institutions would have the liberty and responsibility to set their own goals and work together to achieve those goals. On the international level, there are few restrictions on the discretion of MS to set their (external) monetary policy, especially after the collapse of the Bretton Woods regime. That regime had been successful for about 15 years in using international law to manage a fixed but adjustable exchange rate regime, but was not designed to constrain the most important participant in the system, the United States. On all three levels, there were no or few indications that monetary policy would soon become a topic of the constitutional law.

For European monetary union, the use of constitutional law was an attractive option because it meant that the MS would be in control of the negotiation process, because it enabled a very

independent central bank and because it kept the MS in control over the future of the euro. The lack of trust among MS to share a currency was overcome by an abundant trust in law. Another way to create the euro was to use the flexibility clause of the EEC Treaty. The use of this legal basis was possible because monetary union was often seen as necessary for the internal market. The main reason why this option was politically impossible was because the Community did not have the legitimacy to decide on its own future on such an important topic. Alternatively, a new EU-Treaty could have created a broad competence to allow the EU legislator to decide on the characteristics of the euro. This was part of the Spinelli Draft Treaty. Both these alternatives to the Maastricht Treaty were rejected as a result of the Single European Act. The Delors Report then took a different approach to the role of law for monetary union than the Werner Report by linking the benefits of monetary union to strictly circumscribed tasks for the institutions. This created the substantive justification for the use of an extensive EU Treaty to create a monetary union.

As the euro was negotiated as a constitutional currency, this created specific opportunities and obstacles for the different parts of the EMU. On the topic membership of the Eurozone, the Maastricht Treaty did not have to explicitly state the obligation for MS to try to join the euro. MS wanting to stay out of the euro received an explicit opt-out and the other MS signalled through the ratification of the Maastricht Treaty their willingness to join. For the ECB, the main effect of the constitutionalization of EMU is that its independence is, formally, even stronger protected than the independence of the Bundesbank. Moreover, the lack of an institution responsible for fiscal policy in the Eurozone meant that the institutional balance of power would depend more on the specific legal rules. Hence, the legal rules on the relations between the ECB and other institutions are well defined in the Treaty. Although the counterpart of strong independence of the ECB is a strict mandate, the mandate of the ECB was not well-developed as a legal tool. On the economic side of EMU, the procedures for multilateral surveillance and excessive deficits were mostly aimed at achieving and maintaining a low level of integration. The Treaty places the Council in charge of applying the procedures. Although the procedures do require further legislation, the discretion of the legislator is restricted. This not only means the Treaty does not have a 3% rule, it also means the legislator cannot create a strict 3% rule. For the so-called no bailout clause, a constitutional application of the economic ideas behind a no bailout clause show the incentives to create a highly ambiguous clause that in a moment of crisis could easily be re-interpreted to allow a bailout. Nevertheless, to achieve

the effects of a bailout clause, it hardly matters whether there is, in fact, a no bailout clause. A highly ambiguous clause that is referred to as such is sufficient.

Once the Maastricht Treaty entered into effect, the constitutional framework of the euro proved remarkably stable for the first decade and a half. After the excitement of Maastricht, monetary policy very quickly became boring again, in no small part due to constitutional law. Unfortunately, EMU primary law was quite successful. On the issue of membership of the Eurozone, the legal obligation for MS to try to join the Eurozone served to cover up the fact that for new MS who joined the EU after Maastricht, the acceptance of EMU was part of a larger package of obligations and opportunities. For them, the ratification of the Accession Treaties did not automatically include enthusiasm about joining the Eurozone. Staying outside the Eurozone was accepted by the Eurozone MS. After seeing the Swedish rejection of monetary integration, they did not create a new model for accession for the Eastern enlargement. In economic governance, the Treaty was successful in transforming the German ambitions for a strict stability pact into a rather unambitious set of implementing legislation called the Stability and Growth Pact. The French ambition for an 'Economic Government' was similarly reduced to an informal platform without a well-defined job-description, called the Eurogroup. The ECB's institutional position in the EU was heavily debated, the subject of a CJEU decision and a treaty-reform. Substantially, very little changed. As it turned out, the detailed description of the specific aspects of the ECB's institutional relations in the Treaty was more important than the abstract question about the exact position of the ECB in the Union. The CJEU had little incentive to do anything more than reject the absolutist claims about the independence of the ECB and apply a plain reading of the text of the Treaty. This was also the case for a conflict over the application of the Excessive Deficit Procedure. Also in this case the Court refused to develop the theoretical foundations of EMU. Most importantly, the Court equated the effectiveness of the excessive deficit procedure with the integrity of the procedure.

During the euro-crisis, EMU primary law shaped the responses to the crisis by placing fewer obstacles on some routes to change than on others. As the crisis developed, some conflicts became the topic of much legal debate and even judicial decisions, whilst other parts of euro-crisis law met with few objections, despite some legally problematic aspects. The possibilities for further reform of the Eurozone without treaty change are largely the result of the process of reform until now. The meaning of the no bailout clause changed – as expected – during the crisis. At first, there was no attempt to construct a plausible alternative narrative for the no

bailout clause. Either a strictly textual interpretation was applied or the clause was simply ignored. As the crisis dragged on, it was in the interest of some MS to construct a new meaning for the clause, focusing on conditionality and Eurozone stability. Consensus on this new meaning was created through the unanimous support for the article 136 TFEU amendment. The Court, in *Pringle*, connected this new reading of article 125 TFEU to other elements of EMU, thus completing the process of re-interpretation. The process was similar to some extent for the re-interpretation of the mandate of the ECB. The difference was that the ECB had no interest in formulating hard limits flowing from its mandate. Moreover, there was no opportunity to assemble a political consensus. As a result, the Court had more difficulty in formulating strict limits on the actions of the ECB. Developing in the shadow of the bailouts and bond purchases were the rules on economic governance. The lack of political attention and opposition in this area allowed the legislator to assume a high level of discretion. During the crisis, there was a need for new and strict rules, not for internally consistent rules. The resulting pieces of legislation (the Six Pack and Two Pack) so far do not show any development of a coherent narrative concerning the legal bases on which they rely. It is unlikely, however, that this situation will persist. Either in the application of sanctions or in the further reforms of the rules, more opportunities will arise for actors to challenge the inconsistencies of the current rules.

The rest of this conclusion will provide some further thoughts on three different topics touched upon in this thesis, namely the role of European legal scholarship with regard to the choice for Maastricht, the judicialization of EMU and lastly, the future of euro.

In Chapter 2, the choice for the Maastricht Treaty as the tool for further monetary integration was analysed with regard to the interaction of the legal environment with economic arguments (the Delors Report) and with political considerations (maintaining MS control over monetary integration). In the conclusion of that chapter it was observed that EU constitutional law *enabled* EMU, because the characteristics of EU constitutional law offered the right environment in which to create EMU. One of the reasons why it was possible to create the euro through the Maastricht Treaty was because there was no widely shared believe that it was inappropriate to use EU constitutional law for this purpose. Whereas on the national level, the elevation of the central bank statute to the constitutional level would undoubtedly have raised objections from scholars, few concerns were raised about the euro and ECSB/ECB Statute. The contrast is particularly noticeable between the Dutch consensus in the 1980's to de-constitutionalize money and the enthusiasm a decade later for the Maastricht Treaty as the

foundation of stability. One wonders why constitutional and European law scholars were not more sceptical of the trust placed in constitutional law by the drafters of the Maastricht Treaty. If the only reason the MS would consent to monetary union is because all the important rules were constitutionalized, then maybe that was a good reason to oppose monetary union.

In the earliest phases of European integration, there were good reasons why legal scholarship paid little attention to the negative issues associated with the constitutionalization of economic rules.[790] In this phase, the core challenge was explaining and strengthening the resilience of European law. Moreover, European integration progressed for several decades without big changes to the EEC Treaty. The rigidity of EU constitutional law was – rightly – not a big topic. Over time, however, it became clear that the EU primary law functioned in many ways similar to national constitutional law. The Spinelli Draft Treaty acknowledged this by proposing to de-constitutionalize many areas of EU law. The rejection of this proposal and the subsequent adoption of the SEA are therefore a watershed moment in European integration. From then on, it was clear that European integration, and monetary integration in particular, would depend on treaty-making.

It is difficult to understand why constitutional scholars have been relatively silent, until recently[791], about the extensive constitutionalization of EMU. Two issues in particular should have raised concern. Firstly, one of the main reasons why it is inconceivable in the national legal orders to elevate the statute of the central bank to the constitutional level is because it removes those rules from the democratic domain. Even if we value central bank independence, this does not mean that all aspects of central banking must be regulated on the constitutional level. What is particularly troubling with regard to the euro is the differentiated nature of monetary integration. As EU membership grew faster than Eurozone membership, this meant that there were more and more MS that hold a veto over future reforms of the euro *without* taking part in the euro. Secondly, there is the issue of flexibility. Here the Bundesbank and the Federal Reserve offer interesting historical lessons. Both these central banks were reformed several years after their creation, in order to allow for a higher degree of centralization.[792] These

[790] This paragraph is based on Van der Sluis, M. (2016), 'EU law for a new generation?', 14 *International Journal of Constitutional Law*.
[791] Dawson, M. & F. de Witte (2016), 'From Balance to Conflict: A New Constitution for the EU', 22 *European Law Journal*; Scharpf (2015).
[792] With reform, I mean here the transformation from Bank Deutsche Länder into the Bundesbank. For the reform of the Federal Reserve, see Conti-Brown (2016), ch. 1.

well-known examples show the need to re-evaluate the institutions of monetary policy sometime after their creation. Although rigidity does not necessarily mean inflexibility, it is difficult to envision a similar process of careful evaluation for the ECB, even without the crisis.

In this thesis, the process by which cases on EMU appeared before the CJEU has received more attention than the actual decisions. This is partly because these decisions have already attracted so much scholarly attention, but also because the process oftentimes revealed more about how institutions perceived the legal environment in which they functioned. Two examples of this are the *OLAF*-case and *Pringle.* In both these cases, the way the conflict came before the Court was more instructive on the functioning of EMU primary law than the reasoning of the Court. This does not mean that the involvement of the Court was insignificant. In both situations, the intervention of the Court was necessary to allow further debate or to conclude an interpretative process, but in both cases the real action happened elsewhere. For EMU, the CJEU has not been the source of much legal innovation. Equally interesting, but more difficult to analyze, were the situations where the application of EMU primary law by an institution could have been ground for a judicial challenge but where nonetheless no case landed before the court. In those instances, it was clear that institutions often have considerable leeway to interpret the rules that are supposed to restrict them. For example, for the ECB this means that in its institutional relations the ECB is eager to invoke legal constraints, but with regard to its mandate there are few institutions that are able to oppose dubious legal arguments of the ECB.

The constitutionalization of EMU has been a contributing factor in the judicialization of questions of monetary and fiscal policy in several ways. Firstly, it meant that institutional conflicts could not easily be settled by (threatening with) new legislation. Secondly, the constitutionalization of EMU meant that the balance between centralization and decentralization would, for the most part, be dictated by legal constraints. The exact level of integration would not fluctuate according to political preferences, but primarily be based on law. It should not come as a surprise then that conflicts on this topic landed before the CJEU. Thirdly, the constitutionalization of EMU influenced the drafting of specific provisions in that judicial involvement was anticipated, or even invited.

So far, the involvement of the judiciary in EMU has not led to many concerns of *juristocracy.*[793] Prior to the crisis, the contribution of the CJEU to EMU mainly consisted in confirming its presence. During the crisis, the CJEU has followed the lead of the other institutions. Nevertheless, the question is whether the Court *should* be more involved in developing the normative foundations of EMU in the future. On the one hand, the Court appears to be particularly badly placed to become more involved in EMU. Its level of expertise is minimal on this topic and the judicial procedures are ill-adjusted to the needs of macro-economic and especially monetary policy. On the other hand, the lack of democratic supervision over the ECB and the Commission in the Troika makes judicial control all the more necessary. Especially for the ECB the standard arguments for executive discretion are misplaced.

On the basis of this thesis, it is hard to be optimistic about the future of the euro. The legal framework of the euro is extremely rigid and it is by no means certain that the flexibility shown during the crisis extends to future reforms. The main problem of the euro is not its economics, but its politics, as organized by EMU primary law. The Maastricht Treaty clearly placed the collective of MS in charge over the future of the euro. This was easily forgotten when the Maastricht Treaty was ratified, because of the discretion of the institutions *within the framework of EMU*. Changes *to the framework* still require the consent of all MS. In this perspective, the return of inter-governmentalism is a misnomer. It never left.

In some areas, there are still possibilities for reform without treaty amendment, but these areas are limited in scope. Going outside the EU legal order for further reforms also seems implausible, especially as the 'deepening' of EMU relates to functions that require a closely knit institutional framework, such as taxation. One of the most promising developments, at least from a constitutional perspective, is the banking union. EU constitutional law imposed very few substantive restrictions on how a banking union would be constructed. Nevertheless, the complexities of banking union appear where EMU constitutional law is involved, such as the independence of the ECB and the differentiated nature of EMU. The main question for banking union is not whether it will be able to prevent another banking crisis (it will not), but rather whether during the next crisis there is enough flexibility and authority within the institutions to take decisive decisions beyond the current procedures and restrictions.

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[793] But see Fabbrini (2016). His argument, however, appears to revolve mainly about the *national* courts.

Future reforms of the euro should aim at constituting the right politics, not just the right economics.[794] This includes giving a stronger role to the EP. The EP hardly figured in this thesis, mainly because its role in EMU has been minimal. In Maastricht, the EP was neither given a role within the framework of EMU, nor in the control over the legal framework. Although the EP now also participates in the making of secondary legislation on parts of economic governance and can formally submit proposals for treaty reform, the overall impact of the EP on EMU remains marginal. It will certainly require major innovations to make the EP suitable to take on a leading role in EMU. Under the current circumstances it seems unrealistic that such reforms will occur. There is no reason, however, why legal academics should be limited in their work by what is currently considered realistic.

[794] Dani, M. (2012), 'Rehabilitating Social Conflicts in European Public Law', 18 *European Law Journal*; Chalmers, D. (2012), 'The European Redistributive State and a European Law of Struggle', 18 *European Law Journal*; Dawson & de Witte (2016).

Annex

Title VI of the Treaty Establishing the European Community, as introduced by the Treaty on European Union (1992)

TITLE VI - Economic and Monetary Policy

Chapter 1 - Economic policy

Article 102a
Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Community, as defined in Article 2, and in the context of the broad guidelines referred to in Article 103(2). The Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 3a.

Article 103
1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 102a.
2. The Council shall, acting by a qualified majority on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Community, and shall report its findings to the European Council.
The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Community.
On the basis of this conclusion, the Council shall, acting by a qualified majority, adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.
3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Community as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.
For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.
4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardizing the proper functioning of economic and monetary union, the Council may, acting by a qualified majority on a recommendation from the Commission, make the necessary recommendations to the Member State concerned. The Council may, acting by a qualified majority on a proposal from the Commission, decide to make its recommendations public.
The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear

before the competent Committee of the European Parliament if the Council has made its recommendations public.
5. The Council, acting in accordance with the procedure referred to in Article 189c, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4 of this Article.

Article 103a
1. Without prejudice to any other procedures provided for in this Treaty, the Council may, acting unanimously on a proposal from the Commission, decide upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products.
2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, the Council may, acting unanimously on a proposal from the Commission, grant, under certain conditions, Community financial assistance to the Member State concerned. Where the severe difficulties are caused by natural disasters, the Council shall act by qualified majority. The President of the Council shall inform the European Parliament of the decision taken.

Article 104
1. Overdraft facilities or any other type of credit facility with the ECB or with the central banks of the Member States (hereinafter referred to as 'national central banks`) in favour of Community institutions or bodies, 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 ECB or national central banks of debt instruments.
2. Paragraph 1 shall not apply to publicly-owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the ECB as private credit institutions.

Article 104a
1. Any measure, not based on prudential considerations, establishing privileged access by Community institutions or bodies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions shall be prohibited.
2. The Council, acting in accordance with the procedure referred to in Article 189c, shall, before 1 January 1994, specify definitions for the application of the prohibition referred to in paragraph 1.

Article 104b
1. The Community 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.
2. If necessary, the Council, acting in accordance with the procedure referred to in Article 189c, may specify definitions for the application of the prohibition referred to in Article 104 and in this Article.

Article 104c
1. Member States shall avoid excessive government deficits.
2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:
(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;
(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.
The reference values are specified in the Protocol on the excessive deficit procedure annexed to this Treaty.
3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium term economic and budgetary position of the Member State.
The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.
4. The Committee provided for in Article 109c shall formulate an opinion on the report of the Commission.
5. If the Commission considers that an excessive deficit in a Member State exists or may occur, the Commission shall address an opinion to the Council.
6. The Council shall, acting by a qualified majority on a recommendation from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.
7. Where the existence of an excessive deficit is decided according to paragraph 6, the Council shall make recommendations to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.
8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.
9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.
In such case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.
10. The rights to bring actions provided for in Articles 169 and 170 may not be exercised within the framework of paragraphs 1 to 9 of this Article.
11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

- to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities;
- to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned;
- to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Community until the excessive deficit has, in the view of the Council, been corrected;
- to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions referred to in paragraphs 7 to 9, 11 and 12, the Council shall act on a recommendation from the Commission by a majority of two thirds of the votes of its members weighted in accordance with Article 148(2), excluding the votes of the representative of the Member State concerned.

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to this Treaty.

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the ECB, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph the Council shall, before 1 January 1994, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

Chapter 2 - Monetary policy

Article 105

1. The primary objective of the ESCB shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Community with a view to contributing to the achievement of the objectives of the Community as laid down in Article 2. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 3a.

2. The basic tasks to be carried out through the ESCB shall be:
- to define and implement the monetary policy of the Community;
- to conduct foreign exchange operations consistent with the provisions of Article 109;
- to hold and manage the official foreign reserves of the Member States;
- to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign exchange working balances.

4. The ECB shall be consulted:
- on any proposed Community act in its fields of competence;
- by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 106(6).

The ECB may submit opinions to the appropriate Community institutions or bodies or to national authorities on matters in its fields of competence.
5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.
6. The Council may, acting unanimously on a proposal from the Commission and after consulting the ECB and after receiving the assent of the European Parliament, confer upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

Article 105a
1. The ECB shall have the exclusive right to authorize the issue of bank notes within the Community. The ECB and the national central banks may issue such notes. The bank notes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community.
2. Member States may issue coins subject to approval by the ECB of the volume of the issue. The Council may, acting in accordance with the procedure referred to in Article 189c and after consulting the ECB, adopt measures to harmonize the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Community.

Article 106
1. The ESCB shall be composed of the ECB and of the national central banks.
2. The ECB shall have legal personality.
3. The ESCB shall be governed by the decision-making bodies of the ECB which shall be the Governing Council and the Executive Board.
4. The Statute of the ESCB is laid down in a Protocol annexed to this Treaty.
5. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB may be amended by the Council, acting either by a qualified majority on a recommendation from the ECB and after consulting the Commission or unanimously on a proposal from the Commission and after consulting the ECB. In either case, the assent of the European Parliament shall be required.
6. The Council, acting by a qualified majority either on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB.

Article 107
When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

Article 108
Each Member State shall ensure, at the latest at the date of the establishment of the ESCB, that its national legislation including the statutes of its national central bank is compatible with this Treaty and the Statute of the ESCB.

Article 108a
1. In order to carry out the tasks entrusted to the ESCB, the ECB shall, in accordance with the provisions of this Treaty and under the conditions laid down in the Statute of the ESCB:
- make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and in cases which shall be laid down in the acts of the Council referred to in Article 106(6);
- take decisions necessary for carrying out the tasks entrusted to the ESCB under this Treaty and the Statute of the ESCB;
- make recommendations and deliver opinions.
2. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
Recommendations and opinions shall have no binding force.
A decision shall be binding in its entirety upon those to whom it is addressed.
Articles 190 to 192 shall apply to regulations and decisions adopted by the ECB.
The ECB may decide to publish its decisions, recommendations and opinions.
3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 106(6), the ECB shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

Article 109
1. By way of derogation from Article 228, the Council may, acting unanimously on a recommendation from the ECB or from the Commission, and after consulting the ECB in an endeavour to reach a consensus consistent with the objective of price stability, after consulting the European Parliament, in accordance with the procedure in paragraph 3 for determining the arrangements, conclude formal agreements on an exchange rate system for the ECU in relation to non-Community currencies. The Council may, acting by a qualified majority on a recommendation from the ECB or from the Commission, and after consulting the ECB in an endeavour to reach a consensus consistent with the objective of price stability, adopt, adjust or abandon the central rates of the ECU within the exchange rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the ECU central rates.
2. In the absence of an exchange rate system in relation to one or more non-Community currencies as referred to in paragraph 1, the Council, acting by a qualified majority either on a recommendation from the Commission and after consulting the ECB or on a recommendation from the ECB, may formulate general orientations for exchange rate policy in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability.
3. By way of derogation from Article 228, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Community with one or more States or international organizations, the Council, acting by a qualified majority on a recommendation from the Commission and after consulting the ECB, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Community expresses a single position. The Commission shall be fully associated with the negotiations.
Agreements concluded in accordance with this paragraph shall be binding on the institutions of the Community, on the ECB and on Member States.
4. Subject to paragraph 1, the Council shall, on a proposal from the Commission and after consulting the ECB, acting by a qualified majority decide on the position of the Community at international level as regards issues of particular relevance to economic and monetary union

and, acting unanimously, decide its representation in compliance with the allocation of powers laid down in Articles 103 and 105.
5. Without prejudice to Community competence and Community agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

Chapter 3 - Institutional provisions

Article 109a
1. The Governing Council of the ECB shall comprise the members of the Executive Board of the ECB and the Governors of the national central banks.
2. (a) The Executive Board shall comprise the President, the Vice-President and four other members.
(b) The President, the Vice-President and the other members of the Executive Board shall be appointed from among persons of recognized standing and professional experience in monetary or banking matters by common accord of the Governments of the Member States at the level of Heads of State or of Government, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the ECB.
Their term of office shall be eight years and shall not be renewable.
Only nationals of Member States may be members of the Executive Board.

Article 109b
1. The President of the Council and a member of the Commission may participate, without having the right to vote, in meetings of the Governing Council of the ECB.
The President of the Council may submit a motion for deliberation to the Governing Council of the ECB.
2. The President of the ECB shall be invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB.
3. The ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the ECB shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis.
The President of the ECB and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent Committees of the European Parliament.

Article 109c
1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, a Monetary Committee with advisory status is hereby set up.
It shall have the following tasks:
- to keep under review the monetary and financial situation of the Member States and of the Community and the general payments system of the Member States and to report regularly thereon to the Council and to the Commission;
- to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions;
- without prejudice to Article 151, to contribute to the preparation of the work of the Council referred to in Articles 73f, 73g, 103(2), (3), (4) and (5), 103a, 104a, 104b, 104c, 109e(2), 109f(6), 109h, 109i, 109j(2) and 109k(1);

- to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of this Treaty and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.
The Member States and the Commission shall each appoint two members of the Monetary Committee.
2. At the start of the third stage, an Economic and Financial Committee shall be set up. The Monetary Committee provided for in paragraph 1 shall be dissolved.
The Economic and Financial Committee shall have the following tasks:
- to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions;
- to keep under review the economic and financial situation of the Member States and of the Community and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions;
- without prejudice to Article 151, to contribute to the preparation of the work of the Council referred to in Articles 73f, 73g, 103(2), (3), (4) and (5), 103a, 104a, 104b, 104c, 105(6), 105a(2), 106(5) and (6), 109, 109h, 109i(2) and (3), 109k(2), 109l(4) and (5), and to carry out other advisory and preparatory tasks assigned to it by the Council;
- to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of this Treaty and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.
The Member States, the Commission and the ECB shall each appoint no more than two members of the Committee.
3. The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the ECB and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.
4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Articles 109k and 109l, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

Article 109d
For matters within the scope of Articles 103(4), 104c with the exception of paragraph 14, 109, 109j, 109k and 109l(4) and (5), the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

Chapter 4 - Transitional provisions

Article 109e
1. The second stage for achieving economic and monetary union shall begin on 1 January 1994.
2. Before that date
(a) each Member State shall
- adopt, where necessary, appropriate measures to comply with the prohibitions laid down in Article 73b, without prejudice to Article 73e, and in Articles 104 and 104a(1);

- adopt, if necessary, with a view to permitting the assessment provided for in subparagraph (b), multiannual programmes intended to ensure the lasting convergence necessary for the achievement of economic and monetary union, in particular with regard to price stability and sound public finances;
(b) the Council shall, on the basis of a report from the Commission, assess the progress made with regard to economic and monetary convergence, in particular with regard to price stability and sound public finances, and the progress made with the implementation of Community law concerning the internal market.
3. The provisions of Articles 104, 104a(1), 104b(1) and 104c with the exception of paragraphs 1, 9, 11 and 14 shall apply from the beginning of the second stage.
The provisions of Articles 103a(2), 104c(1), (9) and (11), 105, 105a, 107, 109, 109a, 109b and 109c(2) and (4) shall apply from the beginning of the third stage.
4. In the second stage, Member States shall endeavour to avoid excessive government deficits.
5. During the second stage, each Member State shall, as appropriate, start the process leading to the independence of its central bank, in accordance with Article 108.

Article 109f
1. At the start of the second stage, a European Monetary Institute (hereinafter referred to as 'EMI`) shall be established and take up its duties; it shall have legal personality and be directed and managed by a Council, consisting of a President and the Governors of the national central banks, one of whom shall be Vice-President.
The President shall be appointed by common accord of the Governments of the Member States at the level of Heads of State or of Government, on a recommendation from, as the case may be, the Committee of Governors of the central banks of the Member States (hereinafter referred to as 'Committee of Governors`) or the Council of the EMI, and after consulting the European Parliament and the Council. The President shall be selected from among persons of recognized standing and professional experience in monetary or banking matters. Only nationals of Member States may be President of the EMI. The Council of the EMI shall appoint the Vice-President.
The Statute of the EMI is laid down in a Protocol annexed to this Treaty.
The Committee of Governors shall be dissolved at the start of the second state.
2. The EMI shall:
- strengthen cooperation between the national central banks;
- strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability;
- monitor the functioning of the European Monetary System;
- hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets;
- take over the tasks of the European Monetary Cooperation Fund, which shall be dissolved; the modalities of dissolution are laid down in the Statute of the EMI;
- facilitate the use of the ECU and oversee its development, including the smooth functioning of the ECU clearing system.
3. For the preparation of the third stage, the EMI shall:
- prepare the instruments and the procedures necessary for carrying out a single monetary policy in the third stage;
- promote the harmonization, where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its field of competence;
- prepare the rules for operations to be undertaken by the national central banks within the framework of the ESCB;
- promote the efficiency of cross-border payments;

- supervise the technical preparation of ECU bank notes.
At the latest by 31 December 1996, the EMI shall specify the regulatory, organizational and logistical framework necessary for the ESCB to perform its tasks in the third stage. This framework shall be submitted for decision to the ECB at the date of its establishment.
4. The EMI, acting by a majority of two thirds of the members of its Council, may:
- formulate opinions or recommendations on the overall orientation of monetary policy and exchange rate policy as well as on related measures introduced in each Member State;
- submit opinions or recommendations to Governments and to the Council on policies which might affect the internal or external monetary situation in the Community and, in particular, the functioning of the European Monetary System;
- make recommendations to the monetary authorities of the Member States concerning the conduct of their monetary policy.
5. The EMI, acting unanimously, may decide to publish its opinions and its recommendations.
6. The EMI shall be consulted by the Council regarding any proposed Community act within its field of competence.
Within the limits and under the conditions set out by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament and the EMI, the EMI shall be consulted by the authorities of the Member States on any draft legislative provision within its field of competence.
7. The Council may, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the EMI, confer upon the EMI other tasks for the preparation of the third stage.
8. Where this Treaty provides for a consultative role for the ECB, references to the ECB shall be read as referring to the EMI before the establishment of the ECB.
Where this Treaty provides for a consultative role for the EMI, references to the EMI shall be read, before 1 January 1994, as referring to the Committee of Governors.
9. During the second stage, the term 'ECB` used in Articles 173, 175, 176, 177, 180 and 215 shall be read as referring to the EMI.

Article 109g
The currency composition of the ECU basket shall not be changed.
From the start of the third stage, the value of the ECU shall be irrevocably fixed in accordance with Article 109l(4).

Article 109h
1. Where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardize the functioning of the common market or the progressive implementation of the common commercial policy, the Commission shall immediately investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of this Treaty. The Commission shall state what measures it recommends the State concerned to take.
If the action taken by a Member State and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Committee referred to in Article 109c, recommend to the Council the granting of mutual assistance and appropriate methods therefor.
The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council, acting by a qualified majority, shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:
(a) a concerted approach to or within any other international organizations to which Member States may have recourse;
(b) measures needed to avoid deflection of trade where the State which is in difficulties maintains or reintroduces quantitative restrictions against third countries;
(c) the granting of limited credits by other Member States, subject to their agreement.
3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorize the State which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.
Such authorization may be revoked and such conditions and details may be changed by the Council acting by a qualified majority.
4. Subject to Article 109k(6), this Article shall cease to apply from the beginning of the third stage.

Article 109i
1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 109h(2) is not immediately taken, the Member State concerned may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the common market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.
2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 109h.
3. After the Commission has delivered an opinion and the Committee referred to in Article 109c has been consulted, the Council may, acting by a qualified majority, decide that the State concerned shall amend, suspend or abolish the protective measures referred to above.
4. Subject to Article 109k(6), this Article shall cease to apply from the beginning of the third stage.

Article 109j
1. The Commission and the EMI shall report to the Council on the progress made in the fulfilment by the Member States of their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between each Member State's national legislation, including the statutes of its national central bank, and Articles 107 and 108 of this Treaty and the Statute of the ESCB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:
- the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability;
- the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 104c(6);
- the observance of the normal fluctuation margins provided for by the Exchange Rate Mechanism of the European Monetary System, for at least two years, without devaluing against the currency of any other Member State;

- the durability of convergence achieved by the Member State and of its participation in the Exchange Rate Mechanism of the European Monetary System being reflected in the long-term interest rate levels.
The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to this Treaty. The reports of the Commission and the EMI shall also take account of the development of the ECU, the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.
2. On the basis of these reports, the Council, acting by a qualified majority on a recommendation from the Commission, shall assess:
- for each Member State, whether it fulfils the necessary conditions for the adoption of a single currency;
- whether a majority of the Member States fulfil the necessary conditions for the adoption of a single currency,
and recommend its findings to the Council, meeting in the composition of the Heads of State or of Government. The European Parliament shall be consulted and forward its opinion to the Council, meeting in the composition of the Heads of State or of Government.
3. Taking due account of the reports referred to in paragraph 1 and the opinion of the European Parliament referred to in paragraph 2, the Council, meeting in the composition of Heads of State or of Government, shall, acting by a qualified majority, not later than 31 December 1996:
- decide, on the basis of the recommendations of the Council referred to in paragraph 2, whether a majority of the Member States fulfil the necessary conditions for the adoption of a single currency;
- decide whether it is appropriate for the Community to enter the third stage,
and if so
- set the date for the beginning of the third stage.
4. If by the end of 1997 the date for the beginning of the third stage has not been set, the third stage shall start on 1 January 1999. Before 1 July 1998, the Council, meeting in the composition of Heads of State or of Government, after a repetition of the procedure provided for in paragraphs 1 and 2, with the exception of the second indent of paragraph 2, taking into account the reports referred to in paragraph 1 and the opinion of the European Parliament, shall, acting by a qualified majority and on the basis of the recommendations of the Council referred to in paragraph 2, conform which Member States fulfil the necessary conditions for the adoption of a single currency.

Article 109k
1. If the decision has been taken to set the date in accordance with Article 109j(3), the Council shall, on the basis of its recommendations referred to in Article 109j(2), acting by a qualified majority on a recommendation from the Commission, decide whether any, and if so which, Member States shall have a derogation as defined in paragraph 3 of this Article. Such Member States shall in this Treaty be referred to as 'Member States with a derogation`.
If the Council has confirmed which Member States fulfil the necessary conditions for the adoption of a single currency, in accordance with Article 109j(4), those Member States which do not fulfil the conditions shall have a derogation as defined in paragraph 3 of this Article. Such Member States shall in this Treaty be referred to as 'Member States with a derogation`.
2. At least once every two years, or at the request of a Member State with a derogation, the Commission and the ECB shall report to the Council in accordance with the procedure laid down in Article 109j(1). After consulting the European Parliament and after discussion in the Council, meeting in the composition of the Heads of State or of Government, the Council shall,

acting by a qualified majority on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in Article 109j(1), and abrogate the derogations of the Member States concerned.
3. A derogation referred to in paragraph 1 shall entail that the following Articles do not apply to the Member State concerned: Articles 104c(9) and (11), 105(1), (2), (3) and (5), 105a, 108a, 109, and 109a(2)(b). The exclusion of such a Member State and its national central bank from rights and obligations within the ESCB is laid down in Chapter IX of the Statute of the ESCB.
4. In Articles 105(1), (2) and (3), 105a, 108a, 109 and 109a(2)(b), 'Member States` shall be read as 'Member States without a derogation`.
5. The voting rights of Member States with a derogation shall be suspended for the Council decisions referred to in the Articles of this Treaty mentioned in paragraph 3. In that case, by way of derogation from Articles 148 and 189a(1), a qualified majority shall be defined as two thirds of the votes of the representatives of the Member States without a derogation weighted in accordance with Article 148(2), and unanimity of those Member States shall be required for an act requiring unanimity.
6. Articles 109h and 109i shall continue to apply to a Member State with a derogation.

Article 109l
1. Immediately after the decision on the date for the beginning of the third stage has been taken in accordance with Article 109j(3), or, as the case may be, immediately after 1 July 1998:
- the Council shall adopt the provisions referred to in Article 106(6);
- the governments of the Member States without a derogation shall appoint, in accordance with the procedure set out in Article 50 of the Statute of the ESCB, the President, the Vice-President and the other members of the Executive Board of the ECB. If there are Member States with a derogation, the number of members of the Executive Board may be smaller than provided for in Article 11.1 of the Statute of the ESCB, but in no circumstances shall it be less than four.
As soon as the Executive Board is appointed, the ESCB and the ECB shall be established and shall prepare for their full operation as described in this Treaty and the Statute of the ESCB. The full exercise of their powers shall start from the first day of the third stage.
2. As soon as the ECB is established, it shall, if necessary, take over tasks of the EMI. The EMI shall go into liquidation upon the establishment of the ECB; the modalities of liquidation are laid down in the Statute of the EMI.
3. If and as long as there are Member States with a derogation, and without prejudice to Article 106(3) of this Treaty, the General Council of the ECB referred to in Article 45 of the Statute of the ESCB shall be constituted as a third decision-making body of the ECB.
4. At the starting date of the third stage, the Council shall, acting with the unanimity of the Member States without a derogation, on a proposal from the Commission and after consulting the ECB, adopt the conversion rates at which their currencies shall be irrevocably fixed and at which irrevocably fixed rate the ECU shall be substituted for these currencies, and the ECU will become a currency in its own right. This measure shall by itself not modify the external value of the ECU. The Council shall, acting according to the same procedure, also take the other measures necessary for the rapid introduction of the ECU as the single currency of those Member States.
5. If it is decided, according to the procedure set out in Article 109k(2), to abrogate a derogation, the Council shall, acting with the unanimity of the Member States without a derogation and the Member State concerned, on a proposal from the Commission and after consulting the ECB, adopt the rate at which the ECU shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the ECU as the single currency in the Member State concerned.

Article 109m
1. Until the beginning of the third stage, each Member State shall treat its exchange rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the European Monetary System (EMS) and in the developing the ECU, and shall respect existing powers in this field.
2. From the beginning of the third stage and for as long as a Member State has a derogation, paragraph 1 shall apply by analogy to the exchange rate policy of that Member State.

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